

# HANDBOOK ON LEGISLATIVE REFORM: REALISING CHILDREN'S RIGHTS

VOLUME 1





# Handbook on Legislative Reform: Realising Children's Rights

Volume 1

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**Handbook on Legislative Reform: Realising Children's Rights, Vol.1**

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## Glossary

Note from the author – The definitions of the following concepts are tailored strictly to the use and context in the text of the Handbook.

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**Affirmative action** – A mechanism for promoting equal access by actively promoting the interests of people from groups that have traditionally experienced discrimination.

**Automatic incorporation** – A constitutional provision by which international treaties or conventions are automatically incorporated directly into domestic legislation, becoming immediately and fully justiciable. (See **Monist system** below).

**Case law** – In the common law system, law which is created by arguments and judicial decisions relating to specific cases. (See **Common law system** below).

**Child-friendly court procedures** – Processes and procedures which are designed to make the court accessible to and less intimidating for children who appear as witnesses or victims. Such measures include courtrooms specially designed to put children at ease, legal and support staff trained to prepare children by explaining the process to them in ways that they will understand, and provisions to involve family or other trusted individuals in both the court proceedings, in support of the child, and in follow-up and recovery programmes.<sup>1</sup>

**Child trafficking** – Any act which involves the illicit transportation of children from one place to another. International trafficking is defined by the crossing of international boundaries.

**Children born out of wedlock** – Children whose parents at birth are not legally recognised as being married to each other under the law application to these children.

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<sup>1</sup> RESOLVE Manitoba, “Child Victim Support Service”, *Resolve News*, Winnipeg, Manitoba, Research and Education for Solutions to Violence and Abuse, Volume 7, Number 2, June 2005.

**Children in conflict with the law** – Children who are suspected or accused of infringing criminal laws.

**Children’s codes** (also known as children’s acts or children’s statutes) – Comprehensive legislation covering a wide range of aspects of the lives of children, usually including name and nationality, family relations, standards of care and protection measures.

**Civil law** – A system of law derived mainly from Roman law, emphasising the arrangement of laws into comprehensive national codes. Civil law relies heavily on written law.<sup>2</sup>

**Codex Alimentarius** – A food code established by the World Health Organization (WHO) and Food and Agriculture Organization (FAO), defining quality standards to be met for food that has been fortified.

**Common law** – A system of law derived from English tradition, in which law is determined not only through written legislation (Statutes) but also by court decisions through the creation of judicial precedent from decisions on specific cases tried before the courts.<sup>3</sup> (See also **Case law** above).

**Constitution** – The fundamental law of a State, typically outlining the structure of government and the means by which the government will operate; may also include the principles of human rights which are intended to guide all government action, including legislation.<sup>4</sup>

**Criminal code** – A body of law that defines criminal acts and the application of criminal justice.

**Customary law** – Usually unwritten, the system of law which has developed over time in specific communities or social groups, derived from long-established practices that have acquired the force of law by common adoption or acquiescence; customary law is sometimes

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<sup>2</sup> See Chapter 2 for more details.

<sup>3</sup> See Chapter 2 for more details.

<sup>4</sup> See Chapter 3 for more details.

administered by traditional chiefs and their councils, often dealing with matters relating to children and family.<sup>5</sup>

**Dualist system** – Usually found in common law regimes, a system in which international treaties or agreements are not automatically incorporated into national or domestic law; such incorporation requires specific legislative measures to be accomplished. National laws need to be passed to incorporate the principles behind these treaties or agreements. (Contrast to **Monist system**, below).

**Duty bearers** – Those who are responsible for ensuring that the rights of designated groups are protected, promoted and fulfilled; for the rights of children, the State is the primary duty bearer and is responsible for creating conditions in which other duty bearers, such as parents, service workers, community leaders, the private sector, donors and international institutions, can meet their responsibilities for also protecting, promoting and fulfilling the rights of children.<sup>6</sup>

**Effective remedies** – Judicial or administrative remedies intended to restore to a victim or victims of human rights violations those rights and entitlements which were denied and, in cases where this is deemed necessary by the authorities mandating the remedies, to extend compensation for losses sustained in the violation of the victim's or victims' rights.

**Enabling legislation** – In dualist countries, the means by which international agreements are incorporated into national law, through constitutional amendment, law or decree. (See **Dualist system** above).

**Equal protection clauses** – As a complement to non-discrimination provisions, these human rights provisions provide for equal access or equal opportunity for all.

**Extra-territorial jurisdiction** – The capacity of a State to apply law and exercise authority through the application of national legislation to criminal acts involving their nationals (as perpetrator or victim) and/or

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<sup>5</sup> Heritage Community Foundation, "Nature's Laws: Customary Law", at [Albertasource.ca](http://Albertasource.ca), viewed 10 June 2008. See Chapter 2 for more details.

<sup>6</sup> Thies, Joachim, "Introduction to Rights-based Programming", *Part 1: Rights Based Programming – An Evolving Approach*, Save the Children, Sweden, 2004, p.3.

criminal acts prejudicial to the interests of the country or of its nationals committed outside the territory in which the law is enforced and of which the accused is a national. The exercise of extra-territoriality may be limited by the sovereignty of the State in the territory where the acts take place.<sup>7</sup>

**Family law** – The body of legislation which addresses all aspects of family relations, including marriage, divorce, custody of children, responsibility for the upbringing of children, adoption (where permitted) and inheritance.

**Female genital mutilation** – Customary activities which entail mutilation of female genitalia (i.e. partial or complete removal of the clitoris, or the *labia minora* (excision) or of any external genitalia, with stitching or narrowing of the vaginal opening (infibulation)), often performed on women and girls.

**Food fortification** – The addition of micronutrients or other essential elements that may have been removed in processing to commonly used foods, in order to combat widespread micronutrient deficiencies.

**Gender-sensitive court procedures** – Procedures and processes which take into account their impact on women, men, boys and girls, including the special circumstances of women and girls, designed to overcome the marginalization of and discrimination against women and girls.

**Good governance** – The process by which public institutions conduct public affairs, manage public resources and guarantee the realisation of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law.

**Holistic approach** (to legislative reform) – An approach which encompasses all the dimensions of the situations being addressed, for example taking into account the entirety of children’s lives in revising legislation that affects children and addressing the issues in terms of

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<sup>7</sup> Coughlan, Steve; Currie, Robert J.; Kindred, Hugh M.; and Scassa, Teresa, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, Dalhousie Law School, Prepared for the Law Commission of Canada, June 23, 2006, pp. 4-8.



both the legal areas involved and the measures needed to ensure effective application and enforcement of the law.<sup>8</sup>

**Homogeneous system** – A legal system based on a single legal tradition, either civil law or common law.<sup>9</sup>

**Human rights-based approach (HRBA) to legislative reform** – An approach based on international standards and norms and on the full recognition of the equal rights of children, boys and girls, men and women and the realisation of State obligations under the international human rights instruments to which the State is party.<sup>10</sup>

**Indirect discrimination** – Discrimination which does not occur by explicit prohibitions or restrictions, but rather by creating conditions in which certain groups are nevertheless effectively prevented from exercising all their rights; for example, by structuring voting in elections in such a way that people who cannot read are unable to participate, thereby effectively excluding a category of persons (illiterate, with disabilities etc.) from voting.

**Inter-Convention approach** – An approach which uses the broad spectrum of human rights instruments for the formulation of constitutional provisions, national legislation or government programmes.

**International instruments** – Internationally adopted treaties, conventions, covenants, protocols and declarations, including those that come under the United Nations, its Specialized Agencies or regional organisations.

**International law** – The body of norms and standards contained within international human rights and humanitarian instruments, including the human rights conventions and covenants of the United Nations system, the conventions of the International Red Cross, and the jurisprudence of the international courts and special tribunals that have been constituted by international agreement.

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<sup>8</sup> See Chapter 1 for more details.

<sup>9</sup> See Chapter 2 for more details.

<sup>10</sup> See Chapter 1 for details.

**Islamic law** – A system of civil and penal laws that is predominantly based on *Shari'a*, with a body of interpretation and jurisprudence that may be informed by local experience.

**Justiciable** – Subject to due process in a court of law.

**Juvenile justice** – A special dimension of the justice system which recognises the needs and rights of children who may come into conflict with the law.

**Law** – With regard to human society, the body of rules, regulations and prohibitions, developed through custom, or adopted and promulgated by the government, which guide the conduct of individuals, organisations and the government in relation to others with whom the political, civic, economic and social environment is shared.

**Law reform commissions** – Permanent standing bodies used in some countries to review existing legislation and make recommendations on new measures or revision of existing legislation in order to bring the expression of law up to current standards.

**Legal illiteracy** – Lack of knowledge of laws or of the legislative process.

**Legal reform** – Reform of the legal system, including the judiciary, police and custodial institutions.

**Legal system** – Encompasses all the rules and institutions, based on its legal tradition, which determine how the law is applied.<sup>11</sup>

**Legal tradition** – The cultural perspective under which the legal system is created, providing the philosophy for how the system should be organised and how law should be formed and implemented.<sup>12</sup>

**Legislation** – All acts of the legislature, including formal laws, government action plans, budgets, and administrative measures.

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<sup>11</sup> See Chapter 2 for more details.

<sup>12</sup> See Chapter 2 for more details.

**Legislative reform** – Reform of the whole body of legislation, including Constitutional laws, acts of the legislature, formal laws, decrees and administrative measures as well as legal institutions.

**Local or domestic law** – Law that is adopted by and prevails within a specific country, as opposed to international law. (See above).

**Mainstreaming** – Applying programmes or approaches which have been tried and tested in a small representative region to the entire country.

**Micronutrient malnutrition** – Caused by the lack of essential micronutrients (such as iodine, iron, folic acid, or vitamins A or D) in the diet, resulting in developmental deficits or vulnerability to particular ailments.

**Minority group** – Any group which, by virtue of its ethnic composition, place of origin, traditional practices, or language or culture is marginalized in society and effectively deprived of rights; the term may also be applied more generally to groups which, although not a numerical minority in society, are nevertheless treated by law or custom as if they were less significant than others, as women are in many countries.

**Mixed systems** – Legal systems which involve combinations of more than one legal tradition often involving some form of customary or traditional law or Islamic law combined with civil or common law.<sup>13</sup> (Contrast to **Homogeneous systems**, above).

**Monist system** – A system in which national and international law are viewed as a single legal system, and international treaties, once ratified or acceded to, automatically become part of national law.

**Non-discrimination** – One of the fundamental principles of human rights, which prohibits and condemns any distinction, exclusion, restriction or preference based on grounds such as “race, colour, sex,

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<sup>13</sup> See Chapter 2 for more details.

language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ (CRC, Article 2.1).

**Non-refoulement** – A principle of customary international law which opposes any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect *refoulement*.<sup>14</sup>

**Penal reform** – Reform of the penal system (i.e. court system, prisons, and other penal institutions).

**Personal law** – Law which relates to the status of persons, in particular regarding adoption, marriage, divorce, burial, and devolution of property on death in some constitutional regimes.

**Plural systems** – see **Mixed systems** (above).

**Positive discrimination** – See **Affirmative action** (above); this term is not generally used in contemporary discussion.

**Reflection delay** – A mechanism instituted by some States as a middle ground between respect for the rights of victims of trafficking and States’ need to arrest and prosecute traffickers, to ensure that victims can recover from their trauma, have access to support and assistance including medical care and legal advice, and can thus make an informed decision about whether they want to testify against the trafficker.

**Rule of law** – A principle according to which laws have the ultimate authority over the actions of all individuals (including government representatives). Government authority is exercised only in accordance with publicly disclosed laws and regulations, and is subject to the normal checks of an independent judiciary.

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<sup>14</sup> Global Consultations on International Protection, Cambridge Roundtable, 9- 10 July 2001, organised by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, *Summary Conclusions - The Principle of Non-Refoulement*.

**Self-executing** – Of international treaties and conventions, becoming part of domestic law as a consequence of ratification or accession (in monist systems).

**Statutes** – Laws enacted by the legislature, subject to judicial review and interpretation.

**Supremacy clauses** – Constitutional provisions which affirm the supremacy of the Constitution over all other legislation or regulations.

**System of presumption** – In criminal law, if certain conditions are gathered, even if there is no substantial evidence against a particular person, that person is presumed guilty.

**Traditional law** – See **Customary law**, above.

Handbook on Legislative Reform:

# Realising Children's Rights

## Executive Summary

In reviewing States Parties' reports, the Committee on the Rights of the Child (CRC Committee or the Committee), the treaty body which monitors the progress made in implementing the Convention on the Rights of the Child (CRC), has consistently stressed the need for review and reform of national legislation to harmonise it with the principles and provisions of the CRC. The Committee has often recommended that States Parties "undertake comprehensive review of [national] legislation and ensure its conformity with the principles and provisions of the Convention."<sup>15</sup>

Directly or indirectly, the CRC reporting process has undoubtedly inspired law reform in many States and drawn political attention to children's rights. Several States have responded to the Committee's repeated recommendations for reform of national legislation by enacting children's codes or children's acts.<sup>16</sup> Other States have enacted laws on specific issues related to children's rights, such as child labour, child trafficking, female genital mutilation and the protection of adolescent mothers. States Parties have also revised existing laws and regulations, and provided frameworks which include legal guarantees of and responsibilities for responding to violations of children's rights. A number of countries have adopted Constitutions with provisions dedicated to the protection of the rights of the child.<sup>17</sup> Some have amended their criminal codes to introduce provisions designed to combat sexual exploitation of children and punish perpetrators. In the area of juvenile justice, important steps have been taken in many parts of the world to integrate human rights

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<sup>15</sup> See, e.g., Committee on the Rights of the Child, 'Concluding Observations: Liberia', U.N. Doc. CRC/C/15/Add.236 (4 June 2004), para. 10; Committee on the Rights of the Child, 'Concluding Observations: Singapore', U.N. Doc. CRC/C/15/Add.220 (27 October 2003), para. 9.

<sup>16</sup> Duncan, Beatrice. *Global perspective on consolidated children's statutes*, draft working paper UNICEF, DPP, 2007.

<sup>17</sup> UNICEF (2005); *Laying the Foundation for Children's Rights*, Innocenti Insight, p25.

standards into national laws and policies and to give special attention to the rights of children in conflict with the law.<sup>18</sup>

However, despite these advances, in many of the countries where reforms have taken place, the CRC Committee has found that they do not “sufficiently reflect the comprehensive rights-based approach enshrined in the Convention,”<sup>19</sup> or that the laws enacted “do not fully reflect the principles and provisions of the CRC.”<sup>20</sup> In other instances, the Committee has observed the persistence of discrimination against, among others, girls, children born out of wedlock, children with disabilities, indigenous children and children belonging to minority groups. Additionally, the Committee has stressed the failure of some States to implement or enforce already existing laws. Moreover, few States Parties to the CRC have adopted a holistic approach to legislative reform. Reform of national legislation has been accomplished in an isolated and scattered manner without taking into account the principle of interconnectedness or indivisibility of rights. In addition, legislative reform has tended to be dominated by lawmakers, parliamentarians and/or government experts in closed settings. Few processes have provided an environment conducive to civil society participation, much less children’s participation.<sup>21</sup>

## Purpose of the Handbook

This *Handbook on Legislative Reform: Realising Children’s Rights* (the Handbook) aims to support the effective implementation of the CRC and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>22</sup> and advance gender equality by influencing the adoption of legislative measures, social policies and

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<sup>18</sup> For more information see Nundy, Karuna. *Global Status of legislative reform related to the CRC*, UNICEF, DPP, 2004 and *Desk review of legislative advances related to the CRC - Phase I of the Legislative Reform Initiative*, UNICEF, DPP, (2004).

<sup>19</sup> See, e.g. Kuwait, U.N. Doc. CRC/C/15/Add.96 (26 October 1998); Belize, U.N. Doc. CRC/C/15/Add.99 (10 May 1999).

<sup>20</sup> See, e.g. Belarus, U.N. Doc. CRC/C/15/Add.17 (7 February 1994).

<sup>21</sup> For more information see: *Desk review of legislative advances related to the CRC - Phase I of the Legislative Reform Initiative*, UNICEF, DPP, (2004).

<sup>22</sup> The Handbook is supportive of legislative initiatives in relation to CEDAW in areas that are related to children’s rights (example, CEDAW Article 5), in addition to those which demonstrate complementarities between women’s and children’s rights (example, CEDAW Article 9).

institutional changes that promote gender equality and results for children through:

- Contributing to processes leading to the effective adoption, enactment, implementation, and enforcement of national legislation that complies with international human rights standards and norms; and
- Providing clear and illustrative options and good practices that can be used as guidance to strengthen States Parties' efforts to comply with international instruments, particularly the CRC and CEDAW.

This Handbook advocates for a human rights-based approach to legislative reform with gender equality at its core. It is inspired by the need for innovative processes and approaches to the establishment of a legal framework that effectively protects children (both girls and boys) and ensures the full realisation of their rights. It is also motivated by the need to disseminate more widely practical experiences of rights-based approaches to legislative reform initiatives in favour of children.

## **Using the Handbook**

The Handbook is intended to serve as guidance for legislators, parliamentarians, jurists, lawyers, judges, line ministries, government officials, human rights and children's rights advocates, policy-makers, and for all those involved in harmonizing national legislation with international instruments, particularly the CRC and CEDAW. It is designed to be used, in whole or in part, as a user-friendly practical guide to assist in legal reform for the realisation of children's rights.

The Handbook places children at the centre of the reform process by envisaging them as subjects of rights with special protection and entitlements to make claims from duty bearers. It takes into account the general principles of human rights law in addition to those which derive specifically from the CRC and CEDAW. The Handbook also takes into consideration the gender dimension of legislative reform with a view to ensuring that initiatives result in the elimination of disparities between boys and girls, and discrimination against the latter group.



The Handbook analyses different types of legislation, including constitutional law, specific areas of laws (such as family law, juvenile justice, labour law, etc.) as well as consolidated children's codes/acts. It provides guidance both on the *process* and the *substance* of legislative reform initiatives. It provides a methodology for review of legislation and proposes a series of elements for holistic and comprehensive legislative reform in compliance with international instruments and standards, particularly the CRC and CEDAW.

The Handbook includes excerpts from selected provisions of national legislation in different legal systems and traditions, accompanied by brief commentaries. These examples are not intended to serve as models but rather as illustrations.

The Handbook looks at the entire process of drafting legislation, including identification of resources, budgets, and regulations, as well as the mechanisms and institutions needed to ensure the effective implementation of laws. It seeks to encourage a greater understanding of the links between law, institutions, social policy, and resource allocation. Finally, the Handbook addresses the issues of legal illiteracy, law dissemination, and social mobilisation, partnership, and advocacy activities for a more effective process of formulation and implementation of laws.

It is the hope that this Handbook gives life to the CRC and CEDAW by serving as a reference guide for harmonising national legislation for children with international human rights standards.

### **Structure of the Handbook**

The Handbook is divided into volumes with chapters. Each chapter is divided into sections, which can be taken as distinct to a certain extent.

The volumes complement each other. Taken together, they provide the necessary elements for comprehensive and holistic legislative reform in compliance with the CRC and CEDAW.

*Volume I of the Handbook*

Chapter I	Comprehensive and Holistic Reform on Behalf of Children’s Rights
Chapter II	Assessing Compliance of National Legislation with International Human Rights Norms and Standards
Chapter III	Constitutional Reforms in Favour of Children
Chapter IV	Legislative Reform for the Protection of the Rights of Child Victims of Trafficking
Chapter V	Realising Children’s Rights to Adequate Nutrition through National Legislative Reform

*Summary of the Chapters*

Chapter I “Comprehensive and Holistic Reform on Behalf of Children’s Rights” sets the overall framework of the Handbook by supporting the view that legislative reform in favour of children must be geared towards the fulfilment of children’s human rights.

Chapter II “Assessing Compliance of National Legislation with International Human Rights Standards and Norms” explores the reasons for undertaking a review and possible reform of national legislation relating to children, and outlines some of the considerations and approaches that can be used as part of the review and reform process.

Chapter III “Constitutional Reforms in Favour of Children” presents a set of broad guidelines on possible options for the formulation and interpretation of constitutions as integral parts of comprehensive and holistic legislative reform in favour of children. Chapter II is a guidance tool for use on the occasion of constitutional reform and can also serve as an advocacy tool for countries that have yet to consider reform.

Chapter IV “Legislative Reform for the Protection of the Rights of Child Victims of Trafficking” focuses on the rights of child victims and the legislative processes for protecting these rights, indicating the standards towards which one should aim. Chapter IV uses the

principles and provisions of human rights instruments as basic reference points for proposing legislative measures.

Chapter V “Realising Children’s Rights to Adequate Nutrition through National Legislative Reform” addresses how laws and regulations can impact four focused nutrition interventions that guarantee children the right to adequate nutrition: 1) combating micronutrient malnutrition, primarily through food fortification; 2) protecting, promoting, and supporting breastfeeding; 3) enacting or strengthening accompanying social policies to enable women to breastfeed; and 4) promoting healthy diets and physical activity to reverse childhood obesity and resulting chronic diseases in developed and developing countries.

Manual sobre reforma legislativa:

# La realización de los derechos de la infancia

## Resumen Ejecutivo

En su examen de los informes de los Estados Parte, el Comité de los Derechos del Niño (el Comité), el órgano creado en virtud de tratados que supervisa el progreso alcanzado en la aplicación de la Convención sobre los Derechos del Niño (la Convención), ha hecho hincapié sistemáticamente en la necesidad de revisar y reformar la legislación nacional con el objetivo de armonizarla con los principios y las disposiciones de la Convención. El Comité ha recomendado a menudo que el Estado Parte “lleve a cabo un amplio examen de la legislación [nacional] con miras a asegurar que su legislación interna se ajuste plenamente a los principios y disposiciones de la Convención<sup>23</sup>”.

Directa o indirectamente, el proceso de presentación de informes sobre la Convención ha servido sin duda de ejemplo para la reforma legislativa en muchos Estados y ha llamado la atención de las instancias políticas sobre los derechos de la infancia. Varios Estados han respondido a la repetida recomendación del Comité en favor de la reforma de la legislación nacional, mediante la promulgación de códigos sobre la infancia o Leyes sobre la infancia<sup>24</sup>. Otros países han promulgado leyes sobre cuestiones específicas relacionadas con los derechos de la infancia, como el trabajo infantil, la trata de niños y niñas, la mutilación genital femenina y la protección de las madres adolescentes. Los Estados Parte han revisado también las leyes y regulaciones existentes, y han brindado marcos que incluyen garantías jurídicas y responsabilidades por la violación de los derechos de la infancia. Algunos países han enmendado sus códigos penales para incorporar disposiciones dirigidas a combatir la explotación sexual de los niños y a castigar a los culpables. En la esfera de la justicia de menores, se han adoptado importantes medidas en muchas partes del mundo para integrar las normas de derechos humanos en las leyes y políticas nacionales y prestar una especial atención a los derechos de los niños que están en conflicto con la ley<sup>25</sup>.

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<sup>23</sup> Véase, por ejemplo, Comité de los Derechos del Niño, “Observaciones finales: Liberia”, U.N. Doc. CRC/C/15/Add.236 (4 de junio de 2004), para. 10; Comité de los Derechos del Niño, “Observaciones finales: Singapur”, U.N. Doc. CRC/C/15/Add.220 (27 de octubre de 2003), para. 9.

<sup>24</sup> Duncan, Beatrice. *Global perspective on consolidated children’s statutes*, borrador de documento de trabajo, UNICEF, DPP, 2007.

<sup>25</sup> Para obtener más información, véase Nundy, Karuna. *Global Status of legislative reform related to the CRC*, UNICEF, DPP, 2004 y *Desk review of legislative advances related to the CRC - Fase I de la Iniciativa de Reforma Legislativa*, UNICEF, DPP, (2004).

Sin embargo, a pesar de estos avances logrados en todo el mundo, en muchos de los países donde se han llevado a cabo las reformas, el Comité ha observado que éstas no “no son un fiel trasunto de los derechos consagrados en la Convención<sup>26</sup>”, o que las leyes promulgadas “no reflejan plenamente los principios y disposiciones de la Convención<sup>27</sup>”. En algunas ocasiones, el Comité ha observado la persistencia de la discriminación contra las niñas y las mujeres, contra los hijos nacidos fuera del matrimonio, contra los niños con discapacidades, contra los niños indígenas y contra los niños que pertenecen a grupos minoritarios. En otros casos, el Comité ha señalado la incapacidad de aplicar o poner en vigor las leyes ya existentes. Además, pocos Estados Parte de la Convención han adoptado un enfoque holístico a la reforma legislativa. La reforma de la legislación nacional se ha llevado a cabo de una manera aislada y dispersa (por ejemplo, sin tener en cuenta el principio de la interrelación o la indivisibilidad de los derechos). Además, como es tradicionalmente el caso, la reforma legislativa sigue siendo una tarea ejecutada por legisladores, parlamentarios y/o expertos gubernamentales en entornos cerrados. Pocos procesos han brindado un entorno favorable a la participación de la sociedad civil, y mucho menos a la participación de los niños<sup>28</sup>.

## Objetivo del Manual

Este *Manual sobre reforma legislativa en favor de la infancia* (el Manual) tiene como objetivo prestar apoyo a la aplicación efectiva de la Convención y de la Convención sobre la eliminación de todas las formas de discriminación contra la mujer (CEDAW)<sup>29</sup>, y promover la igualdad entre los géneros influyendo en la aprobación de medidas legislativas, políticas sociales y cambios institucionales que fomenten la igualdad entre los géneros y tengan como resultado cambios reales y positivos para la infancia.

Los objetivos fundamentales del Manual son:

- Contribuir a los procesos que conducen a la aprobación, promulgación y aplicación y puesta en vigor efectivas de leyes nacionales que cumplan con las normas y regulaciones internacionales de derechos humanos; y
- Brindar opciones claras e instructivas y buenas prácticas que puedan utilizarse como orientación para reforzar las actividades de los

<sup>26</sup> Véase, por ejemplo, Kuwait, U.N. Doc. CRC/C/15/Add.96 (26 de octubre de 1998); Belice, U.N. Doc. CRC/C/15/Add.99 (10 de mayo de 1999).

<sup>27</sup> Véase, por ejemplo, Belarús, U.N. Doc. CRC/C/15/Add.17 (7 de febrero de 1994).

<sup>28</sup> Para obtener más información, véase: Desk review of legislative advances related to the CRC - Phase I of the Legislative Reform Initiative, UNICEF, DPP, (2004).

<sup>29</sup> El Manual apoya las iniciativas legislativas relacionadas con la Convención sobre la eliminación de todas las formas de discriminación contra la mujer en esferas que están relacionadas con los derechos de la infancia (por ejemplo, el artículo 5) además de aquellos que demuestren una complementariedad entre los derechos de las mujeres y los niños (por ejemplo, el artículo 9).

Estados Parte dirigidas a cumplir con los instrumentos internacionales, especialmente con la Convención y la CEDAW.

Este Manual promueve un enfoque basado en los derechos humanos con respecto a la reforma legislativa en favor de la infancia. Se inspira en la necesidad de establecer procesos y enfoques innovadores para establecer un marco jurídico que proteja eficazmente a los niños y garantice la plena realización de sus derechos. También está motivado por la necesidad de difundir experiencias más amplias y prácticas de los enfoques sobre las iniciativas de reforma legislativa en favor de la infancia basados en los derechos.

## Utilización del Manual

El objetivo del Manual es servir de orientación a legisladores, parlamentarios, juristas, abogados, jueces, ministros del ramo, oficiales gubernamentales, defensores de los derechos humanos y de los derechos de la infancia, encargados de establecer políticas y a todos aquellos que participen en tareas dirigidas a la armonización de la legislación nacional con los instrumentos internacionales, especialmente la Convención y la CEDAW.

El Manual está concebido para que se utilice, en su totalidad o en parte, como una guía práctica que sirva de asistencia en la reforma legislativa para la realización de los derechos de la infancia. Está escrito en un lenguaje simple y por tanto lo pueden utilizar todas las personas e instituciones interesadas en las iniciativas de reforma legislativa en favor de la infancia.

El Manual sitúa a los niños en el centro de los procesos de reforma al considerarles como sujetos de derechos, con derechos a una protección especial y a exigir su cumplimiento a los detentores de obligaciones. Tiene en cuenta los principios generales de la legislación sobre derechos humanos, además de los que figuran en la Convención y la CEDAW. El Manual tiene también en cuenta las dimensiones de género de la reforma legislativa con miras a garantizar que las iniciativas tengan como resultado la eliminación de las disparidades entre los niños y las niñas.

El Manual analiza diferentes tipos de leyes, entre ellos leyes constitucionales, esferas específicas de las leyes (como la ley de la familia, la justicia de menores, la ley laboral, etc.) así como los códigos/leyes consolidados sobre la infancia. Ofrece orientación tanto sobre el *proceso* como sobre la *sustancia* de las iniciativas de reforma legislativa. Sin caer en la jerga jurídica, el Manual establece una metodología para el examen de la legislación y propone una serie de elementos para una reforma holística y amplia, de conformidad con los instrumentos y normas internacionales, especialmente la Convención y la CEDAW.

A manera de ejemplos, el Manual incluye pasajes extraídos de una selección de disposiciones legislativas nacionales, acompañados de comentarios breves, y toma nota de los diferentes sistemas jurídicos y tradiciones. Estos ejemplos no pretenden servir como “modelos” de legislación o como una “fórmula mágica”, sino más bien como indicaciones y fuentes de inspiración para el lenguaje y las disposiciones que se utilizan en la legislación nacional de los Estados Parte de la Convención. Por tanto, el Manual presenta un marco flexible, que el Estado puede adaptar a su sistema jurídico y a sus exigencias nacionales particulares.

El Manual analiza todo el proceso de redacción de leyes, que incluye la definición de los recursos, presupuestos y regulaciones, así como los mecanismos e instituciones necesarios para garantizar una aplicación eficaz de las leyes. Procura alentar una mayor comprensión de los vínculos entre las leyes, las instituciones, la política social y la asignación de recursos. Finalmente, el Manual aborda cuestiones como el desconocimiento de las leyes, la diseminación de las leyes y la movilización social, las asociaciones y las actividades de promoción para que el proceso de formulación y aplicación de las leyes sea más eficaz.

Se espera que este Manual sirva como guía de consulta para armonizar la legislación nacional en favor de la infancia con las normas internacionales de derechos humanos, y para dotar de contenido a la Convención y la CEDAW.

## **Estructura del Manual**

El Manual está dividido en varios volúmenes, que incluyen una serie de capítulos principales. Cada capítulo se divide a su vez en diferentes secciones, que hasta cierto punto pueden considerarse como entidades separadas.

Los distintos volúmenes están concebidos para que se complementen el uno al otro y, en su conjunto, ofrecen todos los elementos necesarios para una reforma amplia e integral en línea con la Convención y la CEDAW.

### ***Volumen I del Manual***

El primer volumen incluye los cinco capítulos siguientes:

Capítulo I	Reforma amplia e integral en favor de la infancia
Capítulo II	Armonización de la legislación nacional relativa a la infancia con las normas y regulaciones internacionales de derechos humanos
Capítulo III	Reformas constitucionales en favor de la infancia
Capítulo IV	Cumplimiento de los derechos de la infancia a una nutrición adecuada por medio de la reforma legislativa nacional

Capítulo V Reforma legislativa para la protección de los derechos de los niños víctimas de la trata

*Resumen de los capítulos*

El Capítulo I “Reforma amplia e integral en favor de la infancia” establece el tono general del Manual, al apoyar el punto de vista de que la reforma legislativa en favor de la infancia debe estar dirigida hacia el cumplimiento de los derechos humanos de los niños.

El Capítulo II “Armonización de la legislación nacional relativa a la infancia con las normas y regulaciones internacionales de derechos humanos” explora las razones para llevar a cabo una revisión y una posible reforma de la legislación nacional relacionada con la infancia, y describe algunas de las consideraciones y enfoques que pueden utilizarse como parte del proceso de revisión y reforma.

El Capítulo III “Reformas constitucionales en favor de la infancia” presenta una serie de directrices amplias sobre posibles opciones para la formulación e interpretación de las constituciones como parte integral de una reforma legislativa amplia y holística en favor de la infancia. El Capítulo III tiene carácter de promoción, y sirve de instrumento orientativo para su utilización en ocasión de una reforma constitucional, y también es un llamado de atención para los países que todavía no han tomado en consideración la necesidad de una reforma.

El Capítulo IV “Cumplimiento de los derechos de la infancia a una nutrición adecuada por medio de la reforma legislativa nacional” describe cómo las leyes y regulaciones pueden repercutir en cuatro intervenciones centradas en la nutrición que son elementos cruciales en la combinación que garantiza a la infancia el derecho a una nutrición adecuada: 1) combatir la desnutrición de micronutrientes, especialmente por medio del enriquecimiento de los alimentos; 2) proteger, promover y apoyar la lactancia materna; 3) promulgar o reforzar las políticas sociales complementarias que permiten amamantar a las mujeres; y 4) promover regímenes alimentarios sanos y actividades físicas para contrarrestar la alarmante tendencia hacia la obesidad infantil y las enfermedades crónicas resultantes, tanto en los países en desarrollo como desarrollados.

El Capítulo V “Reforma legislativa para la protección de los derechos de los niños víctimas de la trata” se centra en los derechos de las víctimas infantiles y de los procesos legislativos para proteger estos derechos, e indica las normas que deben ser el objetivo de todos. Como ocurre con los otros capítulos, el Capítulo V utiliza los principios y las disposiciones de los instrumentos de derechos humanos como punto de referencia básico para proponer medidas



legislativas, que deben en última instancia conducir al cumplimiento de los derechos de la infancia en esta esfera.

Manuel relatif à la réforme de la législation :

# La réalisation des droits de l'enfant

## Résumé Analytique

Lors de son examen des rapports soumis par les États Parties à la Convention relative aux droits de l'enfant (CDE), le Comité des droits de l'enfant (Comité CDE ou le Comité), l'organe créé aux fins d'application de la CDE qui suit les progrès accomplis en faveur de sa mise en œuvre, a souligné à maintes reprises qu'un examen et une réforme des législations nationales s'imposait à des fins d'harmonisation avec les principes et les dispositions de la CDE. Le Comité a recommandé plusieurs fois aux États Parties de « procéder à un examen approfondi de [leur] législation [nationale] pour veiller à ce qu'elle soit pleinement conformes aux principes et aux dispositions de la Convention »<sup>30</sup>.

Directement ou indirectement le mécanisme d'établissement des rapports de la CDE a indubitablement été à l'origine des réformes législatives entreprises par de nombreux États, et il a attiré l'attention des cercles politiques sur les droits de l'enfant. Plusieurs États ont tenu compte des efforts du Comité qui leur a recommandé à plusieurs reprises d'entreprendre des réformes de leur législation nationale en promulguant des codes ou des textes de loi en faveur des enfants<sup>31</sup>. D'autres pays ont adopté des lois sur des aspects spécifiques des droits de l'enfant, comme le travail des enfants, la traite d'enfants, les mutilations génitales féminines et la protection des mères adolescentes. Les États Parties ont également amendé les lois et réglementations en vigueur, et créé des cadres comprenant des garanties et des responsabilités juridiques en cas de violations des droits de l'enfant. Certains pays ont amendé leur code pénal en introduisant des dispositions ayant pour but de lutter contre l'exploitation sexuelle des enfants et de punir les auteurs de tels délits. Dans le domaine de la justice appliquée aux mineurs, des mesures importantes ont été prises dans plusieurs régions du monde visant à intégrer les normes qui sous-tendent les droits de l'homme dans les législations et politiques nationales, et à apporter une attention particulière aux droits des enfants en conflit avec la loi<sup>32</sup>.

<sup>30</sup> Voir, par ex., Comité des droits de l'enfant, 'Observations finales : Libéria', Doc. ONU : CRC/C/15/Add.236 (4 juin 2004), par. 10; Comité des droits de l'enfant, 'Observations finale : Singapour', Doc. ONU : CRC/C/15/Add.220 (27 octobre 2003), par. 9.

<sup>31</sup> Duncan, Beatrice. *Global perspective on consolidated children's statutes*, projet de document de travail, DPP, 2007.

<sup>32</sup> Pour plus d'informations, consulter Nundy, Karuna. *Global Status of legislative reform related to the CDE*, UNICEF, DPP, 2004 et *Desk review of legislative advances related to the CRC - Phase I* de l'Initiative de réforme législative, UNICEF, DPP, (2004).

Toutefois, malgré ces progrès, dans plusieurs des pays où des réformes sont intervenues, le Comité a constaté que « les dispositions et les principes contenus dans la Convention ne sont pas complètement traduits dans le droit interne »<sup>33</sup>, ou que les lois adoptées ne sont pas « pleinement compatibles avec les dispositions et les principes de la Convention »<sup>34</sup>. Dans d'autres cas, le Comité a observé une persistance de la discrimination à l'égard des filles et des femmes, des enfants nés en dehors des liens du mariage, des enfants handicapés, des enfants autochtones et des enfants appartenant à des groupes minoritaires. Dans d'autres cas, le Comité a constaté que les législateurs avaient fait leur travail mais que les lois n'étaient pas appliquées. Par ailleurs, seuls quelques États Parties à la CDE ont abordé leur réforme législative dans une optique générale. Les réformes des législations nationales ont souvent été menées en l'absence de toute coordination (sans tenir compte du principe d'indivisibilité des droits et des liens qui les unissent). En outre, conformément à la tradition, les réformes législatives ont été menées à bien en vase clos par des législateurs, des parlementaires et/ou des experts gouvernementaux. Rares sont celles qui sont le fruit d'une participation de la société civile, et encore moins des enfants<sup>35</sup>.

## Pourquoi ce manuel

Ce *Manuel sur les réformes législatives en faveur des enfants* (le Manuel) a pour but de soutenir la mise en œuvre de la CDE et de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW)<sup>36</sup>, et de promouvoir l'égalité des sexes en pesant en faveur de l'adoption de mesures législatives, de politiques sociales et de changements institutionnels favorables à l'égalité des sexes et entraînant des changements réels et positifs pour les enfants.

Les principaux objectifs poursuivis avec ce Manuel sont les suivants :

- Contribuer à des mécanismes entraînant l'adoption, la promulgation et l'application d'une législation nationale conforme aux normes et règles internationales relatives aux droits de l'homme; et
- Fournir des options claires, des illustrations et des pratiques couronnées de succès pouvant servir de d'encadrement pour renforcer les initiatives des États Parties visant à se mettre en conformité avec les instruments internationaux, notamment la CDE et la CEDAW.

<sup>33</sup> Voir par ex. Kuweït, Doc. ONU CRC/C/15/Add.96 (26 octobre 1998); Belize, Doc ONU. CRC/C/15/Add.99 (10 mai 1999).

<sup>34</sup> Voir par ex. Bélarus, Doc ONU. CRC/C/15/Add.17 (7 février 1994).

<sup>35</sup> Pour plus d'informations, consulter : Desk review of legislative advances related to the CRC - Phase I de l'Initiative de réforme législative, UNICEF, DPP, (2004).

<sup>36</sup> Le présent Manuel soutient les initiatives législatives relatives à la CEDAW dans la mesure où elles ont un rapport avec les droits de l'enfant (par exemple, l'Article 5 de la CEDAW) en plus des initiatives qui révèlent la complémentarité des droits des femmes et des enfants (par exemple, l'Article 9 de la CEDAW).

Le présent Manuel préconise d'inscrire les réformes législatives en faveur des enfants dans la perspective des droits fondamentaux. Il s'inspire de la nécessité d'avoir recours à des approches et mécanismes novateurs lors de la création d'un cadre juridique capable de protéger efficacement les enfants et de garantir la réalisation totale de leurs droits. Il est aussi le fruit d'une prise de conscience : la nécessité de faire mieux connaître en pratique les réformes législatives en faveur des enfants menées dans l'optique des droits fondamentaux.

## Utilisation du Manuel

Ce Manuel servira de référence aux législateurs, parlementaires, juristes, avocats, juges, employés des ministères, fonctionnaires, défenseurs des droits de l'homme et des droits de l'enfant, décideurs, et à tous ceux qui contribuent à l'harmonisation des législations nationales avec les instruments internationaux, en particulier la CDE et la CEDAW.

Ce Manuel devrait servir de guide pratique, dans son intégralité ou par chapitre, encourageant les réformes législatives en faveur de la réalisation des droits de l'enfant. Il a été rédigé dans une langue simple de façon à pouvoir être utilisé par toute personne ou institution soucieuse de mener à bien une réforme législative en faveur des enfants.

Ce Manuel place les enfants au centre du mécanisme de réforme en les considérant comme des détenteurs de droits devant bénéficier d'une protection spéciale et susceptibles de faire valoir leurs droits auprès de ceux qui ont des devoirs à leur égard. Il prend en compte les principes généraux des instruments relatifs aux droits de l'homme en plus de ceux qui sous-tendent la CDE et la CEDAW. Le présent manuel tient aussi compte de la composante femmes dans la réforme législative dans le but de s'assurer que les initiatives contribuent à l'élimination des disparités entre les filles et les garçons.

Le manuel analyse différents types de législations : droit constitutionnel, domaines spécifiques du droit (droit de la famille, justice appliquée aux mineurs, droit du travail, etc.) ainsi que les codes ou instruments qui concernent les enfants. Il fournit des conseils à la fois sur les *mécanismes* et la *substance* des réformes législatives. Sans tomber dans le jargon juridique, le Manuel propose une méthodologie d'examen de la législation et une série d'éléments constituant d'une réforme globale et en profondeur de la législation, en conformité avec les normes et instruments internationaux, en particulier la CDE et la CEDAW.

À titre d'exemple, le Manuel cite des extraits de dispositions des législations nationales accompagnés de brefs commentaires en tenant compte des divers systèmes juridiques et traditions. Ces exemples ne sont pas là pour servir de « modèles » de législation ou de « formule magique », mais ce sont plutôt des

illustrations et des sources d'inspiration concernant l'énoncé et la manière dont les États Parties à la CDE ont inscrit les dispositions dans leur législation nationale. Ainsi, le Manuel propose un cadre souple que l'État adaptera à son système juridique et aux conditions nationales qui lui sont propres.

Le Manuel décrit le mécanisme de rédaction d'un projet de loi dans son intégralité, en commençant par l'identification des ressources, des budgets et des réglementations, jusqu'aux mécanismes et institutions indispensables pour garantir l'application des lois. Il s'efforce de promouvoir une meilleure compréhension des liens qui unissent les textes de lois, les institutions, les politiques sociales et l'allocation des ressources. Enfin, le Manuel aborde divers autres problèmes : méconnaissance des lois, diffusion des lois, mobilisation sociale, partenariats et activités de sensibilisation afin de renforcer l'efficacité du processus de formulation et d'application des lois.

Ce Manuel a été conçu dans le but de servir de guide lors de l'harmonisation des législations nationales en faveur des enfants avec les normes internationales relatives aux droits de l'homme et de donner vie à la CDE et à la CEDAW.

## **Structure du Manuel**

Le Manuel est divisé en plusieurs volumes comprenant chacun plusieurs chapitres importants. Chaque chapitre est ensuite divisé en différentes sections, qui peuvent être abordées séparément dans une certaine mesure.

Les différents volumes se complètent et l'ensemble contient tous les éléments indispensables à l'entreprise d'une réforme globale et en profondeur de la législation en conformité avec la CDE et la CEDAW.

### ***Volume I du Manuel***

Le premier volume se compose de cinq chapitres :

Chapitre I	Réforme globale et en profondeur de la législation en faveur des enfants
Chapitre II	Conformité de la législation nationale relative aux enfants avec les standards et les normes des instruments internationaux relatifs aux droits de l'homme
Chapitre III	Réformes constitutionnelles en faveur des enfants
Chapitre IV	Réalisation du droit de l'enfant à une nutrition adéquate grâce à une réforme de la législation nationale
Chapitre V	Réforme de la législation sur la protection des droits des enfants victimes de la traite d'enfants

### *Résumé des chapitres*

Le Chapitre I « Réforme globale et en profondeur de la législation en faveur des enfants » donne le ton du Manuel en affirmant que toute réforme de la législation en faveur des enfants doit être axée sur la réalisation des droits fondamentaux des enfants.

Le Chapitre II « Conformité de la législation nationale relative aux enfants avec les standards et les normes des instruments internationaux relatifs aux droits de l'homme » explore les raisons pour lesquelles un gouvernement entreprendra un examen et éventuellement une réforme de sa législation nationale relative aux enfants, et il décrit certaines considérations et méthodes qui s'avéreront utiles lors de l'examen et de la réforme.

Le Chapitre III « Réformes constitutionnelles en faveur des enfants » présente un jeu de directives générales sur les options possibles en termes de formulation et d'interprétation des Constitutions en tant qu'éléments intégraux d'une réforme globale et en profondeur de la législation en faveur des enfants. Le Chapitre III relève de la sensibilisation, se voulant outil d'orientation à utiliser lors des réformes constitutionnelles et servant aussi de signal d'alarme pour les pays qui n'ont pas encore envisagé de réforme.

Le Chapitre IV « Réalisation du droit de l'enfant à une nutrition adéquate grâce à une réforme de la législation nationale » parle de la manière dont les lois et les réglementations peuvent avoir un impact sur quatre interventions relatives à la nutrition qui sont des éléments cruciaux d'un ensemble qui garantit aux enfants le droit à une nutrition adéquate : 1) combattre la malnutrition due à la carence en micronutriments, essentiellement grâce à l'enrichissement des aliments; 2) protéger, promouvoir et soutenir l'allaitement maternel; 3) adopter ou renforcer des politiques sociales d'accompagnement pour permettre aux femmes de nourrir au sein; et 4) promouvoir des régimes alimentaires sains et l'activité physique pour inverser la tendance alarmante à l'obésité chez les enfants et les maladies chroniques qui en résultent dans les pays développés comme dans les pays en développement.

Le Chapitre V « Réforme de la législation sur la protection des droits des enfants victimes de la traite d'enfants » examine les droits des enfants victimes de la traite d'enfants et les mesures législatives qui permettent de protéger ces droits, et il décrit les normes vers lesquelles les pays devraient tendre. Comme les autres chapitres, le Chapitre V s'appuie sur les principes et dispositions des instruments relatifs aux droits de l'homme qui servent de référence de base pour proposer des mesures législatives devant mener en fin de compte au respect des droits de l'enfant dans ce domaine.

# Chapter 1

## COMPREHENSIVE AND HOLISTIC LEGISLATIVE REFORM ON BEHALF OF CHILDREN'S RIGHTS

The adoption of the Convention on the Rights of the Child (CRC)<sup>37</sup> was a major breakthrough in the promotion and protection of children's rights. The CRC moved beyond guaranteeing protection to children, to clearly spelling out children's status as holders of rights, in all aspects of civil, political, economic, social and cultural life. Article 4 of the CRC<sup>38</sup> sets out the overall obligation "to take appropriate legislative, administrative and other measures" to implement the rights guaranteed by the CRC and thus, implies that "legislative reform" is one of the most effective entry points and strategies to advance children's rights. It suggests that legislative reform with the mere objective of 'putting the law in place'<sup>39</sup> is inadequate to achieve both harmonization of national legislation with the CRC and effective implementation of children's rights.

The CRC provides an opportunity to adopt an approach based on the recognition of the rights of the child, using the principles and provisions of the Convention as a fundamental reference point for the process and content of legislative reform. The CRC establishes grounds for comprehensive and holistic legislative reforms that require States Parties to examine the whole spectrum of legislation and regulations that affect the realisation of children's rights - from constitutional and penal reforms to reforms of judicial systems - and adopt legislation and regulations which reflect the interconnected nature of the rights guaranteed by the CRC. This holistic approach to policy planning and

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<sup>37</sup> The CRC was adopted by the UN General Assembly on 20 November 1989.

<sup>38</sup> CRC, Article 4.

<sup>39</sup> Goonesekere, Savitri, *Protecting the world's children: Impact of the Convention on the Rights of the Child in diverse legal systems, Introduction and Overview*, UNICEF, Cambridge University Press (2007).

implementation is essential if legislative reform is to result in positive changes for children.

This chapter presents an approach to legislative reform that is concerned with understanding the critical indivisibility of civil and political, cultural, economic and social rights from an inter-disciplinary perspective, and that encompasses different interventions, as well as integrated measures to realise children's rights.<sup>40</sup>

## **Part 1 HUMAN RIGHTS-BASED APPROACH TO LEGISLATIVE REFORM**

### **1.1 Human Rights-based Legislative Reform**

There is no single definition of legislative *reform*. Experts working in this field have usually defined the concept for themselves and it is often understood in a narrow sense, as merely changing laws.

However, legislative reform encompasses more than merely "putting the law in place." It involves reviewing and reforming not only laws (i.e. legislation already in place) but also those measures necessary to effectively implement them - regulations, institutions, policies, budget allocations and the process of reform in the country.<sup>41</sup>

From a human rights perspective, legislative reform related to the CRC is an approach based on the full recognition of the equal rights of children, boys and girls, as subjects of rights in society. It is an approach that demands full public participation in the drafting, debate and approval of legislation by all those directly or indirectly affected by the legislation. It is also an approach that is directed towards the effective implementation of such legislation in all segments of society and all aspects of children's lives.

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<sup>40</sup> Based on Perrault, Nadine, *Bringing Child Rights to Reality, Needs and Prospects: Beyond the law* prepared for the International interdisciplinary course on children's rights, Ghent University, UNICEF, DPP (2006).

<sup>41</sup> Hall, Erica, *Something to think about*, Internal bulletin sponsored by the Global Policy Section, UNICEF, Bulletin no. 40 (April 2006).



A human rights-based approach (HRBA) to legislative reform may be defined as a framework for ensuring full compliance of national legislation with international human rights norms and concrete realization of human rights.

## 1.2 Human Rights Principles and Legislative Reform

The core human rights principles<sup>42</sup> guide legislative reform initiatives. These principles are: a) universality of rights; b) interdependence and inter-connectedness of rights, (holistic vision with emphasis on priorities and strategies to secure rights in the context of available resources); c) non-discrimination and equality; d) participation of all stakeholders as a right (ownership and sustainability); e) accountability of all duty bearers for human rights obligations and the rule of law.<sup>43</sup> In addition, an HRBA to legislative reform related to the CRC takes into account the guiding principles of the Convention. As such, the principle of the best interests of the child should be the basis upon which all efforts to reform national legislation, customs and practices are undertaken.

### 1. Universality of Rights

An approach to legislative reform based on human rights recognizes that all human rights apply equally in all cultures, traditions and political systems, without adjustment or mitigation. An HRBA to legislative reform requires the development of a legal framework that effectively protects and fulfils the rights of all children, both boys and girls. Legislative reform that captures the principle of universality of rights should be aimed at ensuring inclusiveness, especially in favour of traditionally excluded groups.<sup>44</sup> Thus, it calls for the abolishment of “any distinction, exclusion, restriction or preference”<sup>45</sup> which has the effect of nullifying or impairing the recognition, enjoyment or exercise of all the rights set forth in the CRC. At the same time, universal enjoyment of rights implies taking positive measures, through the

<sup>42</sup> UN Common Understanding on HRBA (Stanford Consensus, 2003).

<sup>43</sup> *Core principles of a rights-based approach to programming* (from Core Course: Human Rights Principles for Programming).

<sup>44</sup> For more details see: Duncan, Beatrice. Chapter III of the Handbook, *Constitutional reforms in favour of children*, UNICEF, DPP (2007).

<sup>45</sup> CCPR General Comment no. 18 on Non-discrimination, Human Rights Committee (1989).

adoption of legislative provisions in favour of children in vulnerable situations (e.g., asylum seekers, migrant children, children with disabilities, children in conflict with the law etc.).

## **2. Interdependence of Rights**

An HRBA to legislative reform recognizes that each right is dependent on the fulfilment of all the other rights and that therefore all rights must be respected. Thus, translating the principle of interdependence of rights requires adopting a comprehensive and balanced approach that focuses on the full range of rights. All laws (constitutional, civil, penal, labour, social etc.), as well as all components of the judicial system must to be reviewed and, if necessary, amended in light of this understanding. This requires a revision of the entire legal framework so as to ensure that it is coherent and does not contradict itself. For instance, from a rights perspective, preventing child marriage requires ensuring that the minimum age for marriage is higher than the minimum school-leaving age and the minimum age of employment. Children's access to justice and implementing agencies (including the courts), through the development of legal assistance programmes, accessible complaints mechanisms and child-friendly and gender sensitive court procedures, also requires adequate attention.

An HRBA to legislative reform logically leads to the realisation of the other human rights instruments that a country has ratified. The CRC and the CEDAW are, for example, interrelated in several aspects. These aspects include *inter alia* the protection against gender-based discrimination, rights to health, nutrition and education, and protection from sexual abuse, including sexual trafficking. In other areas, such as marriage and protection from violence, respect for the provisions of one Convention strengthens the protections set out in the other. Therefore the implementation of one will in many cases facilitate implementation of the other.

### **Box 1: Indivisibility and Inter-connectedness of rights**

The CRC Committee has on several occasions stressed the need to take account of the principle of indivisibility in legislative reform initiatives. In its recommendations to Benin, the Committee welcomed “the measures taken to strengthen the legal framework on the right of the child and to bring the national legislation into conformity with the Convention, notably the Persons and Family Code and the draft Children’s Code.” However, the Committee noted that this

legislation in some areas was not coherent (particularly on issues of violence against children) and that other national legislation was not brought in conformity with the CRC.

*Source:* CRC/C/BEN/CO/2 (20 October 2006).

### **3. Non-discrimination and Equality**

An HRBA to legislative reform helps tackle the root causes of discrimination and strives to eliminate the gaps and obstacles responsible for exclusion and discrimination. It is one of the most effective strategies to counter laws and cultural and traditional practices that affect and disempower certain individuals and/or groups.<sup>46</sup>

An HRBA to legislative reform entails abolition of laws that openly discriminate against women and girls. It also prompts an examination of laws that, while textually ‘neutral’ have a disproportionately negative impact on women and girls. An HRBA to legislative reform promotes equality not just in terms of formal equality (lack of distinction between women and men in the text of laws and policies) but also substantive equality<sup>47</sup> (i.e. the rule’s results or effects).<sup>48</sup> Promoting substantive equality requires examining laws and policies to determine their *impact* on women, looking for disproportionately negative impacts on women or a lack of equality in practice. The Committee on Economic, Social and Cultural Rights refers to this as “equal enjoyment of rights” by women and men.<sup>49</sup> This Committee has pointed out that States must consider the role of “existing economic, social and cultural inequalities, particularly those experienced by women” in perpetuating inequality and address these issues in laws,

<sup>46</sup> Goonesekere, Savitri, “A gender perspective in legislative reform”, paper presented at the Expert meeting on legislative reform, UNICEF, New York (2004).

<sup>47</sup> Schuler, Margaret and Flowers, Nancy. *Women’s human rights, Facilitator’s guide*, Women, Law and Development International (2003).

<sup>48</sup> “Formal rule equality often does not produce equal results because of significant differences in the characteristics and circumstances of women and men. Substantive equality demands that rules take account of these differences to avoid gender-related outcomes that are considered unfair” (see Bartlett, T. Katharine and Harris, Angela, *Gender and Law, Theory, Doctrine, Commentary* (1998), p. 261-262).

<sup>49</sup> General Comment no. 16: ‘The equal right of men and women to the enjoyment of all economic, social and cultural rights’ (art. 3 of the International Covenant on Economic, Social and Cultural Rights), paras. 3-5, U.N. Doc. E/C.12/2005/4, 11 Aug. 2005.

policies, and practice.<sup>50</sup> The Committee on the Elimination of Discrimination against Women also addresses this indirect discrimination,<sup>51</sup> calling for States Parties to take measures to create an ‘enabling environment’ for women to achieve ‘equality of results’. This includes proactively addressing historic discrimination and gender-based stereotypes.

#### **4. Participation and Inclusion**<sup>52</sup>

In a human rights-based approach, individuals are central to their own growth and advancement. Legal illiteracy, defined as lack of knowledge of laws or of the legislative process, has a substantial impact on access to rights. Thus, education and awareness-raising are essential in order to ensure that participation is possible. Creating the conditions for children to fully participate in the decisions that affect their lives can lead to a better understanding of their rights and their concerns by all members of society.<sup>53</sup>

The process prescribed by the CRC as a whole and particularly in Article 4 for realising children’s rights constitutes a departure from traditional practices of lawmaking. A human rights approach to legislative reform supposes that reforms are conducted in a participatory manner (including vulnerable and marginalized stakeholders) that pays particular attention to the views of children and women in all stages of developing legal frameworks. Systematic involvement of all sectors of society and government is an important step to ensuring that legislation in compliance with the CRC and CEDAW is both adopted and implemented. Direct participation by all

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<sup>50</sup> Ibid. General Comment no. 16, para. 8.

<sup>51</sup> “Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modeled on male lifestyles and thus fail to take into account aspects of women’s life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women, which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.” See General Recommendation no. 25, on article 4, paragraph 1, of the CEDAW, on temporary special measures, n.1, p. 9 (2004).

<sup>52</sup> For more information on participation and inclusion see UNICEF Programming Guidance Paper Series, *Supporting the realisation of children’s rights through a rights-based approach to legislative reform*, UNICEF, DPP (2007).

<sup>53</sup> Ibid. p. 27.

those concerned shifts legislative reform from a traditional technocratic exercise (at best allowing input from designated 'experts') to a process that enables individuals and encourages the realisation of their rights.<sup>54</sup>

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<sup>54</sup> Ibid. p. 27.

**Box 2: Participation in legislative reform processes**

**Kgotla gatherings** - In Botswana, a country with a plural system (of both common law and customary law) kgotla gatherings are the customary meetings of a tribe or a portion of it to discuss matters of tribal or communal concern in accordance with customary law. They played an important role in the law review process, including through discussions with the children's reference group.

*Source:* UNICEF Legislative Reform Initiative, Phase II – Legislative reform initiatives, institutional development, and policy changes in favour of children: A Ghana national study, Professor Kofi Quashigah, UNICEF Ghana (2004).

**National movement for children's rights** - In Guatemala, the adoption of the Child and Adolescent Protection Act took several years and was faced with major opposition in the Parliament under the pressure of various influential groups. Due to this resistance, UNICEF supported the creation of a movement for children's rights, uniting actors supportive of the law. The difficulties faced by the network increased solidarity among its members and UNICEF, and established a habit of "working together." As a result, when the law was adopted, the movement for children's rights persisted and focused its attention on the implementation of the law by holding the government accountable and organizing various activities such as trainings and conferences.

*Source:* Sedletzki, Vanessa. UNICEF's experience in the area of legislative reform: a review of selected countries (Legislative reform initiative paper series). UNICEF, DPP (2007).

**Reference Group** - In Botswana, the law review was undertaken in a very participatory manner. A first review of the 1981 Children's Act took place in 2000-2001. However, the recommendations that resulted from the review did not represent people's aspirations and lacked a focus on children's rights. Therefore, in 2003, UNICEF supported another law review, following an agreement with the government to undertake a holistic and comprehensive review of the Children's Act based on human rights concepts and principles, and following a human rights-based process. Two reference groups were set up: a Technical Multi-sectoral Reference Group and a Children's Reference Group. The composition of both groups reflected diversity of gender, experience and sectors. Goals and principles of the groups were spelled out from the beginning and were human rights based. Activities included meetings and retreats, discussions and focus group discussions for children. These activities involved interactions with a wide range of actors such as ministries, lawyers, judges, social workers and parliamentarians. Recommendations were finally presented to the Principal Secretary in the Ministry of Government.

*Source:* Kamchedzera, Garton, UNICEF Legislative Reform Initiative, Phase II - The CRC, legislative reform, and customary law: A Botswana case study, UNICEF Botswana (2004).

## 5. Accountability and Rule of Law

Laws are important for ensuring the implementation of rights, defining responsibilities and obligations, and holding duty bearers accountable. However, laws merely create the legal framework for the exercise and enjoyment of rights. A human rights-based approach to legislative reform supposes that the process of “putting the law in place” also enhances a State’s capacity to fulfil and honour commitments undertaken by ratification of human rights treaties – in particular the CRC and CEDAW. A rights-based approach to legislative reform emphasizes empowerment and accountability of those responsible for compliance with international obligations.

The ‘rule of law’ means that laws, not individuals (including government leaders), have the ultimate power and that these laws must be easy to understand.<sup>55</sup> A human rights-based approach to legislative reform provides an additional set of codes that bind governments, ensuring the accountability of legal systems, through, for instance, an autonomous legal order that establishes regulation of government power. Such an approach also works under the assumptions of equality before law and a legal system with fixed, fair, published rules of procedures that are consistently and transparently applied.

### **Box 3: Benefits of a HRBA to legislative reform**

- Promotes holistic and comprehensive reform
- Stimulates discussion of barriers to reform
- Addresses gender inequality and discrimination against women and girls
- Ensures that laws contribute to strengthening women’s and girls’ capacity to exercise their rights
- Promotes broad participation in political life
- Promotes broad dissemination of international human rights instruments and increased legal literacy
- Promotes effective implementation, in conformity with human rights principles and norms
- Ensures special protection for vulnerable and marginalized children
- Combats social practices negatively affecting children and women and

<sup>55</sup> In the UN System, the rule of law is defined as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” S/2004/616, para. 6.

- promotes positive change
- Promotes an effective, reliable and predictable judicial system that is accessible to all
  - Includes adequate and institutionalized monitoring
  - Promotes adoption of redress mechanisms
  - Ensures that law contributes to children's and women's well-being to the full extent possible

## Part 2 CRITICAL COMPONENTS OF A HUMAN RIGHTS-BASED APPROACH TO LEGISLATIVE REFORM

### 2.1 Characteristics of a Human Rights Approach to Legislative Reform

'Putting the law in place' or setting standards to harmonise with international standards is not an exercise limited to the legislative branch, but is a process that links to effective implementation through involvement of different stakeholders, social policy support, institutional support and adequate resource allocation.<sup>56</sup>

#### Box 4: Combating Female Genital Mutilation

In recent years, laws prohibiting Female Genital Mutilation (FGM) have been passed in an increasing number of African countries. Yet the motivation behind passing these laws and their possible consequences on the targeted communities, particularly women, have been given little attention. While facilitating the passage of such legislation served the purpose of demonstrating political will on the part of governments, a human rights approach to legislative reform dictated that protection of the vulnerable requires their participation, and should take account of the indivisibility of human rights. Non-legal measures have not been considered an essential companion to anti-FGM laws. As a result, girls and women face the double jeopardy of suffering FGM because it is an entrenched social practice and then being penalized by the modern legal system. Such as case illustrates the importance of involving the supposed beneficiaries of a new law in its development and supporting the law's implementation with non-legal measures that ensure it is enforced effectively.

*Source:* Legislation as a tool for behavioural and social change, Dr. Nahid Toubia (RAINBO), paper for the Afro-Arab expert consultation on legal tools for the prevention of FGM, June 2003.

<sup>56</sup> Goonesekere, Savitri, *Protecting the world's children: Impact of the Convention on the Rights of the Child in diverse legal systems*, Introduction and Overview, UNICEF, Cambridge University Press (2007).



A rights-based approach to legislative reform is recognizable by its critical characteristics. First, a human rights approach to legislative reform is intrinsic to the realisation of human rights, because the approach gives life to international human rights instruments through the harmonisation of national legislation with international standards and norms. Second, an HRBA to legislative reform incorporates a gender perspective at all stages of the legislative reform process. Thirdly, institutional reform and law enforcement through effective budget allocations, civic education, trainings and legal illiteracy are indispensable elements of a human rights-based approach to legislative reform. Thus, this approach is concerned with the effective implementation and enforcement of the laws. Fourth, wider participation of and partnerships among concerned actors are critical for ensuring internalization and adherence to the norms and standards. One value of ensuring participation and the creation of partnerships is that it provides an articulated methodology to establish a legal framework that effectively protects rights while increasing empowerment and holding the different actors responsible.

An added-value of an HRBA to legislative reform is that it stimulates and serves as the basis for the adoption of sustainable social policies in favour of children. Hence what was perceived prior to the CRC as supportive social policies and measures on matters such as health and education, have now become indivisible dimensions of children's rights that must be incorporated into legislation.

**Box 5: Human rights approach to legislative reform on FGM**

In Burkina Faso, the passing of the law against FGM was the result of a comprehensive process which included:

- Aggressive consciousness-raising campaigns in local populations about the harmful effect of this practice
- Research and surveys, which allowed for a better understanding of the root causes and scope of the problem
- Involvement and engagement of opinion-leaders and decision- and policy-makers, as well as the media in public discussions and debates
- Establishment of an institution to monitor implementation of the law, with a mandate to intervene in case of violations
- Formation of partnerships and coalitions to "Stop FGM"
- Strong determination to foster participation in drafting the domestic legislation
- Training of judges and other stakeholders

- Lobbying with community leaders

These are the conditions that not only encouraged the adoption of the legislation against FGM, but also stimulated compliance with the law.

*Source:* Kambou, Gisele, *The law as a tool for behavioral change: the case of Burkina Faso* (Voix des Femmes), paper for the Afro-Arab expert consultation on legal tools for the prevention of FGM (June 2003).

The following sections provide an overview of the major considerations under the characteristics mentioned above.<sup>57</sup>

### ***2.1.1 Harmonising National Legislation with International Human Rights Norms***<sup>58</sup>

One of the ultimate goals of an HRBA to legislative reform in favour of children is the harmonisation of national legislation and local traditions and customs with international human rights standards and norms, particularly the CRC and CEDAW. The starting point for such harmonisation is a close examination of the text/substance of national (or sub-national) legislation against the backdrop of CRC and CEDAW. This should be followed by meaningful analysis of the gaps and obstacles in legislation that lead to inequality and non-realisation of rights.

Harmonising national legislation with the CRC<sup>59</sup> implies, among other things:

- Making a clear pronouncement on the status of the CRC in domestic law;
- Internalizing the CRC. The integration of the CRC principles and norms into national Constitutions will prevent successive governments from backtracking on children's rights issues. National Constitutions reflecting CRC principles and norms can be used to challenge negative policy interventions or legal

<sup>57</sup> Please note that a separate chapter is dedicated to each one of the other critical characteristics of an HRBA to legislative reform.

<sup>58</sup> The issue of harmonisation of national legislation is discussed in great detail in Chapter II of the Handbook. For a more comprehensive introduction to law review and law reforms see: Lundy, Christine. Chapter II of the Handbook, *Compliance of National Legislation Related to Children with International Human Rights Standards and Norms*, UNICEF, DPP (2007).

<sup>59</sup> See: *Ibid.* Chapter II of the Handbook.

changes and promote proactive measures, both legal and non-legal;

- Identifying laws to be amended or abolished in order to harmonise national legislation with CRC standards;
- Reviewing reservations made with regard to human rights treaties with the aim of removing the legal constraints and barriers and withdrawing the reservations entered;
- Removing constraints and barriers to equality;
- Minimising discrimination and inequality in order to create a culture of respect for human rights and norms of good governance under the rule of law. In this sense, law reform can help to weaken social practices, taboos and other cultural trends that violate human rights;
- Examining the use of the CRC and new laws in courts of law, and the manner in which courts are contributing to law reform on children's rights through interpretation;
- Examining the way laws are implemented and disseminated;
- Examining the way institutions for law implementation and enforcement are functioning.

The process of harmonisation also requires an examination of the social and cultural contexts in which laws are implemented. These contexts are important to effective harmonisation of human rights standards as there are often gaps between law and practice. In some cases, social norms can have an important influence on the development of legislation, while in others laws may not be implemented because they do not correspond to social values and practices. Identifying social and cultural values that support legislative initiatives to realise the rights of women and children (girls and boys), as well as highlighting social and cultural practices that compromise human rights-based legislative reform, are critical to the adoption and implementation of effective initiatives. Work in this area, therefore, often requires an emphasis on education and shaping of cultural values.

### ***2.1.2 Mainstreaming the Principle of Gender Equality in Legislative Reform***

“In most societies, the formulation of laws has been affected by women's relationship to children. And historically, the implementation

of law has been equally affected by the position of women in society and their relationship to children.”<sup>60</sup>

Addressing gender issues in the legal framework is critical for the simultaneous realisation of both women’s and children’s rights, as gender plays a crucial role in the ordering of our social, economic, and political lives. Adopting a gender perspective to legislative reform opens up discussion on cultural and religious traditions and leads to a greater understanding of the critical indivisibility of civil and political, social, economic, and cultural rights. Focusing on gender equality is necessary in reviewing and reforming laws and policies in order to overcome social stereotypes and discrimination against women and girls in the socio-economic and political arenas. It requires paying special attention to women and girls both as subjects of rights and marginalized groups. The CRC and CEDAW have introduced a gender perspective in legislative reform, which enables us to have a closer look at laws that disempower and disadvantage women and girls, preventing them from enjoying their rights. Addressing gender issues in the legal framework is critical for the simultaneous realisation of both women’s and children’s rights.

**Box 6: Substantive inequality in divorce practice**

Women in China have the right to petition for divorce, although courts consider the woman’s access to housing in granting the petition. Because state housing policy gives the marital home to the husband after divorce, a woman must be able to demonstrate access to other housing in order to have the divorce petition granted. Therefore, access to divorce is discriminatory in practice, even though women have the right legally.

In another example of ostensibly equal status under the law, Macedonia’s Inheritance Law and Family Law grants equal rights to men and women in family relations. However, in practice, women’s limited familiarity with the legal institutions that provide assistance and advice results in discriminatory outcomes, for example, following divorce.

*Sources:* UNIFEM, Gender Issues Fact Sheet No. 3, [www.unifem-eseasia.org/resources/factsheets/UNIFEMSheet3.PDF](http://www.unifem-eseasia.org/resources/factsheets/UNIFEMSheet3.PDF), pp. 4-5; Press Release, United Nations, “Women’s Anti-Discrimination Committee Takes up Report of Former Yugoslav Republic of Macedonia: Experts Commend Rapid Progress, Urge Steps On Trafficking, Minority Rights, Women’s Political Participation” (25 January 2006).

<sup>60</sup> Ibid. Gooneskere, Savitri. *A gender perspective in legislative reform*, UNICEF, New York, 2004.

### 2.1.3 Implementation and Enforcement of Legislative Measures<sup>61</sup>

While explicit textual consistency between national laws and provisions of international human rights instruments is a foundation for effective realisation of rights, it is not sufficient. Laws do not function in a vacuum, and the greater challenge is often their implementation and enforcement.

Laws, if properly implemented, should benefit *all* members of society and pay special attention to those most marginalized. Hence, laws may require specific implementation measures or tools (such as regulations, codes of conduct or professional guidelines) or additional policies, budgets, or institutions in order to be effective. For instance, issues such as trafficking and exploitation in labour cannot be addressed effectively by solely putting in place legal standards that criminalize children's exploitation. The process of 'putting the law in place' (i.e. enacting/promulgating the law) should be accompanied by implementation measures, including the development of institutions that support law enforcement and prevent exploitation and the adoption of policies that ensure the sustainability of these mechanisms. Equally important is the dissemination of the laws to stakeholders and the general public, training of judges, awareness-raising activities, and legal education. As S. Goonesekere puts it "it is this process of legislative reform that may begin to address the known relation in many countries where legislative reform becomes sterile rhetoric that fails to touch the lives of women and children."<sup>62</sup>

## 1. Institutional Reform and Development

### **Box 7: Institutional reforms**

*Child welfare ministry* - After the ratification of the CRC a large number of governments prioritized children's rights enough to establish government departments that serve as focal points for children as well as special task forces to work on urgent issues. These range from child protection units within ministries of welfare, as in Eritrea; to ministries dealing exclusively with children's issues. In the case of Denmark, a ministerial committee on children was created with a parallel committee of civil servants that handles the government's youth policies.

Source: Nundy, K., *Global Status of legislative reform related to the CRC*, UNICEF, 2004, p.28.

<sup>61</sup> UNICEF, Programming guidance on legislative reform, p.36.

<sup>62</sup> Goonesekere, Savitri. *A gender perspective in legislative reform*, paper presented at the Expert meeting on legislative reform, UNICEF New York (2004).

Institutional reform has several dimensions. It means, among others:

- Creating institutions that are in line with human rights standards and principles to direct, implement and enforce laws or reforming institutions;
- Building institutional capacity, e.g. training judges and helping them to develop jurisprudence on child rights, to refer to CRC and CEDAW and other human rights principles and provisions in their decisions;
- In relation to the judiciary, strengthening capacity to develop a judiciary that is independent and committed to the rule of law. Laws and rules mean very little indeed without the underpinning of an accessible, fair, competent, and effective judicial system;
- Facilitating the establishment of monitoring systems and/or a supportive infrastructure: Institutional reform can also refer to non-legal (i.e. Committee to Combat FGM) or semi-legal models (i.e. Ombudspersons, Human Rights Commissions with a children’s focus, Child Protection Authorities, Municipal Boards for Child Protection, etc.);
- Establishing appropriate recourse and mechanisms to ensure redress in case of violation of rights;
- Establishing mechanisms for free legal advice/service etc.;
- Facilitating the establishment of the rule of law by ensuring accountability and transparency of institutions and ensuring access to justice and administrative appeal (i.e. for children under State protection).

**Box 8: Monitoring children’s rights<sup>63</sup>**

*Independent National Institutions for Children’s Rights* – Over 40 States Parties have specialised children’s rights institutions. Most often they take the form of Children’s Ombudspersons or Commissioners for Children’s Rights. Less frequently, in some civil law systems, a similar post is created call the Defender of Minors. A number of these official initiatives suffer from limitations on independence and insufficient resources. Some are empowered to hold independent enquiries, but the ability to initiate proceedings against public authorities is rare.

*Source:* Nundy, Karuna. Global Status of legislative reform related to the CRC, UNICEF, DPP, 2004, p. 29.

<sup>63</sup> For more information on monitoring mechanisms see also: Lansdown, Gerison. *Independent institutions protecting children’s rights*, Innocenti Digest, 8, Innocenti Research Centre (2001).

*Child Protection Authority* - An interesting experiment has taken place in Sri Lanka. The Child Protection Authority has been quite effective, drawing on the advantages of being a national, inter-departmental authority and hence with the authority to implement recommendations more directly. Its activities include the adoption of measures to prevent child abuse and protect and rehabilitate child victims; development of prevention and awareness activities; recommendations for legal reform; monitoring of progress of investigations; and maintenance of a database for planning child protection interventions. Its major gap has been, however, the weak participation of NGOs.

Source: Ibid. *Global Status of legislative reform related to the CRC*, p. 25.

## **2. Training and Capacity-building**

An HRBA to legislative reform also includes building capacities, such as training judges and law enforcement officials, among others, which will allow institutions to function effectively. Government agencies and ministries, parliamentarians, judges, lawyers, and institutions (such as law reform commissions) all have important roles to play in implementing the laws.

### **Box 9: Training and capacity-building**

In Ghana, a review of progress in law enforcement shows a clear gap between practice and enforcement. A typical case in point is in the area of the prevention and punishment of harmful traditional practices. Experience has shown for instance that *Trokosi*<sup>64</sup> and FGM, both religious/culture-based practices, are very difficult to eliminate merely through legislation. The same reason explains the obvious lack of political will to confront these practices with the full force of criminal law. To date, no criminal prosecution has been initiated against the practice *trokosi*. Lack of options for enforcement and limited education on how to bring a claim may be factors that inhibit the effective enforcement of the legislation and thus the protection of the rights of children.

Source: UNICEF Legislative Reform Initiative, Phase II – *Legislative reform initiatives, institutional development, and policy changes in favor of children: A Ghana national study*, Professor Kofi Quashigah, UNICEF Ghana (2004).

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<sup>64</sup> The *Trokosi* practice is a system under which young virgin girls are sent into fetish shrines to atone for the misdeeds of relatives. In its original conception, the young girls were sent there not because any of their relatives had committed transgressions, but for the same reasons other girls entered convents. From that perspective, the *Trokosi* system was designed to create a class of traditional elite women, or “*Fiasidi*.” These “marriageable king’s initiates” were to become the mothers of the elite men and women of the society, kings, philosophers, the seers, and other men and women of virtue.

### 3. Budget and Resource Allocation

The need for funding for legislative reform is highlighted by the CRC Committee, which views it as necessary to realise children’s rights and incorporate the instrument into the domestic legal system.<sup>65</sup> Law implementation measures, such as budget and resource allocation, are essential to legislative reform.

#### **Box 10: Obstacles to implementation of laws**

*Implementation of Child Care Act* – Jamaica enacted a Child Care and Protection Act which repealed the Juvenile Act, (a 45 year-old Act). The new Act provides a more comprehensive piece of legislation aimed at protecting the child in all spheres of life and promoting a caring environment to give each child an equal footing in society.

However, there is a general concern regarding funding to sustain and implement the provisions of the new Act. Some specific obstacles for implementation of the Child Care and Protection Act include:

- Insufficient funding to sustain the training and educational programme to change the national mind-set around the importance of protecting children;
- Insufficient funding to ensure that the mechanisms and institutions function as proposed;
- Insufficient funding for day-to-day logistics, such as vehicles and gasoline to transport children from centres to court.

*Source: UNICEF Legislative Reform Initiatives – Phase I – National report on legislative reform, UNICEF Jamaica (2004).*

“Legislative reform and the subsequent implementation of legislation through policies and institutional development require adequate and often substantial allocation of funds from governments to ensure concrete implementation and to make children’s rights a reality.”<sup>66</sup> Funds are not only critical to the immediate implementation of policies, but also to ensuring adherence to these policies (e.g. by providing for economic opportunities to the group who will be directly or indirectly affected by the law).<sup>67</sup>

<sup>65</sup> ‘General Guidelines for periodic reports’, U.N. Doc. CRC/C/58 (November 1996). For further information on budgeting and rights, see Gore, R. *Influencing Budgets for Children’s Rights* (June 2004).

<sup>66</sup> Summary Report of the Study on the Impact of the Implementation of the Convention on the Rights of the Child, Innocenti Research Centre (2004).

<sup>67</sup> For example, women who practice female excision/cutting as a job.



**Box 11: Costing legislative measures**

*Costing the South African Child Justice Bill*<sup>68</sup> - An important advantage of having the cost-effectiveness analysis done whilst the Child Justice Bill was still being drafted was that it allowed for iteration of the Bill. The Bill had been criticized at that stage for the fact that magistrates presiding over preliminary inquiries would have to recuse themselves from a subsequent trial if they had heard any prejudicial evidence during a preliminary inquiry. The critics said that this would prove too expensive, and this criticism was being used by some to support a suggestion that the Bill be amended so that the magistrate would not attend the preliminary inquiry. This issue was specifically examined by the economists, and the costs were found not to be very significant, so the magistrate's attendance at the preliminary inquiry remained part of the Child Justice Bill. The costing analysis also demonstrated the cost-effectiveness of clustering services. An enabling clause for the establishment of "one stop" centres was thus added to the draft Child Justice Bill.

*Sources: Barberton, C., Stuart, J., and Ajam, T., Costing the Implementation of the Child Justice Bill and developing a strategy for implementation AFReC, University of Cape Town (1999).*

The national budget is essentially the financial embodiment of a government's policy/law goals. Consequently, the policy-making and budgetary process should be intimately related.<sup>69</sup> This implies, among others:

- A focus on realistic resource allocation and budgeting for enforcement of laws;
- Awareness-raising campaigns, in particular law awareness activities (translation of laws into national, local, minority languages, education campaigns and dissemination of laws, availability of new legislation to public in reader-friendly format etc.);
- Capacity-building/Training of civil servants, including professionals working for and with children, such as teachers, psychologists, law enforcement officers, police officers, lawyers, etc;
- Mechanisms to ensure access to the judicial system (e.g. ensure availability of financial and other assistance).

<sup>68</sup> Barberton, C., Stuart, J., and Ajam, T., *Costing the Implementation of the Child Justice Bill and developing a strategy for implementation AFReC, University of Cape Town (1999).*

<sup>69</sup> Perrault, Nadine. *A human rights-based approach to legislative reform*, Concept note, UNICEF, DPP (2004).

**Box 12: Budget allocation for legislative measures**

Child Budget - In Brazil, “The Child Budget” is a national-level effort aimed at promoting transparency in the use of public resources through monitoring public budgets and providing relevant information to civil society groups and others. In 1995, the government formulated the Pact for Children document, which highlighted the importance of monitoring public policy financing that affects children.

*Source: Innocenti Research Centre, Promoting child rights in Brazil.*

**2.1.4 Partnerships and Social Mobilisation**

Establishing a legal framework that enables the realisation of children’s rights requires a great deal of effort by a variety of actors. Successful rights-based efforts require building effective partnerships with national counterparts (both governmental and non-governmental actors) to ensure the involvement of both claim-holders and duty-bearers, including civil society actors and States, the latter being primarily accountable for realisation of rights.

Effective partnerships, involving government and key stakeholders, NGOs, women’s and youth organisations, academia, and the media, are critical as these groups are well positioned to promote legislative reform and be catalysts for monitoring States’ legislative reform responsibility.<sup>70</sup>

**2.2 Value-added of a Human Rights-based Approach to Legislative Reform****2.2.1 Sustainable Social Policies for Children<sup>71</sup>**

Legislative reform is neither an isolated activity nor an optional activity, but rather an essential tool to develop sustainable policies in a democratic context, where the stability and continuity of social policies depend on laws and not on the discretionary decision of individuals at the executive level.

<sup>70</sup> UNICEF Programming Guidance Paper Series, UNICEF, DPP (2007), p.76.

<sup>71</sup> For more information on social policies see: UNICEF Programming guidance on legislative reform, p.13, and Perrault, Nadine. *A Human rights-based approach to legislative reform*, concept note, UNICEF, DPP (2004).

It is important to distinguish between law and policy; although they are intertwined, they are also distinct. The law sets out standards, procedures and principles that must be followed. A policy outlines the goals of government and the strategies, methods, and principles intended to achieve them. Social protection policies, for example, coexist with laws that either reinforce or diminish this protection. Inheritance laws can support a policy of social protection for all, by granting women their rights, or create a barrier for women by treating women unequally.

While laws may be amended or repealed, they ultimately provide a solid foundation for policies in favour of children and women. Social policies alone may be unsustainable, in changing conditions, or capricious if aligned very strongly with the group in power. Social policies deriving from law, however, can have more permanence and sustainability than those created by discretionary action within the executive branch of government. When a law is put in place, it can create an environment supportive of social policies. When social policies are integrated into and reinforced by law, they will be difficult to derail or undermine. Therefore, social policy and law must work hand-in-hand, as interrelated and interdependent tools for the fulfilment of children's and women's rights.

**Box 13: Social policy to support legislative reform**

In Ireland, the Child Care Act 1991 moved away from the perception of children as parental property to an understanding of the child as a person who has rights by virtue of being an individual. This shift was reflected in the Department of Health's Child Care Policy that followed in 1993. Moreover, in recognition of the interdependence of rights, the Irish Government has appointed a Minister of State to the Departments of Health, Education and Justice with special responsibility for children and, in particular, for the coordination of the activities of three departments in relation to child protection.

*Source: Nundy, Karuna, Global Status of legislative reform related to the CRC, UNICEF, DPP, (2004) p. 22.*

Laws and social policies are equally important in translating children's and women's rights into practice. The integration of law reform and social policy also facilitates a more interdisciplinary drafting of laws in a transparent and participatory environment. The end product is likely to be more enforceable and capable of internalization as a legitimate

standard. A combination of law reform and social policies can also act as a basis for human resource development to achieve sustainable development (e.g., education and health, and access to resources, participation, etc. for children, in particular girls, women and members of other marginalized groups).<sup>72</sup>

### *2.2.2 Conclusion*

Social policies and legislative reform in general areas such as housing, shelter, and access to land can help to weaken negative social customs and traditions that infringe on the human rights of women and children. A combination of law reform and social policies can also act as a basis for human resource development to achieve sustainable development (e.g. providing access to education, health, etc.). The integration of legislative reform and social policy will also facilitate a new approach and a more interdisciplinary drafting of laws in a transparent and participatory environment.

An HRBA to legislative reform can help promote, catalyze and sustain social policies in favour of children. It can help correct and overcome some of the main obstacles social policies face in general and for children in particular (such as lack of financial and human resources, lack of empowerment, transparency, and sustainability, gender inequality, etc.). When a law that is in compliance with human rights norms is put in place, it will create an environment supportive of social policies compliant with international human rights norms. When such social policies are integrated into and reinforced by law, it will be difficult to dislodge or renege on them.

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<sup>72</sup> For instance, minorities, indigenous peoples, persons with disabilities etc.

## Chapter 2

# ASSESSING COMPLIANCE OF NATIONAL LEGISLATION WITH INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS

This chapter explores the reasons for undertaking a review and possible reform of national legislation relating to children and outlines some of the considerations and approaches that can be used as part of process.

We start with the recognition that legislation is not merely an administrative mechanism which can be altered, withdrawn or introduced with minimal effort. A nation's laws are a significant expression of national character; they define who the people of the country are, what they value and how they relate to each other. Any change to legislation is correlated to a change in the character of the nation. Legislative change may come as a result of an evolution that has taken place in customs and day-to-day usage, or it may serve as a means for creating a new paradigm that seems important for the future and well-being of the country and its population. Of particular interest, in this context, is legislation which is brought into force to protect individuals or groups from discrimination or to promote particular social values.

Legislation of whatever kind necessarily deals with the relationship between the population of the country and its governments, as well as relationships among the people themselves. This is the case whether the legislation deals with the collection of taxes or the prohibition of murder. At the root of most laws are conceptions of human rights, including protection of individuals from physical harm, participation of individuals and groups in society, and provision of opportunities

for individual growth and development. Review and reform of legislation, when undertaken with the explicit intention of respecting, promoting and protecting the human rights of all, is a way for both governments and civil society to have a direct effect on the lives and well-being of all groups within the population.

At the same time, it must be recognized that legislation can be a source of disparities and discrimination. Sometimes this is overt, as with laws that restrict access to certain services or facilities on the basis of age, sex, race, belief or other criteria. Sometimes it is less obvious. The legislation may mandate equal access to health care, for instance, but also require that patients pay for the care they receive, thereby limiting the access for those whose financial resources are extremely limited. Legislation can also condone existing discrimination by not taking active measures to remove the causes of discrimination. If the law does not require all public services to be readily available to people with disabilities, for example, schools may be effectively closed to children with physical handicaps (because they cannot enter the building) or with learning disabilities (because there are no programmes or trained staff to help them learn), or girls may be excluded (because social customs prevent them from attending schools with male teachers).

Reforming existing legislation can be a challenging exercise. Social structures and vested interests which are supported by the legislation as it is currently written and applied may resist change. People may fear the unknown consequences of adopting a different behaviour or policy that is contained within the new legislation. Legislative reform is more than a paper exercise. It can lead to real change in actions, systems and attitudes, at least over time, and the degree of resistance will reflect the importance of that change and the extent to which it affects society's fundamental values. This is nowhere more evident than when it comes to legislation dealing with children and the family.

In undertaking a process of legislative reform in favour of children, it is also important to bear in mind the limitations and the potential benefits of the exercise. As important as law is, there are some things it cannot accomplish. No law, for instance, can force parents to have the best interests of their children as their basic concern (as specified in Article 18 of the CRC). However, legislation can require parents to behave *as if* they did so, by requiring them to provide their children

with the necessities of life and to foster their children's full development.

### *Legal Traditions and Systems*

Our consideration of the process and structure of legal reform in favour of children is based on the recognition of four basic legal systems operating around the world today: civil law, common law, Islamic law, and plural legal systems, which usually involve a civil or common law system combined with, or balanced by, a system of customary or traditional law. The characteristics of each of these systems will be identified, with special reference to their effect on the creation, adoption and enforcement of laws relating to children.

Within each system, there are different roles played by the legislature, the executive of government (including the civil service), the judiciary and the legal system, and representatives of civil society in both the adoption and the implementation of legislation. The different systems are examined in Section 2.2 of this chapter.

### *Legislative Review and Reform*

Every State Party to the CRC is obliged to undertake a comprehensive review of legislation affecting children's rights, to amend or replace legislation which does not meet the State Party's commitments under the Convention and to adopt new legislation as required to fulfil those aspects of children's rights not covered by existing measures. However, each country will approach the process in a way that is compatible with its own political system and legal tradition. Section 2.3 looks at those aspects of the review and reform process which should be common to all.

The processes of review and reform of legislation relating to children are very closely related. A review of legislation is usually inspired by the need or political will to revise, reform or otherwise change an established body of legislation. It will also likely serve as an evaluation of the existing legislation in relation to the legislators' intentions at the time the legislation was adopted and the way in which that legislation has been implemented and enforced since its adoption. It is possible, therefore, for a review to be conducted without it necessarily leading

to legislative reform, since the review may demonstrate that the legislation as it stands is effective and fully in keeping with the rights of children. Reform, on the other hand, should always be preceded by a careful study of the existing legislation and its implementation, as well as the general situation the legislation is meant to address. Only then is it appropriate to take action that will have an effect on the lives of children, their families and their communities. Section 2.3 considers both review and reform in some detail as separate activities, while maintaining the connections between them.

## **Part 1    LEGAL TRADITIONS AND SYSTEMS**

### **1.1    Introduction to Legal Traditions and Systems**

In order to effectively analyse the process and structure of lawmaking and law implementation in a country, one must first understand the country's legal systems. The legal tradition and how this tradition translates into the legal system, as well as local customs and practice, are important factors in understanding the status and application of human rights standards and principles in a given country.

Definitions of the terms 'legal system' and 'legal tradition' may vary. However, in the context of this document, the legal system of a country encompasses its rules and institutions, which are based on its legal tradition; thus, what are being categorized as "systems" (civil, common, Islamic and customary law) are actually the traditions upon which individual countries' systems of law are built.

The legal tradition is the cultural perspective under which the legal system is created, providing the philosophy for how the system should be organized and how law should be formed and implemented. It is based on a historic perception about the role of law in society.<sup>73</sup>

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<sup>73</sup> These definitions are taken from W. Tetley, 'Mixed jurisdictions: common law v. civil law (codified and un-codified)' *Uniform L. R.*, vol. 4 (1993), p. 591, which cites Merryman, J.H., *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (1995), p. 1. For further reading, this article is available at: <http://www.unidroit.org/english/publications/review/articles/1999-3.htm>.



It is well accepted that the term 'legal system' encompasses three components: 1) the substance of the law, 2) the structure of the law, and 3) the culture of the law.

1. The substance of the law refers to the letter of the law<sup>74</sup> (i.e. the formulation of the provisions and clauses) or broad principles of law (which are interpreted by judges, particularly in common law countries).
2. The structure of the law refers to the institutions and enforcement mechanisms put in place to ensure application of the law. These are usually the courts, tribunals, offices of ombudspersons, human rights commissions, etc.
3. The culture of the law refers to the social and cultural contexts in which laws are implemented. These include the social values and practices as well as social differences that may exist within a society.

The legal system has an impact on the ways in which international human rights norms are integrated into national legislation. In general, there are four main ways in which international law can be incorporated into local or domestic law. These are:

1. Through the ratification of or accession to any international agreement, treaty or convention, which automatically results in the provisions of that instrument being incorporated directly into domestic legislation, and being immediately and fully justiciable (i.e. subject to action in a court of law). This is referred to as "automatic incorporation."<sup>75</sup>
2. Through the promulgation of special enabling legislation, such as a constitutional amendment, a law or decree. Until this is done, the international instrument has no legal force domestically.
3. Through the incorporation of the instrument, in its entirety, in a single piece of legislation.

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<sup>74</sup> This applies specifically to the civil law system.

<sup>75</sup> Handbook for Parliamentarians, The Convention on the Elimination of all forms of Discrimination against Women and its Optional Protocol, United Nations and Inter-Parliamentary Union (2003), p. 41.

4. Through the gradual incorporation of various aspects of the international instrument's application over time, using a number of different laws.

The various ways in which international instruments are applied in countries are outlined in detail in the Section of the Handbook entitled "Constitutional reforms in favour of children."<sup>76</sup>

## 1.2 Differing Legal Systems

This Section looks at homogeneous systems and mixed/plural systems, which are based on countries' legal traditions. Within these two groups (homogeneous and mixed), the traditions considered are those which substantially reflect the legal systems of the States Parties to the CRC. Most countries have some mixture of these traditions, and there are exceptions to the traditions described below. Furthermore, legal traditions are not static or completely distinct, and the below classifications are simplifications. However these traditions do represent the foundation for modern legal systems.

These systems are the civil law, common law, Islamic law and plural or mixed systems with components of customary law. Each system's main characteristics are identified, with special reference to their effect on the domestication of international human rights standards, as well as the drafting, adoption, and enforcement of laws focused on children.

As previously mentioned, there are points of overlap between civil law and common law in practice, and either may be combined with Islamic or customary law in a given country. Even within the broad categories of civil law and common law, there are variations from country to country, so that the basic principles and historical background are adapted and carried forward based on the particular situation of each country. It is from the country's particular expression of the underlying tradition that the system of law is derived.

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<sup>76</sup> For a more comprehensive introduction to the status of international treaties in domestic legislation see Chapter III of this Handbook.

### 1.2.1 *Homogeneous Systems*

Many countries have a legal system based on a single legal tradition—either the civil law tradition or the common law tradition. Usually, these countries' systems are described as homogeneous. The principles of the common law and civil law traditions apply whether the legal system in the country is homogeneous or includes the tradition as part of a pluralist system. While the descriptions below focus on the historic concepts of civil and common law systems, the contrast between them is not always sharply defined. Countries with one system increasingly adopt conventions of the other.

### 1.2.2. *Civil Law Tradition*

The civil law tradition is derived mainly from Roman law, with its emphasis on writing laws into comprehensive national codes. However, some civil law systems remain un-codified, while at the same time some common law jurisdictions may codify parts of their law (such as a criminal code). Thus, evidence of the systematic arrangement of related laws into a single written document does not automatically identify a civil law system.

The civil law tradition serves as the basis of law in the majority of countries of the world, especially in continental Europe, but also in Quebec (Canada), Louisiana (USA), Japan, Latin America, and most former colonies of continental European countries.

Civil law systems are 'monist' systems, meaning that national and international law are viewed as a single legal system. In general, no separate implementing legislation is needed to enforce the accepted international law. Significantly, the constitutional provisions of most civil law countries legally entitle them to automatic integration of international treaties into domestic law upon ratification – enabling lawyers and judges to invoke them directly in cases brought before the courts.<sup>77</sup> Therefore, once an international human rights instrument is ratified by such a country, the instrument becomes part of domestic law and prevails over national legislation in the event of a conflict

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<sup>77</sup> UNICEF, *Global Status of Legislative Reform Related to the Convention on the Rights of the Child*. Compiled by Karuna Nundy (2004).

between the two. Usually, the constitution indicates that ratified treaties are to be automatically incorporated in this way, provided they have been published in the *Official Gazette*. In spite of this fact, the practice of directly applying international treaties in courts is limited. Following ratification of the CRC, some civil law countries took the additional step of enacting laws that reflect the treaty's provisions.

In civil law systems, the legislature and judiciary have different roles: the former creates the law and the latter applies the law. Judges are specially trained as such, in training schools or during the post law school practical work period. Judicial decisions are based on interpretation of the written law, and legal scholarship (commentaries by experts, articles by law professors, etc.) may be used to aid this interpretation. Ultimately, judges in lower courts have no legal obligation to follow the interpretations and decisions of other judges in previous cases (except those of the High Court, Supreme Court or *Cour de Cassation*), although they may do so in practice.

In civil law systems, legislators and law professors exert influence over the content of law (its text and its interpretation). Therefore, these two groups are important partners. Additionally, in a monist system, judges can be called upon to apply international human rights treaties to which the country is a party and they should be encouraged to do so.

### ***1.2.3 Common Law Tradition***

The common law tradition is derived from the English legal tradition. Historically, common law was law developed by custom (prior practice of justice officials), before there were written laws. This practice has continued to be applied by common law courts, even after laws existed in written form.

In the common law system, court decisions (case law) are an important source of law and expression of legal rules. The courts' interpretation of the constitution, legislation, and codes becomes law itself. Judges create and refine this law through interpretation of community standards and traditions. The decisions of courts thus establish precedent for future interpretation of the law by judges in the same or lower courts within the same jurisdiction. Judges then refine this

interpretation in future cases by extending it to different facts and circumstances.

Statutes, which are laws enacted by the legislature, are written and interpreted by the judges.<sup>78</sup> Court cases fill the gaps in legislative texts. In many common law countries judges are seen as balancing the power of the other branches of government. Generally, judges do not receive specific training, but are chosen from among respected and experienced advocates/lawyers.

Most countries of the common law tradition apply the 'dualist' system with respect to treaty obligations.<sup>79</sup> This means that international law is considered a separate system that governs conduct amongst States. It does not acquire domestic status upon ratification unless formal legislative action has been taken. Thus, in common law countries, even if an international instrument such as the CRC or CEDAW has been ratified, specific legislative or administrative measures are required to incorporate its provisions into domestic law. However, in a few common law countries, the CRC and CEDAW have been used by judges in making decisions and have thus influenced case law.<sup>80</sup> In addition, in many States Parties, legislation incorporating CRC and CEDAW principles and standards has been piecemeal and *ad hoc*.

Another important feature of the common law tradition in relation to lawmaking is that it is traditionally based on *judicial precedent* as opposed to codification of law, the main feature of the civil law system. There is, however, emerging evidence to suggest the adoption of some civil law features into the common law tradition and vice-versa: Whereas in civil law countries, there is a growing importance of judicial review in the lawmaking process, in common law countries, there also appears to be an adaptation towards statute law and codes.

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<sup>78</sup> Statutes are often written to be interpreted and can therefore be rather general in their phrasing. Unless the laws are very specific in their wording, they can be interpreted quite broadly, depending on the rights and interests involved.

<sup>79</sup> While most common law countries are dualist when it comes to international treaties, this is not because of the common law. Rather, it is the result of the application of the royal prerogative in ratification of international treaties.

<sup>80</sup> The CRC is a key component of the definitive Canadian reference on all law affecting children (*Wilson on Children and the Law*).

In the common law tradition, the understanding of human rights (generally preserved in the national constitution or a bill or charter of rights) may be redefined or expanded through interpretation by the courts, as judicial decisions establish legal precedents which have the force of law in common law countries. Thus, courts and judges are important partners in broadly defining children’s rights in systems based on common law traditions. Judges must be seen as potential advocates for advancing the realisation of children’s rights. Similarly, legislators should be encouraged to pass legislation holistically incorporating the CRC and CEDAW domestically. Doing so will make it easier for parties to court cases to invoke the CRC or CEDAW in support of their cases. In the absence of holistic incorporation, advocates/lawyers should encourage courts to use the CRC and CEDAW (even when not ratified by the State)<sup>81</sup> as a persuasive authority—based on the State’s voluntary acceptance of obligations in ratifying the instrument.

#### ***1.2.4 Mixed/Pluralist Legal Systems***

Mixed or pluralist legal systems are the most complex to navigate and analyze in terms of how best to support legislative reform for children and women. They may involve combinations of any legal traditions and often include some form of customary or traditional law. In other cases, pluralist countries combine civil or common law with Islamic law. The different traditions may interact or operate in independent spheres. Pluralist countries pose the distinct problem of trying to balance the different legal approaches of multiple systems operating at the same time.

#### ***1.2.5 Islamic Law***

Islam provides rules for both religious and secular life, setting an extensive code that directs how the faithful must behave as a community.

Islamic law is based upon the principles of *Shari’a*, which “refers to the general normative system of Islam as historically understood and

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<sup>81</sup> *Attorney-General of Botswana v. Unity Dow*, 1992 LRC (Const) 623, decided by the Court of Appeal of Botswana.

developed by Muslim jurists.”<sup>82</sup> For purposes of this Handbook, States Parties of the Islamic legal tradition may be described as those whose civil and penal laws are predominantly based on *Shari’a*. The *Shari’a* covers a wide range of issues, from diet, the use of public space, and child custody to criminal punishment. Islamic law is based predominantly on the *Qur’an*, *Hadith* or *Sunna* (custom or conduct of the Prophet Mohammed), *Ijma* (consensus among or opinion of Muslim jurists on a question of law), *Qiyas* (analogical deduction, in matters not covered by the other sources) and *Ijtihad* (exercising independent juristic reasoning). The *Shari’a* took somewhat different forms within these approaches, and its content and methods vary across the Muslim world today depending on prevailing approaches in each region and country, and the local customs that informed them.<sup>83</sup>

Most Muslim countries have incorporated the *Shari’a* into their domestic law, to one degree or another. Constitutions of Islamic States also serve as useful frameworks for determining the status of international law within the legal framework. The constitutions of many States provide that the *Shari’a* shall be the principle source of legislation.

In many States secular and religious laws co-exist where public law is conducted on the basis of secular principles. It is the *Shari’a* on personal status matters – such as marriage, polygamy, divorce, repudiation, custody and guardianship of children, sexual relations and inheritance – that is most frequently found in legislation. This is primarily because the *Qur’an* and *Sunna* give their most detailed prescriptions on these matters, because Islamic personal status laws were often left largely intact during periods of colonial rule, and because Islamic fundamentalist movements typically make this area of law a main focus in their reforms.<sup>84</sup> Furthermore, there are countries

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<sup>82</sup> A. An-Naim, ed., *Islamic Family Law in a Changing World: A Global Resource Book*, Zed Books, London (2003), p. 1, as cited in S. S. Ali, ‘A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law’, in *Protecting the World’s Children: Impact of the UN Convention on the Rights of the Child in Diverse Legal Systems*, UNICEF, Cambridge University Press: New York (2007).

<sup>83</sup> See: Dwyer p. 2,12; Venkatraman p.1964-1970; Elahi p. 368-369; An-Naim, “Religious Human Rights” p. 342-343.

<sup>84</sup> Lee, Waldorf, *Children’s Rights and Islam*, UNICEF unpublished Working Paper (2000).

whose populations belong to different faiths<sup>85</sup> that have enacted personal status laws specific to each of the dominant religions.<sup>86</sup>

Local variation also plays an important role in Islam. Not only were regional traditions influential in the development of the *Shari'a*, but religion as it is now explained and understood at the local level does not always conform to the letter of the *Qur'an*. Some customary practices may be falsely characterised as Islamic. Also, it should be noted that local custom informed the development of the different Islamic schools of law. As a result, the conflicts which may exist between children's human rights and what is understood to be a proper Islamic way of life are not consistent across the Muslim world.

Therefore, particularly in the area of family law, there is some belief that a reformulation of practices relating to custody, guardianship, marriage age, and inheritance rights, among others, is possible within the framework of Islamic law.<sup>87</sup> For instance, some Islamic States have used *ijtihad*, or the evolving interpretation of Islamic religious texts, to change attitudes.<sup>88</sup> Highlighting the provisions of Islamic law that are conducive to children's rights can advance implementation of the CRC and CEDAW.

### ***1.2.6 Traditional or Customary Law***

Political and historical linkages between a number of countries in Asia, Africa and parts of Oceania,<sup>89</sup> and those of the purely civil law and common law traditions (particularly France, Britain, Belgium and Portugal), resulted in the emergence of mixed legal traditions. Mention can also be made of the Anglo-Dutch system of law, which affected countries in southern Africa. The pre-existence of customary law or *Shari'a* (or both) in colonised States and the subsequent positioning of civil law, common law or Anglo-Dutch systems made this possible and persisted even after these States gained political independence.

<sup>85</sup> Countries such as India and Sri Lanka.

<sup>86</sup> See: Syed p. 372-374; Venkatraman p. 1972-4; Goonesekere p. 49-53; Lucas p. 54-55.

<sup>87</sup> S. S. Ali, 'A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law', in *Protecting the World's Children: Impact of the UN Convention on the Rights of the Child in Diverse Legal Systems*, UNICEF, Cambridge University Press: New York (2007), citing various scholars of Islamic law.

<sup>88</sup> A/52/38/Rev.1, paras 45-80.

<sup>89</sup> UNICEF study, *supra*.



This historical process has had a profound effect on the legislative agenda of affected States Parties. Colonisation generally resulted in the introduction of new laws, principally founded on the ideals of the colonising State. In addition, traditions and customs continue to play a significant role in the legal system of many countries. States in which traditional law has a significant impact often officially recognize certain customary provisions as sources of law and define the place of these provisions in the hierarchy of laws. In Fiji, for example, common law and customary law operate within the same system. State law is based on the common law tradition, while both indigenous Fijians and Indians have their own distinct customary law traditions. Fiji has thus integrated the customary law into both its constitution and statutory law.<sup>90</sup>

Customary law, in some cases administered by traditional chiefs and their councils, often deals with matters relating to children and family. Even if the written laws of a country protect and promote children's and women's rights, traditional practices may often hinder their effectiveness. For example, the law may grant women the right to inherit property (from a husband or father who dies), but if a woman is not aware of the law or if customs in her community exclude women from inheriting property, she may not be able to benefit from the law.<sup>91</sup> In the case of Ghana, the national constitution specifically protects women's equal right to inheritance, but many women are unaware of the law.<sup>92</sup>

Often, the plurality of sources of laws in countries with mixed legal systems places them at a disadvantage with respect to standards expected under article 4 of the CRC in general, in particular the obligation to undertake legislative reform. Countries with diverse legacies usually face additional hurdles in ensuring that the legacies of

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<sup>90</sup> Phillips, Gwen, 'Application of Customary Law Rules in Fiji and the Pacific Region: Dual Systems', in *Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child* (2000), p. 122.

<sup>91</sup> See UNICEF, *Human rights for children and women: How UNICEF helps make them a reality*, p. 19-20; Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women* (2004).

<sup>92</sup> Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women* (2004), p. 178.

colonial, customary and *Shari'a* laws are consistent with the principles and provisions of the CRC.

#### Box 14: Main characteristics of key legal systems

##### Civil Law System

- This written law is the primary source of law and is organized into comprehensive codes, which lay out basic legal principles (rule oriented system); codes are written in general language.
- Judges apply law and use legal scholarship as a source for interpretation of the law; interpretation looks at legislative history, doctrine, the law's purpose.
- Judges have no legal obligation to follow the interpretations and decisions of other judges in previous cases (except those of the High Court or Cour de Cassation), although they may do so in practice.
- The judicial decision process begins with identifying the applicable principle and then applying it to case.
- Focus is on social order and timely resolution of cases; consistency of interpretation is often considered less important.
- Judges are specially trained as judges (in training schools or during the post law school practical work period).
- Laws are published in an Official Gazette; once ratified, international treaties will become part of domestic law when they are published in the Official Gazette.

##### Common Law System

- Court decisions (case law) are an important source of law.
- Legislation is generally specific and interpreted by judges.
- The judiciary provides a check on the other branches; court decisions are laws in and of themselves.
- Judges look to previous cases in their jurisdiction to decide a case (law is based on what has been decided before).
- Court decisions are very 'fact specific' (i.e. on interpretations of the facts to see what rule should be applied and how).
- Court decisions may create the impetus for legislative reform to fill gaps in legislation exposed by cases.

##### Islamic Law

- The system is based on religious sources of law and juristic techniques: the *Quran*, *Hadith* or *Sunna* (custom or conduct of the Prophet Mohammed), *Ijma* (consensus or opinion, agreement among Muslim jurists on a question of law), *Qiyas* (analogical deduction, in matters not covered by the other sources) and *Ijtihad* (exercising independent juristic reasoning).
- Islamic law most often coexists with customary norms and/or 'secular' legal frameworks (in a pluralist system).
- Personal status law or family law is the area most commonly covered by Islamic law in pluralist systems.

##### Traditional/Customary Law

- This refers to oral law based on inherited custom and community tradition.
- These laws often prevail in practice even when at odds with formal written laws.
- Traditional law is sometimes adjudicated by traditional leaders or tribal councils.

### 1.3 Status of International Human Rights Instruments in Domestic Legislation

The position of international human rights instruments, such as the CRC and CEDAW, varies with the legal systems and constitutional structures of different countries. For some, the ratification of or accession to any international agreement, treaty or convention automatically results in the provisions of that instrument being incorporated directly into domestic legislation, and being immediately and fully justiciable (subject to action in a court of law). For others, the international instrument has no legal force domestically unless and until special enabling legislation is adopted. In some cases, this may be done through a constitutional amendment. Other countries may choose to incorporate the instrument, in its entirety, in a single piece of legislation. Still others will use a number of different laws, dealing with the various aspects of the instrument's application, to incorporate it gradually over time.

The various ways in which international instruments are applied in countries are outlined in detail in the Section on constitutional changes.

### 1.4 Conclusion

The legal traditions in a given country can have a profound impact on how international human rights treaties such as the CRC and CEDAW are implemented. The legal system also has an effect on how stakeholders can advocate for and support legislative reform (through institutional mobilization, monitoring of resource allocations, and policy and law implementation, for example). Understanding the foundations of the legal tradition in a theoretical sense<sup>93</sup> can provide a

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<sup>93</sup> For a more comprehensive introduction to legal traditions, see M.A. Glendon, et al., *Comparative Legal Traditions in a Nutshell* (2d. ed., 1999); I. Edge, ed., *Islamic Law and Legal Theory*, Aldershot: Dartmouth (1996).

better understanding of the national system, how it works, and how it can foster the realisation of children's and women's rights.

The general principles of human rights (universality, indivisibility and interdependency)<sup>94</sup> collectively connote the need to maintain cohesion in the law reform process.

## **Part 2    LEGISLATION REVIEW AND REFORM ON BEHALF OF CHILDREN'S RIGHTS**

### **2.1    Why Review and Reform Legislation?**

There are several reasons why a country would undertake to review and reform its legislation relating to children. In some places, several factors may combine to prompt an examination of legislation, social policy, administrative structures and the allocation of resources that reflect a State's effort to meet its obligations to its children. The reasons for undertaking the exercise will, to a large extent, determine the process followed and the resulting actions.

One reason for review and reform of legislation could be to ensure that the State Party is meeting its commitment under Article 4 of the CRC to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention." There may, in addition, be a similar obligation in relation to CEDAW or other related international instruments to which the country is a party. For some, a review of legislation could be sparked, as it was in Ghana, by the preparation of a report to the Committee on the Rights of the Child.<sup>95</sup> The Committee's Guidelines for the preparation of reports ask explicit and precise questions about steps taken to implement the provisions of the CRC in national

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<sup>94</sup> See <http://www.unicef.org/CRC/> for more details on the general principles of human rights.

<sup>95</sup> Quashigah, Kofi, *Legislative Reform Initiatives, Institutional Development and Policy Changes in Favour of Children: A Ghana National Study*, Accra, UNICEF Ghana (date unknown) [henceforth: Ghana], p. 13.

legislation, including specific laws, budgetary measures, administrative mechanisms and policies regarding children.<sup>96</sup>

The review and reform process could be part of a broader national examination of the situation of children. This may be driven by public concerns about child poverty, health, education, nutrition, labour or exploitation. These issues may be brought to public and government attention by children, or by their advocates. The government may take the initiative, in response to either a political decision or (in common law countries) judicial findings that bring existing laws or parts thereof into question. The media, by bringing breaches of children's rights to public attention, can be instrumental in generating concern that can lead to review and reform of legislation.

A dramatic change in the political landscape, such as the end of Apartheid in South Africa,<sup>97</sup> can provoke a wide-ranging review and reform of national legislation, including the constitution. This would naturally also include legislation relating to children's rights as a matter of course. In monist countries, for which the CRC became enforceable in law as a direct result of ratification or accession, there is still a need to ensure that other, pre-existing legislation is in harmony with the provisions of the CRC. If legislation is not in accord with the CRC, the State is obliged to take the steps necessary to rectify the situation, so as to avoid contradictions between the CRC and the legislation. This has been the case, for example, in countries such as Nicaragua, Ethiopia, Syria and Belgium.<sup>98</sup>

For dualist countries, such as Jamaica, Ghana and India,<sup>99</sup> which do not automatically adopt international instruments into national law, the existing legislation needs to be reviewed to see the extent to which it fulfils the State's obligations under the CRC. If there are gaps or contradictions, new legislation needs to be adopted to establish the full legal implementation of the CRC's provisions in the country's courts

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<sup>96</sup> Hodgkin, Rachel and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Fully Revised Edition, UNICEF, New York and Geneva (2002) [henceforth: *Implementation Handbook*], p. 54-5.

<sup>97</sup> Nundy, Karuna, *Global Status of Legislative Reform Related to the Convention on the Rights of the Child*, Global Policy Section, UNICEF (internal paper), New York (April 14, 2004) [henceforth: Nundy], p. 13.

<sup>98</sup> Nundy, p. 8-9 (footnote).

<sup>99</sup> Nundy, p. 6-7 and p. 10 (footnotes).

and to promote the full implementation of children's rights in government policy, programmes and operations.

There is a distinct difference between a process of legislation review on behalf of children that arises from a broadly held desire on the part of society to foster a protective, nurturing or egalitarian environment in which children can grow and develop, and a process that is undertaken in order to ensure compliance with CRC/CEDAW.

If the review is the result of a general commitment on the part of the government and civil society to promoting the broadest possible wellbeing of children, it will naturally look at an extensive range of legislation. Legislation that affects children, and which needs to be harmonised with the CRC and CEDAW, goes well beyond laws that specifically mention or pertain to children. This approach will likely also entail a stronger and more expansive understanding of the role of society as whole, and the administrative structures of the State in particular, in supporting and protecting children's rights. However, such an exercise can become vague and unfocused if it tries to take on every aspect of children's lives all at once.

On the other hand, while a review of legislation in response to CRC/CEDAW avoids digression and keeps a clear focus on its objective, it may be seen as a purely technical exercise for government agencies. As such it may lack the kind of public support that enables ready acceptance of the principles of children's rights and, eventually, support for any

**Legislative measures**

- Specific laws and regulations;
- Creation of specific institutions to promote and protect the rights of children;
- Processes within existing broader institutions to take account of the interests of children; and
- Government policies, plans and programmes, including goals set for economic, social and cultural rights of children, such as:
  - education (e.g. school enrolment and completion targets);
  - health care (e.g. immunisation coverage);
  - and
  - nutrition (e.g. access to adequate and appropriate food and nutrition).

**Legislation dealing with children's rights:**

- Includes:
  - protection from abuse and exploitation;
  - administration of justice;
  - provision of services (education, health care, nutrition, housing and economic support);
  - assignment of family responsibilities; and
  - creation of opportunities for children to participate in national life;
- Establishes basic principles that underlie all relations between the State and its children;
- Creates structures, processes and systems through which those relations are carried out;
- Provides for necessary administrative and budgetary resources to implement measures adopted and to maintain institutions created to promote and protect children's rights; and
- Establishes standards and mechanisms for monitoring the situation of children's rights in general, not only in relation to specific pieces of legislation.

resulting change to accustomed practices. It could result in a situation in which children's rights are formally recognised in law but are not respected in practice, if both political will and popular acceptance are missing. Concentration on the specific provisions of CRC/CEDAW could result in failure to take account of some measures which have a significant if indirect effect on children's rights. It is important with this approach as well to recognise that the legislation to be examined is not limited to specific laws which deal explicitly with children. Since just about any action of government will have some effect on the lives and rights of children, all legislation needs to be taken into account in assessing the implementation of the CRC and CEDAW.

***2.1.1 Children's Rights and National Legislation***

The CRC serves not only as an international standard for the treatment of children, but also as a symbol of the new and growing understanding of the position of children in society. Once it was assumed everywhere that children were essentially objects of protection or objects of control, the exclusive responsibility of the family and not fully persons in the legal sense. The CRC embodies the recognition that children are subjects of rights and fully entitled to participate in society to the extent their developing capacities allow.

All legislation relating to children, including but not limited to family law and those measures that deal with criminal activity both by and against children, needs to be reviewed and, if necessary, amended in the light of this new understanding.

Crucial to this is the acknowledgement that children are important members of society and that society, therefore, has a responsibility to care for them and promote their fullest possible development. A particular example of the sort of attitude that needs to be overcome is found in the "doctrine of irregular situation" which was, for years, at the root of much legislation dealing with children in Latin American countries. This concept held that children "are objects of judicial protection rather than individuals with rights."<sup>100</sup> It left children who were not subject to legal intervention, for example children who live in households with either their families or as domestic employees, subject to a wide variety of abuses without legal recourse, while the judicial process and the treatment of children who come to the attention of the courts, including in cases of institutional care and detention, did not "make a clear difference between children in need of care and protection and those in conflict with the law."<sup>101</sup>

Legislation affecting children does more than set out rules for behaviour with regard to children. Although it is important that the law define prohibited acts committed either against or by children, and set out the penalties that will be imposed for those acts, the scope of legislation in relation to children, especially as envisaged by the CRC, is much broader. It encompasses all aspects of a child's life and the child's relationship to others.

This may seem a very broad definition of legislation as it relates to children. However, legislation is the primary means by which governments act on behalf of the State to manage their many responsibilities, including responsibilities to and for children. When considering review and reform of legislation in relation to children's rights, legislation specifically dealing with children – family law, juvenile justice, laws about education or against child labour, laws to protect children from sexual exploitation – is not the only realm of law

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<sup>100</sup> Nundy, p. 9.

<sup>101</sup> Nundy, p. 9.



that must be taken into account. Other pieces of legislation, including those that deal with matters of gender equality between men and women, as well as between boys and girls, should also be considered, since children, as members of society, are affected by all legislative action.

## **2.2 Review of Legislation**

### *2.2.1 Approaches to Review*

The precise nature of the legislation in place will vary from country to country, depending on the legal system, the political process, economic circumstances, traditional values and the role of the State in social matters. In particular, the mechanisms for monitoring children's rights, both in law and in practice, will reflect the ways in which a country manages the relationship between the State and the population in general. However, there are certain fundamental concepts and approaches that should be common to all States Parties to the CRC and to CEDAW, which will be highlighted throughout this chapter of the Handbook and those that follow.

The following discussion deals primarily with the incorporation of the provisions and principles of the CRC and CEDAW into legislation. In those countries which follow the common law tradition, the review should go beyond written legislation to the body of jurisprudence and case law that has a bearing on children's rights. The processes examined here can be applied to both written and unwritten law.

This guidance has implications, as well, for countries with plural legal systems that include customary law. Because customary law is largely unwritten and dependent on interpretation, an analysis of the situation of children's rights and possible revision of customary law will have to be approached with great sensitivity, taking into account both cultural and historical aspects of the customary law. It should be done in a way that is responsive to the characteristics of each community and cultural group. In many plural legal systems, customary law is constitutionally deemed subservient to the state standard of civil or common law. In all circumstances, because of the universality principle that underlies all United Nations human rights instruments, rights take priority over

custom in determining what laws, rules, regulations and traditional behaviours are acceptable. Therefore, it should be possible also to reform customary law as it relates to children's rights by means of legislation if necessary. Given this understanding, a review of customary law as it affects children's rights can be undertaken using the processes described below.

Similarly, review and reform of legislation that derives from Islamic law involves more than the relationship between written law and the provisions of the CRC and CEDAW. The crucial religious and historical dimension of Islamic law requires an approach that takes into account more than written jurisprudence, considering, for example, the role of religious leaders and teachers. Even in countries where Islamic law prevails, however, it should be possible to consider the approaches and objectives of review and reform of legislation as described here.

The Committee on the Rights of the Child, in its evaluation of State Party reports on the implementation of the CRC, has consistently stressed the need for all States to examine their own legislation to see if, and to what extent, it is in compliance with the provisions of the CRC. For example, in its Concluding Observations on the Initial Report of Indonesia, the Committee said:

“The Committee recommends to States Parties that they set up a mechanism to ensure that all proposed and existing legislative and administrative measures are systematically reviewed to ensure the compatibility with the Convention on the Rights of the Child. Such reviews should be carried out considering all the provisions of the Convention, and be guided by its general principles; they should also give adequate attention to the need to ensure appropriate consultation with and involvement of civil society during the review process.”  
*(Report on the twenty-second session, September/October 1999, CRC/C/90, para 291(f).)*<sup>102</sup>

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<sup>102</sup> Implementation Handbook, p. 59.

### 2.2.2 *Who Participates in the Review?*

A review of legislation that affects the rights of children has two equally important dimensions: analysis and consultation. These are not separate and unrelated. As the example of Venezuela's legislation reform process<sup>103</sup> shows, the interaction of technical assessment with public consultation can produce the most effective result with the broadest possible public support.

Throughout, the review process should involve the full range of parties who have an interest in the situation of children and their rights. As the principal organ of the State, responsible for both developing and implementing legislation, the government naturally has a key role to play at all stages of the review. To be effective, the review will need to engage all organs of government, both political and administrative. The commitment of government to the process, and their full acceptance of the results, will be critical to the success of this endeavour.

At the same time, the review process needs to go well beyond the formal governmental structure. It should engage all sectors of the country, covering as many representatives of different stakeholders as possible. It is especially important to involve groups which may be marginalized or disenfranchised from normal centres of authority and decision-making within the country. This would normally include women, geographically isolated groups and minorities of any kind.

The full scope of the legislation review process described below, including both analysis and broad-based public consultation, may not be within the capacity of all countries. Limited resources, lack of suitable civil society partners for government to work with, logistical problems that prevent reaching out to people where they live throughout the country are all factors that can affect the ability of those conducting the review to be as thorough as they would like. Even with these limitations, however, it should still be possible to undertake a review of legislation which will examine all relevant measures (legislation, policies, administrative structures, budgetary provisions)

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<sup>103</sup> Garate, Gorka, *Los Procesos de Construcción de una Nueva Legalidad para Niños y Adolescentes: Tres Experiencias: Venezuela, Guatemala y Costa Rica*, UNICEF El Salvador (internal paper), San Salvador (September 2005) [henceforth: Garate], p. 14-35.

from the perspective of children's rights. The methods may vary, but the questions asked can be the same, and, even if the range of people consulted is not as broad as the entire population, there are always ways to involve representatives of civil society and children themselves in the exercise.

Although the specific details of the review process will vary depending on the nature of the political and legal system in each country, there are several basic elements that will form part of a successful review process. These are:

1. Analysis of the existing legislation in relation to both the provisions of the CRC/CEDAW and the situation of children in the country concerned, including issues such as gender parity, economic status and geographic limitations;
2. Consultation with the widest possible range of people, institutions and groups interested in legislation that affects the rights of children; and
3. Development and presentation of conclusions and recommendations for further action.

The analysis and consultation elements of the review process are equally important and require the same level of commitment and preparation to ensure a successful review. When executed thoroughly, the process will lead to greater understanding of children's rights and effective legislation which fully respects, protects and promotes those rights.

### **1. Analysis**

Legislation is a specialised means for defining and implementing government policies, plans and programmes as well as a mechanism for regulating and managing relationships and actions within the broader society. Because it has legal force and is subject to testing in a court of law, it is written in a precise and carefully nuanced language that is sometimes quite different from common usage of words in day-to-day discourse. Therefore, the analysis of legislation is a task generally delegated to those with expertise in the field.

This does not necessarily mean it can only be done by lawyers, however. Expertise in the subjects dealt with by provisions of CRC/CEDAW, especially those that address the broader society's responsibility to children, can best be found among those who work with children on a daily basis or whose experience lies with the practical effects of the legislation's implementation on children's lives. Thus, in addition to those who have specialised knowledge and experience with the technical aspects of drafting and implementing legislation (which may include representatives of the legal system), the analysis of legislation in relation to the rights of children should also involve child care experts, health workers who deal with children, educators, children's rights advocates and any others who have specialised knowledge of the issues to be considered. Depending on the legislation being considered, the review could be conducted by teams of experts drawn from government and non-governmental organisations, with different teams analysing the categories of legislation that relate most closely to their areas of expertise.

The technical analysis of legislation should take into account not only the extent to which the legislation in question gives effect on paper to the specific provisions of CRC/CEDAW but also the ways in which that legislation directly and indirectly affects the actual situation of children and their rights every day. This means going beyond merely assessing the text of a law to examining how it is applied by the courts and the civil authorities responsible for implementing it and understanding how it is viewed by the people it directly affects, especially children and their families.

The analysis can be led by a single body with a broad range of expertise, such as the Child Law Reform Advisory Committee established by the Ghana National Commission on Children.<sup>104</sup> A similar approach was used in Uganda, with the Ugandan Child Law Review Committee, and Madagascar, with its Commission for the Reform of the Rights of the Child.<sup>105</sup> Such a diverse group brings to bear different viewpoints and backgrounds which will enrich the discussion and provide insights that may expand both the committee's understanding of the total effect of the legislation on the lives of

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<sup>104</sup> Ghana, p. 13.

<sup>105</sup> African Child Policy Forum, *Harmonisation of Laws Relating to Children in East and Southern Africa: A Summary Report*, 2006 (draft), p. 17.

children and the range of recommendations the committee can bring forward.

Some countries have permanent legal commissions which regularly review all legislation and make recommendations for reform as necessary; in some countries, this role is performed by a specially designated Law Reform Commission. The Law Reform Commissions of Kenya, Lesotho and South Africa undertook such reviews of legislation.<sup>106</sup> For a specific review of legislation relating to children's rights, such a general commission could be augmented by specialists in matters of concern to children.

It has been the case in the past that reviews of legislation in some countries have taken a more restricted approach. This has usually involved hiring a small team of legal experts (or sometimes just one lawyer or judge) as consultants to undertake an assessment of the laws relating to children in close comparison with the provisions of CRC and CEDAW (if the latter is relevant). This approach has several inadequacies. Although the consultants engaged may have extensive legal knowledge in the specific areas covered by the legislation studied, they often lack experience in the actual implementation of the legislation and knowledge of the situation of children in regard to that subject area (health, education, nutrition, employment, abuse, etc.). As a consequence, their review of the legislation tends not to be as complete as it might be with a more broad-based group of experts. There is also the risk that, with such a narrowly based approach, the personal ideas and expectations of the consultants may bias the assessment in some direction, because they would lack the wider perspective of a more heterogeneous review panel. As a bonus, expanding the range of people involved in the analysis can be seen as an illustration of the right to participation.

The analysis of legislation, with its supporting information, can be used by the experts' group to formulate recommendations for further action. But, before a final decision is made, it is important that the conclusions of the review are fully owned by the people who will have to take responsibility for the necessary follow-up: This includes not only the government, but also civil society and the public in general.

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<sup>106</sup> Ibid, p. 17.

For the government to fully own the review process, from the beginning, representatives of key ministries should be involved in the analysis of existing legislation and in formulating any recommendations about changes that may be needed, including decisions about budgetary and administrative resources to support the implementation of existing legislation and any new measures that may be proposed. The processes followed in Ghana, Jamaica<sup>107</sup> and Venezuela are all good examples of the engagement of government Ministries and agencies from the beginning. In Venezuela, the role of the Special Congressional Commission was crucial in focusing political attention on the legislation, while the involvement of the National Institute for Children (INAM) ensured government commitment to the implementation of the conclusions of the process.<sup>108</sup> Ghana's engagement of various government ministries, departments and agencies also established a solid basis for continued government support of the results.

## **2. Consultation**

The technical analysis, however, is only part of the work that needs to be done for a thorough review. In order to understand the real effect of the existing legislation and the ways in which the legislation relates to the real situation of children, it is important to undertake a consultation that will involve as many segments of civil society as possible. This will be important not only for any corrective action that may result, but also for the effective application of existing legislation and new measures that may be adopted as a result of recommendations arising from the review. This is particularly important in countries with plural legal systems that incorporate customary law. As a general rule, the broader the participation throughout the review process, the greater the likelihood of public support for any legislation that promotes, protects and respects children's rights.

The possible range of participants in the consultative phase of the review process is extensive. Consultation should engage as many

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<sup>107</sup> UNICEF Jamaica, *Advancing Children's Rights in Jamaica: Report on Legislative Reform Initiative*, UNICEF Jamaica, Kingston (August 2004) [henceforth: Jamaica].

<sup>108</sup> See Garate, p. 14-35.

different points of view as possible, to ensure the widest possible perspective on the ways in which the legislation under consideration affects the lives of children and women.

It is important to engage the people who work with the legislation and its effects on a day-to-day basis. These can include teachers, health workers, social service workers, correctional staff, the staff of government-operated recreational and cultural institutions, administrators and managers, including the government staff working in areas such as social workers and employees of civil registries. Depending on the subject matter, this category may also include the judges and lawyers who consider the legislation in court or in mediation.

Since the specific provisions of the legislation may be implemented at lower levels of government (state/provincial, district and municipal) the representatives of those levels of government should be given a full opportunity to present their opinions and experiences. Traditional or tribal leaders should be able to offer their own experience as a counterpoint to the formal government system, especially in countries in which customary law plays an important role. Civil society, as represented by organisations that work with children and women and/or human rights issues, has an important contribution to make in any review of legislation dealing with children and affecting the rights of children and women.

**Who to Consult**

- Technical Staff
- Judges
- Lawyers in the field
- Politicians (all parties)
- Other levels of government
- Traditional Leaders
- Children's NGOs
- Women's NGOs
- Human rights agencies
- Religious Leaders
- Academics
- Media
- Community Organisations
- Families
- Children

Other potentially helpful participants in the consultation include religious leaders, academics, the private sector (business leaders) and the media, not only for the influence they have on the opinions and actions of the general population but also because they will have valuable insights into the basis for specific measures dealing with children and the social context in which the legislation operates.

Parents and other family members who have experience with the operation of the legislation and the effects it has on family life and the well-being of children should be



given the fullest possible opportunity to express their views and make their recommendations.

Last, but far from least, children themselves should be actively engaged in the review process, since they are the ones most immediately and directly affected by the legislation being considered. The participation of children is discussed in more detail in paragraphs 49 to 56 below.

Of course, not all of these groups will participate at all stages or to the same degree, but it is necessary that they are all involved in a real and not token fashion if the review of legislation in relation to children's rights is to have any positive effect in terms of generally accepted practices and the ways that various entities of government and society deal with children.

### 2.2.3 *Public Participation*

As the first step in the consultation aspect of the legislation review process, the assessments of the technical teams and their analysis of legislation that has led to those assessments should be made available to as wide a public as possible, so that they can learn what is needed for children and what their government could deliver through legislation.

#### **Public Participation**

1. Disseminate analysis as widely as possible.
2. Provide opportunities for public debate.
3. Educate public about children's rights.
4. Integrate public contributions into overall review process.

This could be done by preparing a summary report, written in easily accessible language, which would then be distributed in much the same way as the country reports to the Committee on the Rights of the Child are distributed. Copies could be sent to:

- libraries,
- all interested organisations both governmental and non-governmental,
- religious bodies (especially important in countries with Islamic law),
- academic institutions,
- the media for wider distribution, and

- groups with a particular interest in the findings of the technical analysis, including members of the legal profession, child care workers and their agencies, and other levels of government which may have responsibility for actions on behalf of children.

The widest possible publication of the results of the technical analysis will serve to promote a broad-based public discussion of the implications of the analysis, and of children's rights in general. Ideally, and especially if any changes in legislation are required to enhance compliance with the CRC and CEDAW, the discussion will lead to broad-based public support for legal measures in favour of children's rights.

The public consultation process could be led by a government agency or special task force, or by a mixed government/non-governmental committee or coalition, or it could be led by a completely non-governmental body established to promote children's rights. For example, in Jamaica, public involvement in reviewing existing legislation and lobbying for changes was sparked by the Jamaica Coalition on the Rights of Children (JCRC), a coalition of several non-governmental organisations which was originally established to promote ratification of the CRC and which now operates to encourage measures to put the CRC's provisions into practice.

After conducting their own analysis of existing legislation, employing a legal expert, the JCRC conducted an intensive campaign to bring the issues of children's rights and the need for improved child protection legislation to the attention of politicians and the general public. The methods used included:

- lobbying,
- letter-writing,
- providing information to the media,
- participating in radio programmes,
- holding educational workshops, and
- coordinating with the outreach efforts of various organisations interested in the welfare of children.<sup>109</sup>

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<sup>109</sup> Jamaica, p. 18.

Although a broadly representative consultative process may be complex and complicated to organize and manage, it has the advantage of diluting the impact on the process (and on any new legislation that may result) of individual prejudices, preconceptions and priorities that might easily distort a more narrowly-based review. The more diverse the participation in the process, the more objective the resulting conclusions are likely to be. A broad-based process will allow divergent points of view to be expressed as constructively as possible, as part of an effort to develop a national consensus.

#### ***2.2.4 Public Consultation and Education***

Where legislation, traditional practice and the principles of children's rights take distinctly different approaches to the treatment of children and their position in society, those differences are bound to be reflected in the discussions and debates that develop through consultation with the various groups. It is important that these different views be given their due attention; Everyone has a right to be heard. It is also important that the focus of the consultation on the rights of children not be lost, whatever other claims (for example, the "rights" of parents) may be raised.

The mere idea that children have rights, much less the nature of those rights, can create a great deal of controversy in most societies and cultures. There has been and will continue to be some resistance in many places to the idea of children's rights and, by extension, to any legislation that may exist or be proposed to fulfil those rights. No matter how complete and comprehensive legislation may be with respect to children's rights, there can be no effective implementation unless there is at least a general agreement on the part of a significant segment of the population that the rights of children are valid and should be respected.

Much of the apprehension caused by the idea of children's rights can be attributed to lack of knowledge or understanding of the principles behind the CRC and the specific provisions which are to be reflected in national legislation. The legislation review process, therefore, provides a good opportunity to educate members of the public, and members of the various interest groups that have a stake in greater recognition of and respect for children's rights, in the basic tenets of the CRC and

CEDAW and the ways in which those principles can and should be put into practice in their country.

This education can be integrated with the discussion of specific laws, to enable people to see how rights are not merely abstract concepts but the essential foundation on which practical action on behalf of children and their families is based. By connecting the discussion of rights to an assessment of the effect of actual laws on the lives of children, the people who are most directly involved in dealing with children –and who, by extension, have the most immediate influence on the way in which their rights are addressed – can see how the idea of rights for children is translated into real improvements in the way children are treated.

Some of the most important beneficiaries of this education will be the government officials, members of the judiciary and law enforcement officials who are responsible for the effect their adoption and enforcement of legislation have on children and families. By making a connection between the CRC/CEDAW and not only national laws, but also accepted standards of practice (for example in the treatment of children who come into contact with the justice system), these officials may be able to adapt the way they deal with children to respect the rights of those children. If the consultation leads to support for necessary changes in the way that legislation which affects children and their rights is implemented, even without specific changes to that legislation, this will have been an effective and worthwhile endeavour.

### *2.2.5 Children's Participation in Review of Legislation*

In Jamaica, children themselves were involved in the public consultation on the new Child Care and Protection Act through island-wide workshops, where valuable contributions to the final bill were made.<sup>110</sup> The inclusion of children in the legislation review process is intended not merely to provide opportunities for media coverage and platitudes. If the process of reviewing legislation is to be an effective means for assessing the implementation of the provisions of the Convention on the Rights of the Child in any given country, that process should itself reflect the rights enshrined in the CRC. Pre-

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<sup>110</sup> Ibid.

eminent among those is the obligation of the State Party to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child" (Article 12 of the CRC).

Legislation review on behalf of children's rights is clearly a matter affecting the child. The challenge is how to allow and enable children to acquire the information they need to form and express opinions, and how to create the conditions under which their views can be heard and "given due weight in accordance with the age and maturity of the child" (Article 12.1.). This is a flexible and fluid concept. It cannot be based on age alone, since the capacity to understand issues and articulate that understanding can vary considerably among children of the same age. The consultative process needs to be designed in such a way that children of an appropriate age to understand and comment on the legislation being considered will have suitable opportunities to present their views.

In some States Parties, creative and dynamic means have been found to facilitate children's participation in crucial discussions about legislation that affects them. In South Africa, children from all parts of the country were brought together for an intensive week of exchanging experiences, studying issues and presenting their opinions in a variety of ways – using songs, skits and story-writing to express their views.<sup>111</sup> The children in this activity were all over ten years of age, and capable of articulating both their experiences and their ideas fairly clearly. Younger children might, in similar circumstances, be given the opportunity to use drawing and play with puppets or dolls to tell adults how particular legislation has affected them.

Another model for children's participation is provided by the Caribbean Conference on the Rights of the Child. This was an intergovernmental meeting which took place in Belize City in October 1996 that used a number of innovative methods to engage the children of the Caribbean region in identifying important issues and developing recommendations for solutions in the Belize Commitment to Action. Schools all over the region were given resources to enable them to use the CRC as a teaching tool in the classroom and facilitate comment by

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<sup>111</sup> Note: This is based on the author's recollection of a UNICEF video made around 1995.

students on key issues before the Conference took place. Individual children were given the resources to send their comments directly to the Conference, by letter, by facsimile or through the Internet and the World Wide Web, in some cases using the technical facilities of international organisations' offices. During the actual Conference session, children from Belize, with child representatives from other countries, held their own Children's Forum at the Conference site. There, they developed recommendations for action which were passed on to the delegates at the Conference and incorporated in the final text of the Belize Commitment.<sup>112</sup>

In every case, the role of adults, in both government and non-governmental organisations, is of critical importance in opening the channels of communication and ensuring that the children feel they have been heard and that their views will have a positive effect.

The challenge of how to determine the "evolving capacity" of the child to reason and express opinions that merit consideration is one that affects not only the process of legislation review but also the content of recommendations for any changes to either legislation or practice. The term "evolving capacity" is used in Article 5 of the CRC to define the way in which parents, guardians and others (such as teachers of all sorts) who have care of the child, guide the child's own ability to claim and exercise the rights recognised in the CRC. It refers to the way in which a child's ability to understand and act on that understanding changes with greater experience and the development of intellectual abilities as the child grows older. It should not be taken to imply that children's *rights* evolve and change as the children become more mature, only that the ability of children to express opinions on the exercise of those rights changes.

In Article 12 of the CRC, this concept is presented from the perspective of how children's opinions are to be accepted and considered. They are to be "given due weight in accordance with the age and maturity of the child." The consultation process in the context of review of legislation should enable all children who are affected by the legislation to present their opinions. Those opinions should influence the

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<sup>112</sup> Lundy, Christine, *The Report of the Caribbean Conference on the Rights of the Child: Meeting the Post Ratification Challenge*, UNICEF CAO, Bridgetown, p. 8, and author's recollection.

conclusions of the review to the extent that they carry the appropriate weight based on the capacity of the children to understand the issues being addressed and to comment appropriately.

A public consultation process that does not provide for appropriate participation by children who are capable of participating (whatever their chronological age) will not fulfil the obligations of the State Party under the CRC. Any recommendations that may come from such a process will likely inadequately reflect the real situation of children and the full range of measures needed to protect and promote their rights. The mere act of seeing and hearing children participate constructively in a review of the legislation that affects them can have a positive effect on the general public's perception of children's ability to participate in society.

### *2.2.6 Government Engagement*

Throughout their consultation process, the JCRC in Jamaica worked closely with a long list of government ministries and agencies, which ensured that both the process and the resulting recommendations were endorsed by the government. The government ministries and agencies included the Children's Services Division, the Bureau of Women's Affairs, the Office of the Special Envoy for Children, the Planning Institute of Jamaica, the Ministries of Health, of Education and Culture, of Local Government and Community Development, of National Security and Justice, of Labour and Social Security, and the Office of the Prime Minister.<sup>113</sup>

This kind of significant government involvement is crucial to creating the conditions under which the conclusions of the review can be adopted by the government and used to generate appropriate action to reinforce the rights of children. It is particularly important that the government involvement in the Jamaican process was not limited to those agencies specifically charged with responsibility for children's matters. The review should also engage major ministries crossing all sectoral lines and involving the participation of the highest political levels (as in the Jamaican case, with the Office of the Prime Minister).

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<sup>113</sup> Jamaica, p. 18.

This broad commitment would clearly show priority being given to the question of children's rights as reflected in legislation.

For most reviews of legislation, it will be extremely helpful to engage the active participation of at least senior civil servants and, ideally, the ministers as well who are responsible for government policy and action in the following areas:

- Planning
- Finance and Budgeting
- Justice (for both legal issues and drafting of legislation)
- Health
- Education
- Social Services / Child Welfare
- Labour
- Women's Issues
- National Security / Police / Prisons and Correctional Services
- Recreation / Culture
- Human Rights

### *2.2.7 Organising and Managing the Review of Legislation*

The effectiveness of a legislation review depends on the strength and commitment of its coordination and management. Different countries have found a variety of ways to set in motion and maintain the momentum of such processes. In Ghana, it was the mixed (government and non-government) Ghana National Commission on Children which set the process in motion after their preparation of the first national report to the UN Committee on the Rights of the Child revealed a number of legal inadequacies.<sup>114</sup> The process in Jamaica was led primarily by the non-governmental Jamaica Coalition on the Rights of the Child, although legislators and government ministries played important roles in the latter stages.<sup>115</sup> Venezuela's process was somewhat diffuse, involving several agencies and organisations, but the Special Congressional Commission held the process together and kept it focused on the objective of improving legislation dealing with children.<sup>116</sup>

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<sup>114</sup> Ghana, p. 28.

<sup>115</sup> Jamaica, p. 18.

<sup>116</sup> Garate, p. 17-21.



In these examples, the importance of the role of NGOs and civil society is clearly demonstrated. Whether on their own or in cooperation with government, they provided leadership that ensured children were the priority. NGOs coordinated, lobbied government, conducted media promotion and public education and created space for public engagement in the review process. Effective civil society participation in the review of legislation requires that the various civil society organisations be strong and well-organised. This is not always the case. Particularly when they are expected to take lead roles in the review process, either on their own or in partnership, these fundamental representatives of the public interest will often need support. Such support may come from international agencies (such as UNICEF or Save the Children), from national NGOs or coalitions, or from the government structures which relate to the areas of concern of the civil society organisations.

Sometimes, the NGO sector cannot take a leading role in review. A number of factors may limit civil society capacity, including internal upheavals, political situations, difficulties in communication and travel between different parts of the country, and widespread illiteracy which may restrict people's access to information. In these circumstances, the government may have no option but to act on its own to promote some level of public consultation on legislation relating to children. This was the case in Burkina Faso, where the government took the initiative in assessing existing legislation and proposing changes.<sup>117</sup>

Even in countries where civil society organisations have played a prominent role, the leadership and initiative taken by the government or by legislative bodies gave the review its validity and opened the way to improving the legislation relating to children. The improvement might have come through ensuring more effective implementation of existing legislation or by the development and adoption of new legislation more in keeping with the CRC and CEDAW. Since they have the primary responsibility for legislation and for the enforcement of laws, governments must be significant

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<sup>117</sup> UNICEF Burkina Faso, *Legislative Reform Initiative: Phase II: Country Study*, UNICEF Burkina Faso (internal paper), Ouagadougou, date unknown, p. 28-9.

players throughout the review process and take full ownership of the conclusions of the review, as an essential component of their obligations under the CRC/CEDAW.

The process of reviewing legislation on behalf of children can be led by different entities at different stages, as was the case in Venezuela, for example.<sup>118</sup> There may be benefits to this approach, in helping to achieve different goals at different stages in the process. Raising public and political awareness of the importance of children's rights and the possible need to adapt laws to support those rights is a task often best suited to NGOs and other civil society actors, such as religious organisations and the media. This may help foster the political will to improve the way governments (at all levels) fulfil their responsibilities to children and their families in accordance with commitments under the CRC/CEDAW. If legislative changes are required, governments should take charge of developing the legislation and setting the conditions under which the new legislation can be implemented effectively. These goals may well be easier to achieve if the various strengths and expertises of different entities can be brought to bear at the appropriate times.

#### **Steps in Legislative Review**

1. Identify coordinator
2. Clarify reason for review
3. Define scope
4. Set time-line
5. Clarify methods to be used
6. Identify participants in analysis and consultation
7. Set up feedback system
8. Affirm government commitment to follow-up

There is nonetheless great value in having the process managed from beginning to end by a single coordinator. Changing responsibility for delivering results any stage in the process causes undesirable delays. Having the same coordinator throughout, motivated to achieve the objective of the review, makes for more effective management of the process. (That objective should be improving implementation of existing legislation and proposing recommendations for any new legislation that may be needed to support children's rights). This was the experience in Ghana<sup>119</sup> and Jamaica,<sup>120</sup> for example. As these country examples also show, the value of having a single coordinator is enhanced when that body includes representation from both the government and civil society.

<sup>118</sup> Garate, p. 14-35.

<sup>119</sup> Ghana, p. 13-14.

<sup>120</sup> Jamaica, p. 18-19.

Whoever assumes responsibility for overseeing the legislation review process must understand that this is a major commitment of both time and resources. Both overseeing the work of technical analysis and managing the broad public consultation require people who have themselves the analytical skills and management expertise to do this work effectively. In many countries, there may be a need for outside assistance to do this well. Drawing on regional capacities to take advantage of positive experiences in neighbouring jurisdictions could be of great help. There is, therefore, an important supportive role for organisations such as the African Union and CARICOM.

While direct involvement in the process by international agencies (such as UNICEF and Save the Children) would not be desirable, since the process and its final result must be fully owned by the government and people of the country concerned, there is a significant role these agencies can play in supporting the organisation(s) which are taking a leading role in creating change that benefits their own children.

The review of legislation as it affects children's rights can be contained within a political or administrative structure (government department or ministry or an independent institution) or it can be established as a free-standing and self-sufficient process. Examples of the latter approach include national enquiries or special commissions tasked with conducting a thorough examination of the present situation and coming up with recommendations for future action, including reform of laws if needed. Some countries used the more independent mechanism effectively in the 1970s and 1980s to examine socially significant issues such as the status of women or relationships between different ethnic or religious groups. This approach may also be extremely useful now, in the context of children's rights and the law.

### ***2.2.8 Structure of a Review of Legislation***

The coordinator of the legislation review will probably start the process by clarifying the context: the reasons for undertaking the review in the first place, the scope of the review's activities and the length of time that the process is expected to take. The plan for the review should outline the anticipated operation of both the analytical and consultative aspects. Ideally, these should be implemented together, so that they can interact and reinforce each other. This was

the case in Venezuela, where the technical work of the experts who were assessing and drafting new legislation occurred in parallel with the various public activities that allowed civil society and specialised interest groups to present their views of legislation for children.<sup>121</sup>

The review coordinator should also identify the methods to be used throughout the review. In addition to a formal analysis of the legislation being studied in relation to the CRC/CEDAW, it may be helpful to conduct specific studies to determine the effect and the effectiveness of particular measures (which could include, in addition to legislation, social policies, government programmes and institutional activities). Some possible methodologies to consider are:

- socio-economic studies of affected groups;
- statistical analysis (including gender- and age-sensitive data);
- public opinion surveys;
- "audits" of the implementation of certain pieces of legislation;
- public meetings;
- focused consultations with specific groups; and
- in-depth interviews with those whose lives are affected by the legislation, including children and their family members as well as the people who implement programmes and policies related to the legislation.

There may be a place, in this process, for reference to experts and to experiences in other countries with similar legal systems.

The review process should have a clearly defined timetable. While it is important to take enough time to complete a thorough analysis of the legislation and to develop suitable and useful recommendations, the review should not be open-ended. A review that continues for months or years without any appreciable achievement in terms of either developing a broad national consensus on children and their rights or determining specific recommendations about the next practical steps to be taken will not be seen as helpful or effective. A comprehensive review, which covers all aspects of children's rights in the country, does not need to be exhaustive. There should be a clear deadline for

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<sup>121</sup> Garate, p. 18.

the completion of the review from the beginning, and the process should be implemented on the basis of a realistic schedule.

From the beginning, it is important to determine the degree of specificity needed to attain a clear view of the situation without losing focus. Too much detail can cause the reviewers to become immersed in legal minutiae and lose sight of the real goal, which is to see if the legislation currently in place fully respects, protects and promotes children's rights and, if it does not, identify ways in which it might be improved.

Appropriate "feedback" mechanisms throughout the process will help to keep it relevant and responsive to not only the real legal situation of children but also to public expectations. For example, in Venezuela, the regular exchanges between the Special Congressional Commission and bodies such as the Centre for Judicial Research and the NGO coalition sought participation of the various parties involved in the review process and ensured that the inputs of each one were available for the others to incorporate into their own conclusions. As the review process unfolds, it is likely that public expectations will change in response to the availability of more and better information about the situation of children's rights. From the beginning, flexibility must be established in order to adjust either the questions being asked or the methods employed as the situation evolves.

Whether the initial analytical phase of the review process is conducted by a small number of experts or takes the form of a broader and more public exercise, it will be important to define the scope of the exercise, by identifying the legislation and any related policies, programmes and institutional structures that will be subject to review. It is self-evident that the more legislation there is to be analysed, the longer the review process will take and the more complex it will be. This consideration should be balanced against the recognition that it will also result in a more thorough and comprehensive assessment of the ways in which legislation affects children's rights.

The end result of the review should be to promote further action as needed. If there is a report, it should not be left to sit on a shelf, unopened, its recommendations unimplemented. From the beginning of the review process, there should be a firm commitment from the

government to act in response to the conclusions of the review. This will also make the process much livelier, because people who participate will know that their contribution will have some effect on actions that will be taken later.

### *2.2.9 Reviewing Legislation*

As a point of departure for the review, consideration may be given to the constitutional basis for the legislation. This can involve the more technical aspects of the constitutional structure, such as the division of powers and responsibility among different jurisdictions in a federal system, as well as an assessment of the ways in which constitutional guarantees and protections of human rights relate to the provisions of the international Conventions. It can be particularly useful to identify those areas in which national human rights protections surpass those provided for in international instruments.

Some national constitutions have clearly defined provisions relating to children's rights, outlining specific government responsibilities to adopt and implement legislation to give effect to those provisions. Such provisions may provide the impetus for a review of legislation as it relates to children's rights. In other countries, the constitutional provisions applicable to children's rights may be general, in the context of the rights of the broader population, so interpretation of the relevant guidance may be needed to clarify how they relate to the specific rights of children. (See Chapter 3 below for further examination of this aspect of the review process).

Since one of the goals of the review is likely to be to generate changes in attitudes, behaviour and, if necessary, legislation in favour of children's rights, and to do this as quickly and effectively as possible, the efficiency of the review is an important consideration. This means carefully selecting the legislation that will be assessed as part of the terms of reference of the review. The selection may be fairly straightforward, especially if the review is undertaken in response to specific concerns, such as a gap in coverage of children's rights identified in the course of reporting to the Committee on the Rights of the Child, or as a result of a court challenge based on children's rights and a subsequent judicial decision that calls into question some

existing legislation, or because of a concern that is brought to the public's attention by media coverage.

The legislation to be reviewed might be divided into three categories of decreasing priority:

1. Legislation at the national level which deals directly with matters affecting the rights of children, such as laws relating to marriage, divorce and child custody; juvenile justice; and services for disabled children;
2. Legislation at the national level which, while not referring specifically to children, nevertheless has an effect on them and their rights, such as legislation on the operation of electronic media; regulations for employment programmes; and laws governing the safety of automobiles; and
3. Legislation at other levels of government that has an effect on children's rights. This may be given increased priority in federal States in which the lower levels of government have primary or significant roles to play in the areas covered by the CRC/CEDAW (for instance, family law, education or health care), or in decentralized States which make districts or municipalities responsible for delivering services in sectors affecting children. This is a broad category, which can cover everything from criminal law, the organization and operation of police and correctional services (in federal States with decentralized responsibilities), to the setting of speed limits in school zones and municipal rules about the operation of stores selling products to children.

In many jurisdictions, some legislation relating to children and their rights may already be assembled into a compendium, for example dealing with family law or juvenile justice. In common law countries, such a compendium would also include relevant jurisprudence, and in Islamic law countries it would naturally incorporate the various elements of *Shari'a* that are applied there. Countries with plural legal systems involving traditional or customary law would include those practices as well.

If such a catalogue does not exist, it might be worthwhile to compile one as the first step of the review process. Such a compilation would

be useful not only for the review but also for the work of children's advocates in a variety of contexts. Preparation of such a compendium should be done with the recognition that legislation affecting children and the exercise of their rights does not always refer explicitly to children in titles or short descriptions. Some knowledge of the general content and application of such laws will help to determine their applicability in the context of the review. (This would be a good exercise for students of law or related disciplines).

**Challenges of Legislative Review**

1. Differences between legal systems
2. Problems of enforcement (economic, geographic, cultural, social)
3. Lack of capacity to implement laws
4. Implicit discrimination
5. Application of a relativistic approach which sets priorities among rights

In countries with plural legal systems that have a component of traditional or customary law, the challenge may be to pull together adequate information on the customary law, which may not be written or may be written only in very vague terms. The review may have to undertake a compilation of customary jurisprudence by interviewing traditional chiefs or others who administer the customary law if such

information is not otherwise available. To the extent that the customary law is a valid and active determinant of children's treatment in society, it needs to be taken fully into account at all stages of the review. In Ghana, for example, the legislation review took account of such issues as succession under customary law, forced and early marriages, economic slavery and other matters in which the customary law had a clear effect on the ability of children to realise their rights. Without taking such aspects into account, any analysis of legislation as it is applied to children in Ghana would have been incomplete and the conclusions reached by the review would have been less relevant as a result.<sup>122</sup>

It is also important to consider the implications of legislation which seems purely technical or irrelevant to the interests of children. The study conducted in Yemen, for example, pointed out that a new *Law on Local Administration* would result in a decentralization of responsibility for delivering government services, which would lead to a greater chance of government programmes meeting the real needs of children in the community because the people responsible for the programmes

<sup>122</sup> Ghana, p. 16-9.



would be from the community the programmes were affecting. This would be predicated, however, on the availability of adequate resources at the local administration level to deliver the necessary services.<sup>123</sup>

As the legislation is assembled by category, one thing that is likely to emerge is a lack of balance between different categories of legislation. For example, in Haiti<sup>124</sup> and Gabon<sup>125</sup> much detailed legislation is in place to determine the nature of a child's paternity ("legitimate" children, "natural" children, children born of adultery or incest, even children born to two successive legitimate marriages)<sup>126</sup> but provisions to govern the institutional care of abandoned or orphaned children are notably inadequate.<sup>127</sup> Even at this preliminary stage of the analysis, it should be possible to identify gaps and areas where more attention is needed. The accumulation of conclusions such as this throughout the review, fed back into the process of both analysis and consultation, will lead to the development of clear recommendations for action, which should be the final result of the review.

It is inevitable, where two or more different legal systems operate in the same country, that the review of legislation will have to address conflicts in both principle and practice between systems. Even when the constitution establishes which system (usually the law-based or

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<sup>123</sup> Beatty, Sharon, Dr. Barbara Croken, Abdul Hakim Al Hamdani, Fatima Jibrán, Saed al Mahktafi, *Impact of the Convention on the Rights of the Child in Yemen*, Rádda Barnen/Save the Children, Sana'a (25 August 1998) [henceforth: Yemen], p. 10.

<sup>124</sup> Vieux, Serge-Henri and Bernard Gousse, *Étude Comparative entre la Convention relative aux droits de l'enfant et La législation haïtienne*, publication details unknown, unpaginated [henceforth: Haiti].

<sup>125</sup> *Plan Étude Comparative entre la Législation Gabonaise, La Convention relative aux droits de l'enfant, La Charte Africaine des droits et du bien-être de l'enfant*, UNICEF (internal working document; no publication data) [henceforth: Gabon].

<sup>126</sup> Haiti, p. 8-12, p. 56-9, p. 83-5, p. 113-6; Gabon p. 9-19.

<sup>127</sup> Gabon, 17th page (being orphaned as a prerequisite for adoption) and 23rd and 24th pages (guardianship), but the section on children in care of the State (22nd and 23rd page) refers only to children removed from their parents' care, either for the child's protection or at the request of their parents. There is no reference to orphans in institutional care. With regard to abandoned children, the only reference is in connection with birth registration (10th page). Haiti discusses adoption (11th and 12th pages) without mentioning orphans. Adoption is also dealt with as a remedy for abandoned children (61st to 67th page). The 29th page contains a reference to support for minor orphans of civilian or military employees of the State. The care of abandoned children as vagabonds, who must be placed in re-education institutions until they reach the age of majority, is referred to on the 31st page but no description is provided for the structure and operation of such institutions, although the comment is made that there are not enough of them.

judiciary-based one) will prevail in event of differences between the approaches taken by the two systems to the same situation, tradition and custom can exert a strong influence on people's behaviour. The review may well have to take a position on the implications of such differences between law and custom for children's rights. Those conducting the review will have to be prepared for the possibility of conflict in responses to the review's position on what may be very sensitive issues.

Equally important as assessing legislation as it is written, in relation to the specific Convention provisions, is assessing the implementation of that legislation and the way in which that implementation affects the situation of children's rights. Non-legislative instruments of government may also be relevant in assessing the effectiveness of legislation in specific areas. Such instruments could include social policy declarations, operational plans of the relevant ministries, budgets and other fiscal documents of government, and the organisational structure, management and monitoring of institutions dealing with children.

Many countries have wonderful laws on their books that perfectly reflect the commitment to children's rights expressed in CRC/CEDAW, but in actual practice the result is less than ideal. In Haiti, for example, the study found that there is a legal requirement that all children attend elementary school, with explicit penalties (fine or imprisonment) for parents whose children do not attend school. Even so, a large percentage of children do not attend school, and their parents do not suffer penalties. Indeed, it is doubtful that the penalties would lead to the legislated goal because of the economic factors which prohibit school attendance for poor children.<sup>128</sup> The existence of a law compelling education does not, of itself, fulfil the requirements of Article 28 of the CRC or, for that matter, Article 10 of CEDAW.

The assessment of legislation relating to children's rights should take into account aspects of implicit discrimination through the unequal application of those laws across gender, geographic, economic, social and cultural differences. The Haiti study provides another example of

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<sup>128</sup> Haiti, p. 21-2.

this in the legal provisions relating to birth registration.<sup>129</sup> The law establishes that all children are to be duly registered at birth. The registration process, however, requires the services of a civil registry official. Every canton is supposed to have such an official, but almost half of them, primarily in isolated rural areas, do not. As a result, children born in those cantons are not registered as required by law, not because of any deliberate neglect on the part of parents, but because of the circumstances that affect the implementation of the law. This is a clear example of geographic and perhaps also economic discrimination (since those with economic resources would be able to travel to towns with a civil registry official to register their children's birth).

There is still a strong sense in many parts of the world – not just in countries with customary legal systems – that matters concerning children and the family, including such issues as early marriage, female genital mutilation and child labour, should not be dealt with, much less controlled, by the authorities of the State. The virtual wall that has divided the household, the domain of the family and traditional practices, from the wider society governed by laws and concepts of rights remains a source of controversy in many, if not most, countries regardless of their type of legal system. It is this wall that is being dismantled by the application of universal human rights principles to children (and, to the extent that they are also confined within the household, to women).

This can make the review process more complicated and it may require more time and public education to complete satisfactorily. Throughout, the review process should maintain the principle that all human rights are universal and indivisible – they apply to everyone equally and recognition of one right entails recognition of all. This is the case because rights are inherent in each human being. Just as each right applies to all people equally, in accordance with the principle of non-discrimination, so too do all rights apply equally to each individual. For this reason, the opportunity for public education about children's rights provided by a debate about the application of rights in different societies may be one of the more significant benefits of the review process itself.

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<sup>129</sup> Haiti, p. 8-9.

### 2.2.10 Using CRC and CEDAW

Whatever the reason for undertaking a review of legislation with regard to children's rights, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) will naturally be a focus for the examination of existing legislation and practice. There are two complementary ways of using CRC/CEDAW in this process.

On the one hand, the Conventions can be used as a "checklist," taking each article individually and looking to see if there is existing legislation that relates to the rights specifically mentioned in that article and, if the legislation does exist, determining whether it satisfies the obligations under that article, both in its formal expression and the way in which it is enforced and implemented.

On the other hand, the CRC and CEDAW can be used as a standard against which all existing legislation, programmes, policies and institutions are measured. This approach involves starting with the legislation and practice and assessing their appropriateness against the two Conventions as a whole.

With the first approach, there will be a clear link between the CRC/CEDAW and specific measures in place so that a State will be able to demonstrate, if required, the extent to which obligations under the Conventions have been met. However, this approach does not easily take into account any legislation, policies or programmes that may not directly relate to the provisions of the Conventions but which, nevertheless, have an effect on the fulfilment of certain rights. That need is satisfied by using the "standard of comparison" approach.

A number of useful resources are available to help with the analysis of the legislation on the basis of the CRC and CEDAW. For each Convention, the Observations of their respective Committees on the reports of the State Party can provide guidance as to the intention and meaning of various articles. For the CRC, the *Implementation Handbook for the Convention on the Rights of the Child* is an extremely valuable reference. It explains each of the articles in clear and readily accessible language, with copious references to the Observations of the

Committee on the Rights of the Child to demonstrate how the provisions of the CRC can be realised in practical terms, including through legislative action. The General Comment Number 5 of the Committee on the Rights of the Child is also a useful reference, addressing in some detail the General Measures of Implementation of the Convention.

The easiest way to use the CRC and CEDAW as a checklist for the analysis of legislation relating to children is to break the Conventions down not just by article but also by the individual provisions within each article. For example, Article 18 of the CRC (which describes the responsibilities of parents for bringing up their children and the responsibility of the State to support the parents by providing institutions, facilities and services for the care of children) could be addressed by looking for legislation that:

- Provides measures to ensure that both parents are involved in bringing up and caring for their child(ren); this could include legislation on recognition of paternity, child custody and support in cases of separation or divorce, and parental leave at the birth or adoption of a child;
- Provides standards against which to determine whether parents have the best interests of their child(ren) as their basic concern in the treatment they accord to their children; this could include legislation dealing with parental failure to provide the necessities of life, with exploitation of the child in family businesses (including farming) at the expense of other activities such as education, and with child abuse in various forms;
- Provides for government-supported programmes of assistance to parents and legal guardians; this can include such matters as access to subsidized food and housing, financial support for families, free access to basic services such as health care and education, and any special programmes to help parents of disabled children obtain the services they need for their children;
- Provides for the establishment and adequate funding of institutions, facilities and services for the care of children; these include regulated child care, early childhood development, programmes for disabled and disadvantaged children, and

rules governing the operation of boarding schools, recreation programmes and "summer camps" that have the care of children for extended periods of time away from their parents.

It is tempting to stop the checking process after one key piece of legislation has been identified and so neglect others that might have important relationships to the Convention provision being addressed. It is also tempting to stop with the statement of the legislation and not take into account its effectiveness in practice. In this way, the relationship between certain rights and a range of legislation and related measures can be lost. In particular, such a curtailed review may not catch contradictions within the total body of legislation, or between legislation and policies or customary practices, which would have the effect of undercutting the provisions of the CRC/CEDAW. For example, analysis using the CRC/CEDAW as a "checklist" may find, in relation to Article 16 of CEDAW, that written legislation sets a minimum age for marriage at 16 years for both girls and boys. But if the analysis stops there, it could fail to take account of the fact that, under customary law, girls as young as 12 years of age are routinely married to men three or four times their age in certain regions, a situation which certainly violates the rights of those children.

All the legislation that applies to a specific provision of the CRC/CEDAW should be taken into consideration. In countries with common law and Islamic legal systems, judicial decisions and other relevant authorities should also be included. Customary practices may be given equal weight to written legislation if those practices are considered to be equivalent to statutory law in determining people's actions. If the legislation dealing with children is consolidated into a comprehensive law, such as a Children's Code, the analysis should draw out those sections of the Code that relate to the specific Convention provisions, and treat those sections, for purposes of the analysis, as if they were to some extent independent. They may then be assessed, not in relation to the rest of the Children's Code, but by the way in which they relate to and affect the implementation of other legislative measures, jurisprudence and customary laws that are connected to the same Convention provision.

Where there is a conflict between pieces of legislation, or between laws and jurisprudence, Islamic law principles or customary practice, the

review should determine which one(s) takes precedence. The constitutions of countries with plural legal systems generally contain provisions which clarify the relationship between the different legal systems. In Zambia, for example, it is made clear that the common law and the formal system of law courts and judges will overrule any decision made under the customary law.<sup>130</sup> Constitutional strictures and actual practice may differ, however, and the common law system may not be able to overrule decisions of the customary law if people affected by those decisions are deterred by social pressure or lack of resources from taking their cases to court. Circumstances that prevent children from claiming their rights in countries with plural legal systems should be taken into full account by the review.

The analysis should identify any divergences between the Conventions' provisions and the legislation and practices within the country. For example, the review of legislation might consider Article 28(a) of the CRC, which requires that education be "compulsory and available free to all," by noting the existence of legislation requiring that every child go to school until the age of 12, and that there should be no charge for to attend. The State might claim that Article 28(a) had been satisfied. But if the free schools are overcrowded and staffed with unqualified teachers, they may meet the letter of the CRC while failing to provide the sort of education children need. The education offered may not be sufficient to fulfil the rights of the children and their community. Thus, the provisions of the CRC should be seen as merely the starting point for a country's efforts to deliver the best education possible for its children.

The analysis may identify legislation that seems to demonstrate compliance with the CRC/CEDAW, but omits certain groups or categories of children. For example, a law on child labour may be examined in relation to Article 32.1(a) of the CRC, which requires States Parties to "[p]rovide for a minimum age or ages for admission to employment." The legislation might be found to allow paid employment in agriculture only for children over 14 years of age. This would certainly comply with the words of the CRC, without taking into account the situation of children working without pay on their

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<sup>130</sup> Information acquired by author while preparing training manuals on CRC for use in Zambia, 1996.

families' farms or children older than 14 working on farms to the detriment of their education. Thus, the law would not necessarily be the best possible expression of support for children's rights. A measure which went beyond the limited terms of the CRC, for example by providing protection for children working without pay and children caught between the need to work and the need to attend school, would be more desirable.

It is of interest to know whether the laws and/or practice fall below the standard set by the Conventions or if they exceed the standard. For purposes of legislation review, the standard of comparison will be the most stringent instrument ratified by the State Party. For example, a State Party which has ratified the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict should review its legislation on the basis of the standard of the Optional Protocol, not Article 38 of the CRC, which sets a lower minimum age for military service and is less stringent in the restrictions imposed on military activity for those under the age of 18. The standards set in international agreements should be considered as the minimum goal for recognising, protecting and promoting the rights of children. Any State Party which can exceed those standards in the way it treats its children should be commended.

This raises the concern that reliance on the CRC/CEDAW exclusively as a checklist for assessing legislation can result in turning the minimum standards set out in the CRC and CEDAW into maximum standards for the purposes of national legislation. If the review assumes that the State's obligations under the CRC/CEDAW will be fully satisfied by complying with the specific provisions of each Convention article, rather than using the principles of children's and women's rights as guidance for all government action, fulfilling the letter of the Conventions can actually stifle their spirit. The Conventions are statements of the global consensus on the rights of children and women at the time they were adopted. Both the CRC and CEDAW make it clear that States are invited to exceed the standards set out in each Convention, and to adopt legislation and policies which provide more protection for the rights of children and women and offer more opportunity for the fullest possible expression of those rights.



The situation may arise in which no legislation is found that relates directly to a specific provision of the CRC/CEDAW. For example, the constitution of Bosnia and Herzegovina has no specific provision dealing with social protection (the theme of Articles 26 and 27 of the CRC), although some measures exist at the level of the two entities that compose the country (the Federation of Bosnia and Herzegovina and Republika Srpska).<sup>131</sup> In such a case, the lack of national legislation would be noted by the review, and the measures in place with the lower levels of government would be taken into consideration.

Similarly, an analysis of the *Code Civil* of Gabon identified links between the provisions of the *Code* and a range of rights drawn from provisions in the CRC and CEDAW. The assessment given in the report on this analysis was that there were no significant divergences between the *Code Civil* and the Conventions. However, there is no mention in the analysis of limits to military service by children or of services for children with disabilities, so these would seem not to be covered by what is presented as comprehensive legislation for children.<sup>132</sup> Such omissions become obvious when the checklist method is applied.

The legal analysis in Gabon also found that, under customary law, children did not have freedom of expression or freedom of religion, while under the civil law there was no protection for children's privacy.<sup>133</sup> The category of participation rights is likely to be the one most often neglected in national legislation, because of the prevalence of traditional attitudes to children as objects rather than subjects of rights. The review should pay special attention to these rights in assessing legislation. Measures that affect children's participation rights may be found in a wide range of legislation, including that which deals with health care (consent to treatment), education, family status, employment, public information, libraries, the Internet, and mass media, among other themes.

If no legislation exists that falls directly under a certain provision of CRC/CEDAW, the analysis should look for measures which

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<sup>131</sup> UNICEF, *Legal Aspects of Social Protection for Children in Bosnia and Herzegovina*, UNICEF Bosnia and Herzegovina, undated, p. 9.

<sup>132</sup> Gabon, p. 83-92.

<sup>133</sup> Gabon, p. 81-2.

approximate that provision. For example, if no laws are found which cover the conditions under which children may work, the general conditions of work as set out in a Labour Code may be considered in the review.

Inevitably, some legislation will come up again and again in relation to different provisions of the Conventions, especially if there is a Children's Code which consolidates a number of different measures for children. There may also be some legislation which has a bearing on the lives of children but which is not identified in the course of the checklist analysis. Legislation governing food quality, for instance, has an important impact on child nutrition but, since children are probably not mentioned specifically, that legislation may not be brought to attention based merely on the analysis of Article 24 (c) of the CRC (which among other things, requires States to assure the provision of adequate nutritious food to combat disease and malnutrition).

To capture those aspects of the situation of children's rights that may be missed with the checklist approach, a more extensive survey of laws can be undertaken, taking each element of the entire body of legislation and comparing it to the CRC/CEDAW as a whole. As a first step, the reverse comparison method may be an illuminating way to look at those laws which may already have been identified through the checklist.

Consider, for example, a hypothetical Children's Code which deals extensively with the requirements of birth registration, nationality and naming of the child based on paternity, the responsibilities of parents to care for their children, protection of the child from abuse or neglect, and foster care and adoption arrangements for children who are orphaned, abandoned or removed from their family for their own protection. The checklist method may identify links between the hypothetical Children's Code and Articles 5, 7, 8, 9, 10, 11, 18, 19, 20 and 21 of the CRC taken individually. However, a comparison of the Code against the standards of the CRC and CEDAW might reveal that name and nationality cannot be conferred on the child by its mother. The child would still have a guarantee of name and nationality, so the letter of the CRC might be considered to be fulfilled, but there would be a significant shortfall in relation to the full rights of both the child and the mother. Therefore, the Code could be deemed not to fulfil

Articles 7 of the CRC and Articles 5 and 16 of CEDAW taken together. Comparing each legislative measure (as well as policies, programmes and government budgets) to the Conventions as a whole, rather than to each individual article separately, helps to clarify the real extent to which the provisions of the Conventions are being implemented.

In another example, there may be a provision in the Children's Code dealing with the operation of child care institutions under the responsibility of the State. Analysis would then relate that section of the Code back directly to the CRC provisions in Article 25 (on periodic review of treatment), Article 20 (on protection of children removed from their parents in their own best interests) and other articles dealing with provision to children of the basic necessities of life (shelter, health care, food and education). The assessment of all those connections would show the extent to which the legislation was fulfilling children's rights.

After the legislation with the most self-evident connection to the CRC and CEDAW has been assessed, the review can consider other legislation (such as the food quality legislation referred to above) which can be understood to be of importance to the fulfilment of children's rights. For example, legislation relating to roads, railways and air travel, as well as legislation governing the issuance of passports and other travel documents can affect a child's mobility rights. Legislation dealing with public administration (as with the *Law on Local Administration* in Yemen) can determine the kind and quality of institutions and structures that are available to meet obligations of care for all children.

If strictly following the CRC/CEDAW as a checklist carries the risk of becoming too narrowly focussed on the specific provisions of those Conventions, the second approach of using the CRC and CEDAW as standards of comparison for all legislation, runs the risk of becoming a diffuse and academic exercise. It is possible, following this approach exclusively, to build up a massive amount of information about a whole body of legislation without having the analytical tools to determine what information is most relevant and helpful for the planning of action to improve the situation of children and women in regard to their rights.

Using the CRC and CEDAW as standards of comparison for a broad review of legislation has the virtue of comprehensiveness, but benefits from priority-setting, with the first priority being the legislation which is seen as having the most direct relationship to children's rights. This approach, by starting with the legislation itself, will find that many laws may relate to and reflect the same Convention provisions. It can also take into account other aspects of implementation of the CRC and CEDAW more easily, such as government policies, programmes, and administrative measures that may fall outside even the broad definition of legislation. As a result, a network of connections among all government measures and the CRC/CEDAW can be created, rather than the one-to-one correspondence that is most likely to result from the checklist approach. However, it is possible that, if certain rights are not reflected at all in legislation, this approach will miss some important obligations.

In practice, a blend of the two approaches seems the most effective and useful. Using CRC/CEDAW as a checklist ensures that all the rights of children are taken into account; using the Conventions as a standard for assessing all legislation, policy and administrative action means that the important connections among those measures and between the legislation and various rights set out in the Conventions will be given their due recognition. Children and their rights cannot be separated from the society of which they are an integral part. In a very real sense, everything that a government does, including the legislation, policies and regulations it adopts, will affect children in some way and so should be tested against the guarantees in the CRC and CEDAW.

### *2.2.11 Other Sources of Guidance for Review and Reform*

Regional agreements on children's rights, developed in the context of similar cultural and traditional attitudes but with principles and commitments based on the CRC and CEDAW, may provide insights and measures that will support the legislation review in its efforts to make recommendations about ways to change attitudes and behaviours that are unfavourable to children's rights. Regional human rights instruments, such as the African Charter on the Rights and Welfare of Children, provide a regionally-focused amplification of the CRC. In addition, action plans based on the CRC, such as the Belize Commitment to Action for the Rights of the Child, may offer ideas

which can be incorporated into recommendations for national measures.

Additionally, the legislation review should take into account the full range of international instruments which complement and amplify certain aspects of the CRC and CEDAW, if the State is party to them. These might include the core United Nations Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, which, together with the Universal Declaration of Human Rights, constitute the "International Bill of Rights" and are the foundation for all United Nations human rights agreements. International Labour Organization (ILO) Conventions that deal with child labour and working women will be helpful in identifying specific measures which can be taken to protect children from exploitation and neglect. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption amplifies the CRC's protections for children without parents. UNESCO resolutions and agreements relating to both protection of culture and education provide added dimensions to that aspect of child development. Three key United Nations instruments provide extremely helpful recommendations for the treatment of children in conflict with the law: the United Nations Minimum Standard Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines") and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The review of legislation may also be guided by the comments and recommendations made by the Committee on the Rights of the Child in response to the periodic reports submitted by the State Party, as well as by the General Comments issued by the Committee to provide interpretations of specific articles in the Convention or to guide States Parties in their implementation of the Convention's provisions. The Committee's own analysis of the information presented to it can provide ideas and inspiration for both the direction of the review and its eventual conclusions. In particular, the Committee's Observations should serve to direct attention to the areas in which the most immediate action in favour of children's rights is needed, including legislation. From this, the review can develop its own recommendations, based on a study of the existing legislation in

theory and in practice, for revisions and new legislation needed to fulfil the State's obligations under the CRC and CEDAW.

### 2.2.12 *General Principles*

At each stage of the analysis of legislation, no matter what the specific right or rights being addressed, it is extremely important to bear in mind the four general principles that the Committee on the Rights of the Child has identified as being crucial to the implementation of every element of the CRC:

- Non-discrimination is the principle that the CRC applies to every child, no matter what that "the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" (Article 2). The "other status" is important; it means that the list of the characteristics on the basis of which it is not permitted to discriminate against children is not limited. It can be expanded as circumstances dictate. As an example of this, discrimination on the basis of health status, would be a category of non-discrimination covered by this principle in countries where HIV/AIDS is a significant issue.
- The Best Interests of the Child is to be "a primary consideration" "in all action concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies," according to Article 3. Therefore, a judgement about the extent to which legislation gives appropriate weight to the best interests of the child is an essential part of the analysis of each law examined in the course of the review. The phrase "primary consideration" means that the best interest of the child would not necessarily determine the action to be taken, since other considerations would naturally be taken into account. However, decisions should at least incorporate an understanding of their effect on children's best interests.
- The Right to Life, Survival and Development represents a significant extension of the commonly accepted human right

not to be killed arbitrarily. In Article 6 of the CRC, it is recast as an active commitment on the part of the State to take the measures needed to ensure that children will be able to survive and develop their full potential. Later in the CRC, there are several references to "physical, mental, spiritual, moral and social development" (as in Article 27), so this fundamental principle applies not only to the necessities for bare survival (food, shelter and health care) but to every aspect of a child's life and, consequently, to all legislation affecting the child.

- The Right to be Heard for all children is the fundamental "right to express. . . views freely in all matters affecting the child" (Article 12). This is the principle which lifts the child from a position of subservience and powerlessness in society to being a full participant in all aspects of the political, social and cultural life of his or her community. Although the right is tempered by the qualification that the child's views should be "given due weight in accordance with the age and maturity of the child," it is necessary, especially for those laws that lead to decisions that directly affect a child's life, to provide the opportunity for all children to express their views.

Every piece of legislation reviewed for its application to the rights of children can be assessed in terms of the extent to which it respects these four fundamental principles. Article 3 of the CRC makes it clear that the primary importance of the best interests of the child applies to the work of legislative bodies, which includes the approval and adoption of legislation, and Article 12 refers to "all matters affecting the child," and as such it should be taken into account in all legislation affecting children, the development of government policies, the actions of State agencies and judicial deliberations.

The principle of *non-discrimination* is fundamental not only to the CRC but to everything to do with human rights. Since rights are inherent in all human beings, they must be applied without any discrimination. The recognition of this principle is the basis for CEDAW, which has as its goal the elimination of discrimination against women. In many parts of the world, women and girls continue to be the victims of persistent, sometimes subtle, but always present discrimination based solely on their gender, denying their capacity as individuals and their

status as human beings. A review of national legislation based on the CRC and CEDAW considered together, as two dimensions of the same objective, will naturally take the position that there should be no discrimination against women and girls. It is important, in this connection, that the review consider women not only in their capacity as mothers (although this is clearly important) but also as role-models for girls, whose rights guarantee that they should be able to develop their fullest potential as members of society in whatever they chose to do with their lives.

The *best interests of the child* is a concept that has generally been applied in matters concerning child care and custody, for example when parents separate and the decision must be made about how the children will be cared for and where (with whom) they will live. It has been extended, in some countries, to decisions made about who will be responsible for a child's care in situations of conflict between medically necessary procedures and religious or ethical principles of the child and his or her parents. This happens, for instance, when children who are Jehovah's Witnesses, or their parents on their behalf, refuse life-saving blood transfusions on religious grounds. In such cases, the children are made wards of the State for purposes of authorizing the treatment that is objectionable, on the basis that this is in the best interests of the child, whether or not the child agrees.

Even in the restricted sphere of family law, the concept of the best interests of the child is often a difficult one to deal with. Determination of best interest is generally made by adults, on the basis of their own experience and societal expectations. Thus, we can sometimes find a situation in which adults may argue in favour of a practice such as female genital mutilation, which is clearly prohibited in the CRC, on the basis that it is in the best interests of the child to follow traditional practice so that she will be accepted as part of the community, whatever the danger to her present and future health.

The CRC, however, extends the principle of best interests of the child far beyond the realm of family law. It is now to be applied "[to] all actions concerning children." This can be taken to mean all actions taken by a government, since virtually everything a government does will concern children in some way. This principle affects not just



legislation, but also government policies, administrative arrangements and budgetary provisions.

The question of what constitutes the best interests of the child can be a challenge for those undertaking a review of legislation in the light of the CRC and CEDAW. The solution to this quandary is simple: the best interests of the child are defined throughout the CRC by the specific provisions which identify the conditions under which a child will be able to develop as fully as possible. Thus, it is in the best interests of the child to have a name and nationality, to know his or her parents, to have as stable a home as possible, to be cared for in a way that meets all of his or her basic needs, to have an opportunity to participate in society to the maximum of his or her capacity, to receive a well-rounded education, to be protected from all forms of exploitation, abuse or violence, to be treated fairly by the police and justice system, to be able to play. If the provisions of the CRC (and related provisions in CEDAW) are all fulfilled, then the best interests of the child will be satisfied.<sup>134</sup>

The *right to life, survival and development* connects the CRC to other major international human rights instruments, such as the Covenant on Civil and Political Rights (for the right to life) and the Covenant on Economic, Social and Cultural Rights (for survival and development). The extent to which this right is respected and put into practice in regard to the CRC will also affect the fulfilment of the related provisions in the other instruments. This is a right which requires not just that States refrain from negative actions that would cause injury and death to children. It also requires that agents of the State, notably the government, put in place positive measures which will actively promote the fullest possible development of their children, as well as ensure their continued survival. As a direct result of this principle, the public service sectors of health and education have an important role to play in fulfilling commitments to children's rights.

In the CRC, the right to survival and development is given specific definition from Article 23 to Article 29. These are the articles that outline the responsibilities of the State for the physical well-being and

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<sup>134</sup> Christine Lundy, *An Introduction to the Convention on the Rights of the Child*, St. Thomas, Full Circle Press, 1998, p. 51-4.

development and the intellectual development of the child. In analysing legislation from the perspective of the right to survival and development, it is important to bear in mind the full spectrum of "physical, mental, spiritual, moral and social development" which is referred to explicitly in Article 27.

Reference has already been made to the challenges inherent in creating adequate mechanisms for children to "express [their] views freely in all matters affecting the child" in relation to the process of legislation review. However, the *principle of hearing the views of the child* should also be taken into account in the analysis of the extent to which legislation meets the standards set by the CRC. The content of laws and regulations, the institutions set up to provide for children and the actual practices that deal with children in all contexts need to be assessed not only in terms of the way in which they serve or promote the right to life, survival and development in the best interests of the child, without discrimination, but also on the basis of the ways in which children themselves are able to participate in both the development of the laws and regulations and their implementation, to the extent that this is reasonable and appropriate. Some subjective judgement will likely be involved in assessing the extent of participation by children, but the effort should be made nevertheless.

### ***2.2.13 Results of the Review***

To be effective, the review process should not be merely an abstract exercise in legal analysis. The conclusions of the review should lead to specific action on behalf of children's rights, and these should be outlined clearly in the recommendations that result from both the analysis and the public consultation dimensions of the review. The recommendations should be as specific as possible, so as to guide subsequent governmental actions, including the drafting of any new or revised legislation as well as any policies, administrative arrangements or budgetary provisions that may be needed to give effect to the new or existing legislation. The recommendations should also provide a direction for continued public discussion of the principles of children's rights and their direct application. For example, the initial review in

Jamaica recommended the creation and adoption of a Child Care and Protection Act, something that eventually came to pass.<sup>135</sup>

If inadequacies in terms of implementation of the CRC/CEDAW have been identified in the course of the review (and there is no country in the world in which some inadequacies would not be identified by a thorough review, given the aspirational natures of the CRC and CEDAW), it is not enough merely to identify them. The conclusions of the review should try to direct the response to those inadequacies by suggesting possible legislative and administrative measures that could be taken, in the spirit of Article 4 of the CRC. Beyond changes in legislation and the adoption of new laws, remedying inadequacies might involve, for example, identifying areas of the country's budget where greater resources could be allocated to institutions and programmes which serve to make children's rights a reality. Recommendations about education, information and training in children's rights for both the general public and the staff of governmental and non-governmental agencies working with children would also be appropriate.

The conclusions may take into account any limitations that may exist on a State's ability to implement the measures suggested, but this should not be used as an excuse for inaction. The recommendations may outline a phased process of implementation for the Conventions but it should be clear at all times that the complete fulfilment of commitments under CRC/CEDAW is a minimally acceptable response to the situation of children and that the goal, with clearly defined time lines for achievement, is to meet all obligations as quickly as possible.

In making these recommendations, those conducting the review should also indicate who will be responsible for ensuring that the recommendations are realised. Responsibility may be vested in one institution (such as the national coordinating body for children's rights, a specific government ministry with authority in the area of the recommendation or a legislative committee or appointee) or it may be apportioned depending on the action recommended. Without a clearly identified agent to carry the recommendations forward, they may

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<sup>135</sup> Jamaica, p. 13.

language unfulfilled, neglected for lack of a dedicated advocate on their behalf.

Throughout the review process, and in the preparation and publication of the conclusions reached, the primacy of the international standards for human rights should be maintained at all times. Where there are divergences between the internationally agreed standards and national or local practice, there may be a temptation to argue special circumstances which would obviate any need to change those practices to meet the standards set. One result of the review process may be to enable a State to withdraw reservations which may have been entered upon ratification of the CRC or CEDAW, once the relationship of national legislation to obligations under the Convention(s) has been clarified. This would help to satisfy the unwavering contentions of the Committee on the Rights of the Child that reservations are undesirable, urging all countries which have entered reservations to withdraw them, in the best interests of children.<sup>136</sup>

There can be no exceptions to the universality of human rights principles, especially ones which have been as widely adopted as those contained in the CRC. Everyday practices which contradict the CRC/CEDAW are just as much subject to review, criticism, and reform, if required, as formal laws. The review process should be undertaken with this principle in mind. Any action or attitude which compromises the rights of children, especially as identified in the four fundamental principles of non-discrimination, the best interests of the child (the right to life, survival and development, and the right of the child to be heard) should be dealt with in the same way as legislation. The conclusions of the review of legislation may equally assess those attitudes and propose measures to change them.<sup>137</sup>

The role of legislation in influencing behaviour is an important explanation for the CRC's attention to legislative measures in Article 4

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<sup>136</sup> The Committee on the Rights of the Child, General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(B) of the Convention [henceforth: Guidelines], paragraph 11 under General Measures of Implementation.

<sup>137</sup> The whole challenge of "cultural relativism" remains one of the major restrictions on full implementation of the CRC and CEDAW. This was clear from comments in the Haitian study. By contrast, the Gabon study makes the point that cultural attitudes can and should be changed.

and for the entire legislation review process advocated so strongly by the Committee on the Rights of the Child.<sup>138</sup> The purpose of legislation reform is not only to achieve State Party compliance on paper with its obligations under the CRC and CEDAW, but also to generate any needed transformation in public attitudes and behaviours with regard to children that tend in any way to undercut the rights of children. In the course of the review of legislation, the identification of customs, traditional practices and attitudes which contradict the provisions of the CRC and CEDAW should not be used to question the international standards but to guide recommendations for measures (legislative, administrative and others) which could be taken by the government in order to advance children's rights by changing those practices and attitudes.

## 2.3 Reform of Legislation

### 2.3.1 *From Review to Reform*

Once the legislation review is completed and the recommendations for improvements to legislation dealing with children are in hand, the process becomes more precisely focused on the details of reform of legislation to incorporate the provisions of the CRC/CEDAW directly in national law, so that the rights guaranteed to children will be justiciable – subject to due process in a court of law.

The variety of legislative and administrative systems currently operating in the world means that there are many different methods by which countries can ensure that the rights of children as set out in the CRC and CEDAW will be enforceable by law. The precise nature of specific legislation will depend on the situation of an individual country and its traditions, expectations and political realities. However, there are certain common objectives which should be achieved by every State Party and some common approaches which may be used even in countries with different legal systems. Together, these can help in the creation of legislation which benefits children and their families by putting into legal effect the rights and obligations defined in the CRC and CEDAW.

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<sup>138</sup> Guidelines, paragraphs 12-4, 18 and 20.

In identifying the elements of reform which are important for every country to incorporate into their legislative process, the guidance of the Committee on the Rights of the Child is particularly helpful. Both in terms of individual countries, for which the Committee provides specific direction in the Concluding Observations on every report received from the States Parties, and in the general guidelines the Committee has provided for the use of all States Parties, the Committee offers insights into both the practicalities of and the philosophy behind the legislation needed to make children's rights a reality throughout the world. This section of the Handbook will, therefore, draw heavily on the rich resource of comments and recommendations from the Committee on the Rights of the Child to inform consideration of the process and the general content of legislation reform measures in favour of children's rights.

Even in countries where the provisions of the CRC and CEDAW are self-executing – becoming part of domestic law as a consequence of ratification or accession – there are variations in the ways that the provisions of the CRC and CEDAW are applied in judicial proceedings. There are also many instances of conflict in both action and intention between the CRC/CEDAW, incorporated into national law, and other legislation still in force which may work against the rights of children. Thus, there may be confusion about the relative weight that can be brought to bear in the making of a decision in court between the standards of domestic legislation and the international obligations. This situation can only be resolved by clarifying the domestic legislation to bring it into harmony with the Conventions.

For countries in which the CRC and CEDAW are not automatically justiciable, it is equally important to take the necessary steps to enshrine the provisions of those Conventions in domestic legislation. Without this crucial measure, the standards set by the CRC and CEDAW would be used by judges considering cases relevant to the Conventions merely as a reference for purposes of interpreting domestic legislation, and no legal arguments could be brought to bear specifically in regard to the State Party's obligations under the Conventions. As a result, one of the most consistent themes in the Concluding Observations of the Committee on the Rights of the Child for every country reporting on the implementation of the CRC is a

strong recommendation that domestic legislation be harmonised with the provisions of the CRC.

Especially important, for the Committee and for the promotion and protection of children's rights in general, is the need to ensure that the four general principles are incorporated into and reflected by all legislation that deals with children. Particular stress is placed on freedom from discrimination, making the best interests of the child a primary consideration, and respecting the views of the child. The Concluding Observations on the Initial Report of the United Kingdom are typical:

“The Committee would like to suggest that greater priority be given to incorporating the general principles of the Convention, especially the provisions of its article 3, relating to the best interests of the child, and article 12, concerning the child’s right to make their views known and to have those views given due weight, in the legislative and administrative measures and in policies undertaken to implement the rights of the child.” (*United Kingdom Initial Report Concluding Observations, Add. 34, para. 27.*)<sup>139</sup>

These three fundamental principles are so important that they should be taken into account in any and all legislation dealing with children.

The right to life, survival and development is treated somewhat differently from the other three fundamental principles when it comes to the expectations of the Committee on the Rights of the Child for implementation. The right to survival and development is a succinct expression of the economic, social and cultural rights of children. The fulfilment of the survival and development rights of children requires State investment in services such as education, primary and advanced health care and a range of social services, for which many countries lack the economic or human resources. It is not expected that States with limited resources will be able to achieve the full implementation of these rights easily or quickly. The Committee on the Rights of the Child tends, therefore, to take a less stringent view of legislation and other actions States may undertake in order to fulfil the right to

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<sup>139</sup> Implementation Handbook, p. 65.

survival and development.<sup>140</sup> However, there is always the expectation that States, whatever their means, will be steadily moving toward the full implementation of these rights, by gradually introducing the measures necessary to provide the services children are entitled to. In this, the CRC also provides the requirement that countries that offer international assistance should be tailoring their programmes to support fulfilment of children's rights to survival and development elsewhere in the world.<sup>141</sup> (Aspects of this will be discussed later in this Handbook, under the heading of "Follow-up and Implementation.")

The legislation review process will have identified those aspects of legislation which need to be clarified or expanded or amended, as well as legislation that needs to be repealed (such as discriminatory legislation). In addition, the process should outline any new legislation that may be needed in order to ensure that all legislation is compatible with the CRC and CEDAW and that all of the provisions of the Conventions are fully addressed. The conclusions of the review may provide recommendations about specific measures to be revised or new legislation to be adopted, as happened in Ghana<sup>142</sup> and Jamaica.<sup>143</sup> Draft bills may also be provided as a starting point for reform of legislation.

Other factors may also enter into the legislation reform process. In fact, reforms of legislation may be proposed and undertaken before a review is started. The decision that reform is needed may be the impulse for review. However, the impulse to reform legislation is not self-generating. Changing laws to reflect changed social conditions and evolving public attitudes usually happens as a result of some pressure from outside the legal system. This can be the result of the adoption of a new political direction in the country, or it can respond to pressure from civil society based on increased awareness of both the existing situation and the possibility of creating change, in which the media may play a significant role.

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<sup>140</sup> Guidelines, paragraph 20.

<sup>141</sup> Guidelines, paragraph 21.

<sup>142</sup> Ghana, p. 14-6.

<sup>143</sup> Jamaica, p. 13-5.



In Venezuela, the first step toward comprehensive reform of national legislation with regard to children took the form of a draft bill introduced into the legislature by a political party in opposition. This led to the creation of a Special Congressional Commission to review the proposed legislation. When that lost momentum, the National Institute for Children (a government agency) assumed leadership of the process. In the final stages, the primary force for reform of legislation became a coalition of 25 NGOs, "United for a Law for Children and Adolescents." Along the way, elements of a review of existing legislation were employed, primarily to serve as way of generating support for the proposed new law. At the same time, the debate and discussion about the proposed legislation generated a participatory analysis of existing legislation and led to a series of revisions of the proposed legislation that brought it closer to the full realisation of children's rights. Thus, review and reform proceeded together and supported each other, resulting in greater public understanding of and support for the new measure, and stronger government commitment to enforcing the legislation.<sup>144</sup>

### *2.3.2 Developing New or Amended Legislation*

Depending on the ways in which different legal systems frame their legislation, there are essentially two practical methods by which reform of legislation relating to children is undertaken. For many States, the most efficient way to achieve the goal of harmonising legislation with the CRC/CEDAW takes the form of a comprehensive overhaul of all relevant legislation by means of a single omnibus bill or Children's Code or, more practically, one code for the legal regime relating to child protection and family relationships and another dealing with criminal law and juvenile justice. This method is often used in countries with civil law systems, where there is a well-established tradition of codified law. Elsewhere, especially in some common law countries, the preference has been for law by law review and revision, with each piece of legislation amended individually or in small related clusters. Countries with an Islamic law system or plural legal system may take either approach, depending on the structure of their legal and justice system.

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<sup>144</sup> Garate, p. 14-20.

## 1. Children's Code

Approaching legislation reform by means of a comprehensive Children's Code has the advantage of immediately creating a substantial body of legislation dealing with virtually all aspects of children's lives. There is a clear complementary relationship among all parts of the legislation and the different components should be mutually supportive. The Committee on the Rights of the Child has shown a strong preference for this means of incorporating the CRC into domestic legislation. In the Concluding Observations on the Initial Country Report of the Lao People's Democratic Republic, for instance, the Committee's attitude was explicit.

"The Committee also suggests that the State Party envisage the adoption of a specific code or legislation for children, with a separate section on children who need a special protection." (*Lao People's Democratic Republic Initial Report Concluding Observations, Add. 78, para. 30.*)<sup>145</sup>

Although a comprehensive Children's Code does make it easier to implement the CRC as a whole, the very breadth of coverage may present challenges. In Guatemala, for example, the difficulty of including all aspects of children's rights (notably the provisions relating to adoption) into one comprehensive piece of legislation meant that the Guatemala Children's Code, as it was finally passed, did not include some important elements; A separate law on adoption was approved later.<sup>146</sup>

This situation demonstrates that the very complexity of such an all-encompassing law can make it difficult to adopt. There is always the risk that some segments of society may oppose certain parts of the Code and so end up derailing it in its entirety, or succeed in diluting thus minimising its effectiveness.

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<sup>145</sup> Implementation Handbook, p. 66.

<sup>146</sup> Garate, p. 23-8.

The experience in Nicaragua was more positive, with the adoption of a comprehensive Children's Legal Code in 1998. The Code replaced a number of obsolete laws which did not fit with the principles of the CRC, and it created a new legal framework for all aspects of the State's dealings with children. The Code, which deals with family law, children in society and the treatment of children by the justice system, covers most of the basic elements of the CRC and children's rights, including:

- the regulation of full protection of children by families, society, the government and private institutions;
- the definition of children as those less than 13 years old and adolescents as those between 13 and 18;
- the definition of children and adolescents as social individuals with rights;
- provision for equality of condition and opportunity, free from discrimination, exploitation, violence or other factors that violate children's rights and liberties;
- the definition of the family as the fundamental and natural entity to guarantee the growth, development and wellbeing of children and adolescents;
- establishment of the best interests of children and adolescents as a national concern, with full entitlement of all to full physical, psychological, moral, cultural and social development;
- special attention to children who belong to indigenous communities or minority ethnic, religious or linguistic groups; and
- identification of the role of the State in all of its forms as the guarantor of the survival and development of children.<sup>147</sup>

The comprehensiveness of a Children's Code requires a thorough examination of all potential implications of each provision, both individually and for its influence on the implementation of other parts of the Code. It is also important to determine the impact of the Code on any other legislation that may continue in force, at all levels of

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<sup>147</sup> Vijil, Mireille and Noemi Danao Cabuslay, *The Convention on the Rights of the Child Impact Study: The Study of Nicaragua*, Rädda Barnen/Swedish Save the Children, Managua, (November 1998) [henceforth: Nicaragua], p. 23-4.

government. Any legislation which will counteract the provisions of the new Children's Code will have to be either repealed and replaced by the provisions of the Code or revised to bring it into conformity with the new legislation. In Nicaragua, for instance, the review of other existing legislation meant close consultation with municipal authorities to avoid contradictions between the Children's Code and local legislation. The multiplicity of elements in a Children's Code can make it more difficult to predict the long-term effect it will have on the lives of children and on the country as a whole.

It should also be noted that, even with a comprehensive Children's Code, there will inevitably be other legislation (for example, technical legislation on micronutrient deficiencies, or broader legislative measures dealing with health care or marriage and divorce) which, while not specifically mentioning children, will have a significant effect on the rights of children. Even with a Children's Code, therefore, some attention will have to be paid to other specific items of legislation.

## **2. Law-by-Law Reform**

In many countries, such as those that follow the common law tradition, the option of adopting a comprehensive Children's Code would not be easily workable. Such countries will choose the other approach to incorporation of the CRC and CEDAW into domestic legislation. This is to enshrine each provision, or a combination of related provisions, in individual laws that can be developed, debated and adopted separately. The changes in legislation may be proposed not only as a result of the review of existing laws but also to accommodate judicial decisions and perceived changes in public attitudes and behaviour. Separate measures may be necessary to bring the customary law into harmony with the principles of the CRC and CEDAW.

With regard to common law countries, it should be borne in mind that changes in law do not necessarily involve changes in legislation. Because the common law is created as much through judicial decision and precedent as through legislation, it is important to involve the judges in the reform process, through education and active engagement. Similar measures may be necessary with traditional leaders who implement and determine customary law. Where both

written statutes and judicial or traditional decisions have a role to play in the development of law and establishing the basis for legal practice, legislation reform can create the context in which the common or customary law is developed.

Jamaica provides one example of this approach. The process of revising laws following ratification of the CRC in 1991 involved the adoption of a series of measures, including:

1. The Inheritance (Provision for Family and Dependants) Act, 1993;
2. the Domestic Violence Act, 1994;
3. the Family Property Act, 1995;
4. the Legal Aid Act, 1997;
5. the Maintenance Orders (Facilities for Enforcement (Amendment) Act, 1999; and
6. the Citizenship (Constitutional Amendment) Act, 1999.<sup>148</sup>

A review of legislation conducted in 1994, undertaken by a legal expert on behalf of the Jamaica Coalition for the Rights of the Child, produced a recommendation for the adoption of a "Child Care and Protection Act." Such an Act was adopted in 2004, repealing the 45-year-old Juvenile Act and providing a legal framework for the care and protection of children that emphasises the best interests of the child.<sup>149</sup>

Although Morocco includes the civil law tradition as part of its legal system, it also follows Islamic law and the nature of its monarchical constitution makes the law-by-law approach more appropriate. The adoption of specific laws to deal with particular situations, such as the Abandoned Children Act and the Social Protection of Disabled Children Act, has helped to put some elements of the CRC into effect, and further legislative changes are planned.<sup>150</sup>

The multiple law option, as opposed to the Children's Code approach, provides for a more gradual change in the existing legislation. At each

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<sup>148</sup> Jamaica, p. 9.

<sup>149</sup> Jamaica, p. 14.

<sup>150</sup> Ali, Shakeen Sarder, *Implementation of Child Rights in Muslim Jurisdictions: A Comparative Perspective of the CRC and Principles of Islamic Law*, UNICEF(internal document), New York, date unknown [henceforth: Shaheen Sardar Ali], p. 39-40.

step, it will be necessary to determine which of several laws or interpretations will prevail in the event of a legal challenge in the courts. Generally, the legislation should specify that the newer law, the one more in line with the CRC and CEDAW, will have priority over other legislation which may deal with similar issues.

Such a process may take a longer time to complete than the adoption of a single Children's Code, but it is possible for the legislation that is of most urgent importance to be dealt with more quickly, at the beginning of the process. What this process lacks in comprehensiveness it makes up in attention to detail, as each piece of legislation is addressed on its own merits. It can also be more sensitive to the changing perception of children that should result from the application of newer laws based on the CRC, along with the public education and information campaigns that accompany the review and reform of legislation. The changing perception may also be reflected in judicial decisions before it reaches the level of legislation.

There may be duplication as the reform process goes on, because many different legislative measures have overlapping effects, so this process is not as neatly contained as the use of a Children's Code. However, it is usually possible, with the detailed analysis (by Parliamentary Committees, for example, as well as civil servants and the interested members of the public) that comes with each piece of legislation, to ensure that there are no conflicts with other existing or planned legislation.

The law-by-law approach may also serve to generate greater support for the implementation of children's rights. Since each individual piece of legislation deals with clearly defined and often limited objectives, it should be possible to develop a constituency of support for each one based on its own merits. Although the different measures may attract different constituencies, there should always be a clear base of public support for each one, which will make eventual implementation more effective. Also, it is often easier to educate the general public about specific provisions of one law dealing with a well-defined aspect of children's rights than to try to cover the whole gamut of rights at once, as with a Children's Code.

### 2.3.3 *Legislation Reform Process*

As has been noted, the Law Reform Commissions of Kenya and Lesotho played key roles in reviewing legislation relating to children and their rights in those countries. In countries with such bodies, the role of the Commission is to review all legislation and make recommendations to the government for revision of existing laws and adoption of new ones (for both civil and criminal law) as needed to meet the evolving nature of society. Specific legislation emerged from the reviews in Kenya and Lesotho to give effect to the CRC in national legislation: The Children's Act, 2001 in Kenya and the Children's Protection and Welfare Bill in Lesotho.<sup>151</sup>

Other countries have established specialised bodies with a mandate to concentrate on reform of legislation relating to children. In Ghana, the Child Law Reform Advisory Committee was established in 1996 to make recommendations for legislation intended to effect the implementation of the provisions of the CRC. This was a mixed body, with institutional representation from government (the Ministry of Justice, the Ghana Education Service and the Department of Social Welfare), the legal system (the judiciary, legal practitioners and the Ghana Police Service), civil society (the 31<sup>st</sup> December Women's Movement, the Commission on Human Rights and Administrative Justice) and children (National Youth Council). This group reviewed national legislation in light of the CRC and CEDAW and made proposals for several laws that they expected would effectively translate the obligations of the Conventions into Ghanaian law and practice.<sup>152</sup>

In Nicaragua, the drafting of the Children's Legal Code was coordinated by the National Commission for the Promotion and Defence of Children's Rights, a mixed structure that involved various ministries, government agencies dealing with children, church representatives and the NGO Coalition for the Rights of Children. As part of the drafting process, the Coalition held several consultations

<sup>151</sup> African Child Policy Forum, *Harmonisation of Laws Relating to Children in East and Southern Africa: A Summary Report*, 2006 (draft), p.17.

<sup>152</sup> Ghana, p. 13-4.

with community leaders, educators, students, parents, volunteers, professional associations, representatives of NGOs, politicians and Municipal Children's Commissions. Information workshops on the proposed legislation resulted in the formation of the Network of Promoters of the Children's Legal Code, composed of people who had experience in training and community development. They conducted more workshops at the community level, to spread the information about children's rights and the new legal regime for children as widely as possible.<sup>153</sup>

The initial draft of the Children's Legal Code was presented in 1996 but approval was delayed by the election in 1997 and the need to begin lobbying again with the new National Assembly. The adoption of the Code was, in large measure, due to the effectiveness of the network of NGOs and government agencies that supported and promoted it. The extensive public information and education programme undoubtedly served to build the necessary popular consensus in favour of the legislation even before it was passed, which in turn facilitated its approval by the newly elected legislators. This shows the importance of extending the legislation reform process beyond the immediate confines of the legislature, to engage the general public as well as special interest groups in making legislation more respectful of children's rights. It sometimes takes this base of support to convince legislators of the importance of taking actions which may challenge established practices.<sup>154</sup>

A more formal legislature-led reform process was undertaken in China. The Internal and Judicial Affairs Committee of the People's National Congress began looking into revision of legislation dealing with children in 2005, with the intention of presenting the revised legislation in 2006. As a key part of the process, however, the NPC called for proposals for the new legislation from government agencies and social organisations. The All China Women's Federation took a leading role in promoting community-level consultations, regional workshops and children's forums to generate contributions to the new legislation. As a result, the proposed legislation reflected a broad-

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<sup>153</sup> Nicaragua, p. 23.

<sup>154</sup> Ibid.



based public understanding of the rights of children as provided for in the CRC, including the general principles.<sup>155</sup>

The impetus for reform of legislation can come from almost any source within society. The example from Canada, "Making the Grade," shows how the media and schools can empower children themselves to take the initiative in promoting new and revised legislation for their own benefit. There has been strong public support for the entire process, and students (with guidance from their teachers and experts in dealing with political matters) have been successful in lobbying politicians and civil servants. Although on a small scale, this is a good example of how to make it possible for children to participate directly in the reform of legislation that is important to them.<sup>156</sup>

In the experience of many countries, the initiative for legislation reform has come from the government, which is often the best organised advocate for children's rights. In Morocco, the interest of the king in promoting children's rights has been a significant factor in the development and adoption of several new laws directly inspired by the CRC.<sup>157</sup> However, even with such strong governmental support, effective implementation of the CRC still requires broader public involvement. The cultural and social sensitivity of so many of the principles in the CRC and CEDAW mean that they are unlikely to be fully implemented without broad-based agreement within the general population. This highlights the earlier assertion that merely changing a law will not, of itself, change the situation of children. Reform of legislation is not effective without adequate provision for ensuring that the laws are fully enforced.

#### ***2.3.4 Ensuring Implementation of Legislation Reform***

Even when considering written statutes, laws are only as effective as their enforcement allows them to be. Whether it is a comprehensive Children's Code or a series of individual laws, any legislation adopted

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<sup>155</sup> Hodges, Anthony, *UNICEF support for the review and revision of China's Law on the Protection of Minors*, UNICEF China Country Office, Beijing, 2006.

<sup>156</sup> Based on the author's correspondence with reporter Mike Wise, content of televised reports, and information available at [www.cbc.ca/torontoatsix/](http://www.cbc.ca/torontoatsix/). The government poster and other information about labour rights of children can be found at [www.labour.gov.on.ca/English/site/youngworkers.html](http://www.labour.gov.on.ca/English/site/youngworkers.html).

<sup>157</sup> Shaheen Sardar Ali, p. 44-5.

to give effect to the provisions of the CRC and CEDAW in favour of children's rights should also include adequate provision for its own enforcement. This could include budgetary allocations, administrative organisation, creation or reinforcement of institutional structures and promulgation of regulations as needed. When legislation specifies the creation of a particular structure to provide a service or implement a policy, there should also be a clear indication of how that structure will be funded and what resources it will need in order to operate as required.

For example, the legislation in Haiti that deals with children in conflict with the law mandates a special Tribunal for Children to be created in five jurisdictions distributed throughout the country. In practice, according to the study, *Étude Comparative entre la Convention relative aux droits de l'enfant et La législation haïtienne*, only one such tribunal is in operation, in the capital, Port-au-Prince. The law, therefore, is not being fulfilled. Similarly, in Bosnia and Herzegovina, the legal mandate for provision of social services for children and their families rests with the municipalities, that provide social protection services through Centres for Social Work. However, the legislation makes no provision for the financing of these services, and the CSWs are, in consequence, chronically under-funded.<sup>158</sup>

Therefore, as new legislation in favour of children's rights is drafted, debated and approved, it should make provision for the mechanisms necessary for implementation. This was done with the Child Care and Protection Act in Jamaica. A specific government executive body, the Child Development Agency, was created through a merger of pre-existing bodies (the Children Services Division, the Adoption Board and the Child Support Unit). The Child Development Agency is charged with implementing the Child Care and Protection Act. Also given clear responsibilities under the Act is the Children's Advocate, whose office was established to act in legal matters on behalf of children. Further, the Act established a Central Registry to maintain records of all reported cases of child abuse. The Child Development Agency submits budgetary requests directly to the Ministry of Finance, operating on the same level as line ministries when it comes to consideration for the government's budget. To the extent possible,

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<sup>158</sup> Haiti, 37<sup>th</sup> page.

within the limitations that are naturally imposed by the operation of a democratic political system, the Child Care and Protection Act contains the provisions which should make its implementation effective.<sup>159</sup>

Legislation is made real only when it is put into practice. For that to work effectively, the people responsible for implementing the new or revised legislation need to understand what the legislation says and to have the skills necessary to fulfil what the legislation requires. The people affected include civil servants working for the ministries responsible for action under the legislation, social service staff and managers (particularly in child care agencies), teachers and school administrators, health care workers and administrators, and even private sector employers and the media who may be charged with providing information about the new or revised legislation.

For all these groups, training and provision of information can be critical to the success of the reform. They need to know more than the details of the new legislation and their role in its implementation. It is also important for them to grasp the underlying principles of children's rights which are reflected in the legislation, with special emphasis on non-discrimination, the best interests of the child, a commitment to child survival and development and the importance of paying attention to the views of the child. This information can be provided through a dedicated government publicity campaign, reports in the news media, study materials prepared for schools and professional training institutions (including law schools), and appropriate posters and advertisements.

It is particularly important to engage judges and other actors in the legal system (including lawyers, court clerks and other staff, custodial officers in both prisons and remand centres and police officers at all levels) in the full implementation of the provisions of the new or revised legislation. This may be especially important in common law countries, where the role of the judiciary is crucial to the definition of the law in all respects. The ability of the courts to pass judgement on the validity of laws in those countries means that judges, especially, need to be fully aware of the commitments made by their State to

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<sup>159</sup> Jamaica, p. 15-7.

children's rights and the importance of the legislation in the fulfilment of those commitments.

It is also important to involve the authorities who are responsible for the application of Islamic law in those countries where this is a part of the legal system, with particular emphasis on the relationship between the legislation and the precedents in the oral tradition and commentaries on the *Qur'an*. Where customary law is practised, the practitioners should also be given comprehensive training in the new legislation and its relationship to traditional ways, especially if the new legislation runs counter to those ways. In order to ensure that adequate training and information are provided as needed, it would be best if provision for such educational and information activities were included as essential components of the new legislation or its attendant regulations.

### ***2.3.5 Monitoring and Public Information***

Changes to laws or long-established customs can generate opposition and resistance. This is especially the case if those changes are seen as undercutting well-established attitudes or if they challenge power relationships that, for example, define an inferior or restricted position for women in society. As part of the legislation reform process, care must be taken to provide for an effective counter to responses that may seek to hinder or prevent the enforcement of the new legislation.

This can be done by undertaking a broad-based public information programme that stresses the positive value of the changes embodied in the reformed legislation, not just in terms of international obligations to be met but also, and more importantly, in terms of the benefits that will accrue to the country and its communities as a result of the legislation. While not necessarily part of the legislation or its regulations, such an extensive public education programme could be incorporated into the planning for the legislation and might be implemented throughout the consideration of the bill by the legislature. Such education activities could follow the pattern of the public information and education measures employed in both Nicaragua<sup>160</sup> and Venezuela<sup>161</sup> which accompanied and informed the

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<sup>160</sup> Nicaragua, p. 30-1, p. 44-5 and p. 5.

process of debating and adopting new legislation dealing with children and their rights. In this endeavour, the engagement of civil society groups that support the legislation would be extremely helpful. These groups may be encouraged to expand their lobbying of legislators in favour of the legislation to a broader public information campaign, possibly with support from the government or international organisations committed to the promotion of children's rights. The role of the media not only in disseminating information but also in shaping public opinion should not be overlooked.

The information provided to the general public as part of a specific campaign to promote acceptance of new or revised legislation that incorporates the provisions of the CRC and CEDAW into domestic legislation is one element of what should be a broader effort to increase overall awareness of children's rights. This can create a favourable environment for all legislation reform initiatives taken to fulfil obligations under the Conventions, perhaps even generating popular demand for such reforms. This would be particularly helpful in countries that follow customary law as well as statute, since the changes in public attitude that could be provoked by such a campaign would support efforts to change the custom as well.

In this process, as with specific reforms mentioned above, the involvement of NGOs and civil society in general is extremely important. Promotion of children's rights should involve not only advocacy organisations working on behalf of children which have long-standing engagement in the CRC/CEDAW, but a whole range of groups, including religious bodies (especially important in countries with Islamic law), professional associations and organisations which touch children's lives in areas such as sports, culture, education and family life. All available forms of communication should be used, including (in those countries where the facilities exist) new media such as the Internet and text messaging. Many UNICEF National Committees and organisations such as Save the Children have used their Internet sites not only to provide information about children's rights but also to generate action on behalf of children both locally and internationally.

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<sup>161</sup> Garate, p. 14-8.

Accountability and the effectiveness of each reform as it is implemented can build a general consensus in favour of children's rights, which will in turn support each new reform as it is made. Monitoring the effect of reformed legislation on the lives of children can serve not only to justify the changes made but also to promote further reforms in the same direction. To provide the kind of objective analysis needed to validate the reforms, monitoring responsibility should be vested in an authority which is independent from political activity and identified specifically as an advocate for children and their rights. The model of a Children's Ombudsperson, following on the example of Norway that has been adopted in other countries, has been a preferred option by the Committee on the Rights of the Child, which encourages the establishment of such an official position in many of the Concluding Observations on country reports.

One example of such a monitoring body for the rights of children is the National Observatory for the Rights of the Child in Morocco, formed under royal patronage.<sup>162</sup> The interest of the Head of State means that this body has the authority to monitor the implementation of the CRC and to make necessary and appropriate recommendations for improvements to legislation to meet Morocco's obligations under the CRC.

A monitoring official or body can assess legislation, track the state of children's rights in relation to all aspects of the CRC/CEDAW and produce reports for the public and the government outlining both positive and negative conditions for children's rights in the country. There may be special value for such a monitoring structure in countries with plural legal systems, including those with strong traditions of customary law. The investigations conducted by the Children's Ombudsperson could draw attention not only to the situation of children's rights with regard to written law but also to the ways in which customary law affects children's rights. The publicity provided by the reports of the Ombudsperson for the treatment of children's rights under customary law could be a major force in the reform of customary law in favour of children's rights.

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<sup>162</sup> Shaheen Sardar Ali, p. 44-5.

Monitoring the situation of children's rights will also help provide practical information on the effect of new or revised legislation produced by the reform processes we have been considering. Continuous feedback on the ways that legislation actually touches the lives of children will reveal contradictions and gaps between and among laws that may not have been noticed before the legislation was adopted. The role of the Ombudsperson would not be to criticise or provoke controversy, but to identify problems before they reach a crucial stage and recommend solutions. This sort of attention, brought to bear in regular public reports on issues of common interest and concern, would also serve to identify at an early stage the opportunity for further reform of legislation that may arise as a result of the changing circumstances of children's lives, including changes brought about by the reforms initially adopted to meet obligations under the CRC/CEDAW.

## **2.4 Conclusion**

As demographic trends evolve, global economic integration advances apace and the environmental conditions in which children are born and grow undergo dramatic transformation, the attitudes of individuals, communities and governments toward both their own children and their international obligations can also be expected to change. The change, in this case, is mediated and, to some extent, generated by the realisation in practice of the principles enshrined in the CRC and CEDAW, as a result of a well-thought-out and broadly participatory process of legislation review and reform.

Legislation that is adopted at least in part to meet a State Party's commitments to children as a result of ratification of or accession to the CRC and CEDAW should serve as more than a technical or even political measure to satisfy international requirements. It can, and should, give rise to changes in generally held attitudes and behaviour with regard to children on the part of adults, whether they are parents, teachers, health workers, social service workers, police officers, part of the legal system or just members of the community that includes children, and also on the part of children themselves.

Because so many people are affected by legislation that deals with children, the process of reviewing and reforming that legislation should reflect the broadest possible social consensus. This is why the process should incorporate a significant element of public information and education about children's rights and the commitments the State has undertaken in becoming party to the CRC and CEDAW (where applicable). The process also needs to be one in which all concerned can express their opinions and feel that their views have been heard and taken into account in the final legal measures. In particular, the process needs to include children and their views, as a clear demonstration of the importance placed on the rights of children to participate in discussions about issues that matter to them.

Reform of legislation can take many different forms, depending on the nature of the country's legal system, the situation of children and the political process. The content of the legislation may vary, but it should always reflect the principles of the CRC and CEDAW. The four fundamental principles of the CRC should underlie both the review and reform process and the substance of all legislation. These principles – non-discrimination, the best interests of the child, the right to life, survival and development, and the right of the child to have his or her views heard on all matters affecting the child – are at the heart of the CRC and essential to the understanding and realisation of all children's rights. The process itself should be a demonstration of the rights of children, which is why it is so important to create opportunities for children to participate in both the review of existing legislation and the development of new measures of whatever kind, whether they be written laws, government policies, administrative procedures or public attitudes and expectations.

The public consensus developed through the process leading up to the adoption of legislation reforms is an important determinant of the effectiveness of the legislation as it is enforced. A change in legal measures dealing with children, made to respect children's rights, will be effective only if there is sufficient public support to ensure that the legislation is respected in practice. Effectiveness also requires that provision be made, preferably in the context of the legislation itself, for the necessary structures and resources to be put in place so the legislation can be implemented as intended. Among the structures needed to make reform of legislation as effective as possible is a



system for monitoring the situation of children's rights, possibly through a Children's Ombudsperson or Children's Commissioner.

Legislation reform is an ongoing concern. As situations and attitudes change, there will need to be a review of the way in which new legislation affects children's rights, and further reforms to that legislation will likely be needed as time goes on.

## Chapter 3

# CONSTITUTIONAL REFORMS IN FAVOUR OF CHILDREN

This section presents a set of broad guidelines to countries on possible options for the formulation and interpretation of Constitutions as integral parts of comprehensive law reform measures in favour of children. The rationale behind presenting “broad guidelines” is to ensure that users benefit from a range of options based upon their specific needs. The extent of detail, elaboration and simplicity would depend on the political, social, economic and cultural circumstances of the country concerned. Importantly, the chapter acknowledges that constitutional reforms, in comparison with legislative reforms, are more complex and require more consensus building processes. Whereas legislative reforms could be initiated under the auspices of a government ministry or civil society, constitutional reforms are usually more political in character, and often triggered by major political events or milestones. Comparatively, the financial costs involved in the type of reforms to be discussed are also potentially high and the time applied to such exercises very prolonged. The chapter does not therefore intend to urge countries to undertake reforms. On the contrary, its purpose is to provide advice and advocacy messages for occasions when constitutional reform does take place, and also serve as a wake up call to countries that have yet to consider reform.

As with other chapters, this chapter adopts a rights-based approach, by using the principles and provisions of human rights instruments as basic reference points for proposing constitutional reforms, which should ultimately lead to the fulfilment of human rights. The chapter also recognises the immense constitutional reform interventions across the globe and uses specific country case studies to illustrate potential best practice and lessons. The section also addresses the potential roles that custom and religion can play in constitutional law and policy development within the context of the two main legal traditions

presented in the introduction. It contributes to the overall objective of the handbook by supporting the view that legal reforms, of which constitutional reforms form an essential part, must be geared towards the fulfilment of the rights of the child.

## **Part 1    CONSTITUTIONS AS TOOLS OF LEGISLATIVE AND POLICY REFORMS**

This part briefly discusses the role of constitutions in the overall running of a State and demonstrates how this dovetails into law and policy formulation in favour of children. In essence it shows an important correlation between constitutions of States and their obligations under the CRC and CEDAW.

### **1.1    The Role of Constitutions in State Affairs**

In the broadest sense, a constitution refers to a country's supreme law, which contains the guiding principles according to which that country is governed. More specifically, it is a text which outlines the powers of parliament, the executive, judiciary and other national institutions. It is characteristic of written constitutions, especially those guaranteeing fundamental rights, that they also impose constraints on the powers of the legislature and the government (Barendt, 1998).<sup>163</sup>

A useful example of how a constitution can be defined comes from the case of Botswana. In the case of *Unity Dow vs. the Court of Appeal*<sup>164</sup> (1991), the Court of Appeal (the highest court in that country), defined a written constitution in the following way:

“A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvass the institutions of the state; allocating powers, defining relationships between such institutions and the people within the jurisdiction of the state, and the people themselves. A constitution often provides for the protection of the rights and

<sup>163</sup> Barendt, E, *An Introduction to Constitutional Law*, Oxford University Press (1998).

<sup>164</sup> Appeals Court, 1994 (6) BCLR 1.

freedoms of the people, which rights and freedoms have thus to be respected in all future state action.”

While it is the general practice of States to produce their respective Constitutions in one consolidated written text, the United Kingdom (UK) represents a unique example of a State without such a codified written instrument. Contrary to general practice, the UK Constitution consists of a collection of legal and non-legal rules, which define the powers of the arms of the State and the relations between them.

Constitutions may be broadly classified into unitary and federal constitutions depending upon the type of government in place. Federal States such as the United States, Canada, Australia and Nigeria are governed by federal constitutions, whereas unitary States such as Uganda, The Gambia and Ghana, operate upon single unitary constitutions. In the case of the former, stakeholders should appreciate the interface between the constitution of the Federation and the constitution of the individual federal states. The general operative principle is that federal constitutions apply with overriding force throughout the country, invalidating all inconsistent laws including the constitutions of individual federal states. Subject to consistency with the federal constitution, state constitutions should also operate as the supreme law of the region, to which all other local laws must conform in order to be valid.

Countries with elaborate systems of decentralisation (for example, Uganda) generally refer to their respective national constitutions as the basis for all actions. Decentralised political units (for example, District Assemblies, Municipalities or Councils) are thereby generally not permitted to create their own constitutions. Powers of lawmaking are often restricted to the creation of bylaws for addressing specific issues, such as sanitation and education. Such local initiatives must, however, comply with the letter and spirit of the state constitution.

In addition to the three arms of the State, namely, the executive, legislature and judiciary, constitutions also lay out mandates for other independent constitutional bodies such as human rights commissions. Given the increasing influence of international law, constitutions

further serve as opportunities for defining the relationship between the domestic law of a State and its treaty obligations.<sup>165</sup>

In specific relation to children, constitutions also serve as frameworks for the formulation and implementation of national legislation and policies in favour of children. Because they possess the status of the highest standards by which all acts and omissions are evaluated and also have the binding force of the law, their role as tools of change in favour of children cannot be underestimated. Within the context of the rights of the child, they become the basic standard by which all actions, “whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies” (article 3(1) of the CRC) are evaluated. For the authoritative position of the constitution to be safeguarded and sustained across time and regimes, it would be necessary to design “supremacy clauses” to give effect to this. Without supremacy clauses, the rights of children may not be guaranteed.

**Box 15: Supremacy clauses:**

**Examples from Iraq, Nigeria, East Timor and Ukraine**

Article 13 (1) of the Constitution of **Iraq** regards the Constitution as the “supreme and highest law...and shall be binding throughout the country without exceptions.”

Article 1 (3) of the Constitution of **Nigeria**, provides that “if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.”

Section 2 (3) of the Constitution of **East Timor** states that “the validity of the laws and other actions of the State depend on compliance with the Constitution.”

Article 8(2) of the Constitution of **Ukraine** establishes its Constitution as having the “highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.”

To secure the efficacy of any constitution, remedial action for potential or actual breaches should be available through administrative and judicial due processes. Such recourse enhances the status of constitutions as protective instruments in favour of children. An example of a remedial action clause comes from the Constitution of The Gambia:

<sup>165</sup> See sub-section below on the interface between international law and constitutional reforms for more details.

“A person who alleges that-

- (a) any Act of the National Assembly or anything contained in or done, under the authority of an Act of the National Assembly, or
- (b) any act or omission of any person or authority is inconsistent with, or is in contravention of a provision this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect.”

## 1.2 Constitutions as Frameworks for Legislative Reform

Constitutions serve as reference points for the formulation of laws and regulations in favour of children. They do this by first of all defining *what the law is* within the context of State jurisprudence. Constitutions of some common law jurisdictions make *express provision* for what constitutes the scope of law. The common law experience shows that what constitutes ‘law’ may include, but not be limited to: the constitution, statutory law, received law (colonial law), judge-made law (judgments of the courts), customary law and Islamic Law, with variations across jurisdictions. Under this heading, constitutions broadly speaking should also provide direction on the inter-relationship between modern law, customary law, Islamic law and international law.

A clear example of how the law can be defined comes from Ghana, where Article 11 (1) of the Constitution states that “[T]he laws of Ghana shall comprise: (a) this constitution, (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law and (e) the common law.”

Apart from providing the general parameters of the law and defining the relationship between the constitution, custom and religion, some constitutions also provide a general framework for future legislative interventions in favour of children and women. While in some countries (for example, Ghana) this is provided in express terms, in others (for example, South Africa and Ethiopia), this may be inferred.

**Box 16: Constitutional mandates for legislative reform:****Case studies from South Africa, Ethiopia<sup>166</sup> and Ghana**

**South Africa:** Article 28 of the Constitution outlines specific rights for children: The right to a name, nationality, family care, nutrition, shelter, health, juvenile care, protection from neglect, maltreatment, exploitative labour and armed conflict.

**Ethiopia:** Article 36 of the Constitution affirms the right of the child to life, a name, nationality, parental care, and protection from economic exploitation and corporal punishment.

**Ghana:** Article 22 of the Constitution *expressly* mandates Parliament to enact laws to secure the equal rights of men and women to *property acquired during marriage*.

In addition, Article 28 of Ghana's Constitution *expressly* mandates Parliament to enact such laws as are necessary to ensure the realisation of the rights of children. These rights include the rights to: Special care, assistance and alimony, inheritance, protection from economic and sexual exploitation and deprivation of medical treatment on grounds of religious beliefs.

### 1.3 Constitutions as Frameworks for Policy Reform

Constitutions give expression to State priorities in the area of policy. Many common law jurisdictions provide statements of their development priorities through "Principles of State Policy." Broad provisions are usually provided on issues that are political, social, economic, educational and cultural, or that concern foreign relations and budgeting. Such principles serve as yardsticks for judging and criticising the actions of government by both State and non-State actors and further provide an indication of the principles that drive a government's developmental process.

**Box 17: Principles of State Policy:****Case Examples from the Republic of Ireland, India, Pakistan, The Gambia, Ghana, Nigeria and Uganda**

Ireland has played a pioneering role in constitutional incorporation of these principles. Others, which have followed this example, include The Gambia, Ghana, India, Nigeria, Pakistan and Uganda. With respect to Ghana, introductory provisions provide that Directive Principles of State Policy are to "guide all citizens, Parliament, the President, the judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society" (article 34 (1)). In general, these principles

<sup>166</sup> All provisions have been summarised.

more or less bind together and elaborate segments of the International Bill of Rights for purposes of social cohesion, resource allocation and development. These principles have the potential to serve as broad frameworks for implementation of the Millennium Development Goals.

Under the Social Objectives of its Directive Principles of State Policy, The Gambia has made a constitutional commitment to pursue policies to protect the rights of *children* and other vulnerable groups and in doing so, is to be guided by “international human rights instruments..., which recognize and apply particular categories of basic human rights to development processes. Under the same section, the State is to work towards the provision of clean and safe water, adequate health, shelter and sufficient food and security to all persons” (Article 216).

The Principles in practice: A case study from Ghana

Directive Principles of State Policy of 1992 guided the Multisectoral Child Law Reform Committee in the formulation of the first Children’s Act of 1998 (Act 560). This ensured the inclusion of civil and political rights in addition to economic, social and cultural rights in the text of the instrument. In the area of social policy they have also served as a framework for the design and implementation of national policy instruments, notably, all post-1992 Poverty Reduction Strategies and the draft National Social Protection Strategy currently undergoing finalisation by the Ministry of Manpower, Youth and Employment. Significantly, article 34(2) of the Constitution requires of the President to *report to Parliament at least once a year*, all steps taken to ensure the realisation of the policy objectives contained under the Directive Principles of State Policy; in particular, the realisation of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education. The Presidential presentation is open to all sectors of the public including civil society, children and the UN.

## 1.4 Constitutions Should Reinforce the Status of Children as Subjects of Human Rights

The status of constitutions as frameworks for legitimising laws and policies in favour of children, presents them with the opportunity to reinforce the status of children as *subjects of rights* as opposed to being *objects of charity*. By incorporating general provisions (for example, the International Bill of Rights) and specific provisions (with respect to the CRC and CEDAW), States are thereby admitting that the citizenry (including children) are rights holders with the capacity to make claims against duty bearers.

This is an essential component of the rights-based approach and falls in line with State obligations under international human rights law. The Constitution of Venezuela provides deep insight into how



countries can craft provisions that reinforce children as subjects of rights.

“Children are *full subjects of rights* and shall be protected by the law and by specialised organs and courts, which shall respect, guarantee and develop the provisions of this Constitution, the Convention on the Rights of the Child and other international treaties on this subject, signed and ratified by the Republic. The State, families and society shall give absolute priority to ensuring holistic protection and in so doing, shall take the best interests of the child into account in all decisions and actions that concern them. The State shall promote their progressive assumption of an active role in society and a national orientation system shall direct policies for the holistic protection of children. The Convention on the Rights of the Child is thus incorporated into the national law at the highest level, as part of the Constitution” (article 78).

In an article on the rights of the child in relation to the final Constitution of South Africa, Mosikatsana (1998) draws out how Constitutions influence holistic implementation of the CRC, using the lens of a rights-based approach.

**Box 18: How Constitutions can positively influence CRC implementation:**

1. Constitutional provisions specific to children provide a trigger and springboard for legislative reform.
2. As a minimum, constitutionalization legitimises political discourse on children’s rights and provides political justification for *government expenditure* on social programmes for children.
3. With the location of the rights of the child in the supreme law of the land, children can be legally and properly viewed as *subjects of rights*.
4. It enables the rights claimants, who are children, to make substantial claims against the State, using the law as a *sword*.
5. It enables children to use the law as a *shield* to protect themselves from erosion of social benefits by the State.
6. It can create *justiciable rights* that children may enforce against the State.
7. It offers the government political justification for providing social welfare benefits to children as they compete for *scarce resources*.
8. It provides government with useful moral and legal justifications for its social welfare expenditures when conservative and liberals demand *fiscal restraint* through reduced expenditures on social programmes.

Source: Mosikatsana T.L (1998); Children’s Rights and Family Autonomy in the South African

Context: A Comment on Children's Rights under the Final Constitution; Michigan Journal of Race and Law, symposium article.

## 1.5 Key Considerations in the Formulation of the Substance and Process of Constitutions in Favour of Children

When considering the formulation of a new constitution or the review of an existing one, States are generally influenced by their specific political, economic, social and cultural circumstances. Historically, political perspectives have, however, far outweighed other considerations in the development of constitutional law. Emancipation from colonial rule in countries such as India (1950), Ghana (1957) and Nigeria (1963) provides such examples. The establishment of principles of a new system of government subsequent to a revolution, as in the case of the French constitution of 1791, provides another political basis. From a rights-based perspective however, issues of substance and process may also be considered and integrated into constitutional law formulation and reviews.

### 1.5.1 *The Substance*

#### **Box 19: Three H's to Consider in the Formulation of the Substance of Constitutions**

**Historical circumstances** should provide moral justification for an improvement in the status and conditions of children. History will aid a State in ascertaining which groups have been traditionally excluded from participation and access to social services. Historically excluded groups such as women, children, the disabled and minorities should be protected under the umbrella of constitutional law.

**Human Rights treaty obligations** should be addressed by express constitutional provisions. Article 31 of the Constitution of Cambodia, for example, states that "the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the UN Charter, the Universal Declaration of Human Rights, the Covenants and Conventions related to human rights, women's and children's rights."

**Human Development** priorities, as set out by global standards, espouse a broad array of development concerns. Examples include the Millennium Development Goals and the Declaration on the Right to Development.<sup>167</sup>

<sup>167</sup> The emphasis here should be on the general content of these global standards and not on their time-bound specific provisions.

### 1.5.2 *The Process*

Legal reform within the context of constitutional law could be initiated through two broad processes: (a) the formulation of the very first constitution of a State and/or (b) the revision or amendment of an existing constitution. The binding and universal character of constitutions calls for broad-based participation of all sectors of the State: Political (including traditional authorities), economic (such as Trade Unions), religious (especially faith-based organizations) and the social services sub-sectors (which often intersect with children's interests) and civil society. Such a cross-sectoral approach would ensure inclusion of ethnic and geographic sub-groups, constitutional sustainability and stability across time. While specific interest groups such as faith-based organizations and trade unions have traditionally been visible during such processes, some groups, such as child-related institutions, children and young people, have had less of a role. Their visibility throughout the process is a means of ensuring that their concerns receive due attention.

Procedures for constitutional reviews will differ, based upon the political system in question. In general, they involve more complex procedures and consultations as compared to legislative reviews.<sup>168</sup> A recent example of a constitutional review initiative is found in Kenya, where The Constitution of Kenya Review Commission spearheaded a nationwide consultative process for obtaining constitutional proposals on a wide range of human rights and policy issues.

The Kenyan reform began with the struggle to change the political system from one party to a multi-party democracy. This movement gathered great momentum in the 1990s, bringing together individuals and organizations from many sectors of society and many parts of the country. At the forefront of the movement were religious, gender and human rights organizations, and the Constitutional Commission charged with spearheading the process facilitated a broad participatory process. It encouraged numerous civil society organizations to provide civic education and entered into formal

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<sup>168</sup> The United Kingdom presents an exception to this general observation. There is no difference between the review of the Constitution and an ordinary piece of legislation as both can be carried out with the same level of flexibility. See Barendt (1998).

arrangements with other groups to assist in providing civic education by providing financial and other resources. The Commission prepared a national curriculum and teaching materials for civic education, including *Reviewing the Constitution*, all of which were widely distributed. It also distributed a booklet, entitled *The Constitutional Review Process in Kenya: Issues and Questions for Public Hearing*, to stimulate reflections on reform and to elicit recommendations. The process made it possible for the Commission to gather information for crafting specific provisions on the rights of children.<sup>169</sup>

Broadly speaking, two types of constitutional reviews may be envisaged: a) a holistic review, involving the constitution in its entirety or b) a review of specific provisions. The Kenyan example cited above fits into the former category, whereas India and the United States may be cited as examples of the latter. Some constitutions set out the circumstances and legal procedures to be followed in any given constitutional review and have even defined some areas as “entrenched,” requiring a national referendum to approve valid amendments. In all cases, however, the Legislature plays a key role in the constitutional reform process.

**Box 20: Amendments to entrenched provisions:  
Case studies from the United States, Canada and Ghana**

**United States:** Article V of the Constitution of the United States sets out a complex procedure for amendments to take effect. It spells out two broad methods: The first is for a Bill to pass both houses of the legislature by a two-thirds majority in each. Once the Bill has passed both houses it is then referred to the states. The second method is for a constitutional convention to be called by two-thirds of the legislatures of the states and for that convention to propose one or more amendments. These amendments are then sent to the states to be approved by three-fourths of the legislatures. This route has never been taken and there have been discussions in political science circles about how such a convention would be convened and what kind of changes it would bring about. Regardless of which of the two methods are chosen the amendment as passed must be approved by three-fourths of states. The amendment as passed may specify whether the Bill must be passed by the state legislature or by a state convention.<sup>170</sup>

<sup>169</sup> Summarized from *The People’s Choice. The Report of the Constitution of Kenya Review Commission*. Short Version (2002).

<sup>170</sup> See <http://www.usconstitution.net/constam.html> for more details.

**Canada:** Sections 38-49 of the Constitution Act of 1982 outline procedures for amending the Constitution. Amendments can only be passed by the Canadian House of Commons the Senate and a two-thirds majority of the provincial legislatures

representing at least 50 per cent of the national population. Though not constitutionally mandated a popular referendum in every province is also considered to be necessary by many especially following the precedent established by the Charlottetown Accord.<sup>171</sup> If a constitutional amendment affects only one province, however, only the assent of the legislature of that province is required. Nonetheless, there are some parts of the Constitution that can only be modified by a unanimous vote of all the provinces. This may include changes to the composition of the Supreme Court changes to the process for amending the Constitution itself or abolition of the Monarchy in Canada.

**Ghana:** The general responsibility for initiating constitutional reform lies with Parliament. By article 289 Parliament is mandated to amend any provision of the Constitution provided it receives approval of two thirds of all members at the second and third readings. However specific clauses in the Constitution (for example those pertaining to fundamental human rights including article 28 in relation to children's rights) cannot be amended by a mere Act of Parliament. Article 290 (4) requires such proposals be submitted to a referendum at which there is at least a 40 per cent turnout of those entitled to vote and at least 75 per cent of those voting cast their votes in favour of passage of the Bill.

## 1.6 The Relationship between Constitutions, Customary Law and Islamic Law

In the design of constitutions, countries are to take into account the values of their respective societies in determining potential factors that are likely to influence the direction of constitutional debates and the substance of provisions. While there are many factors that have the potential to affect constitutional reforms, this section is limited to customary law and Islamic law as important keys to the determination of constitutional rights in many countries. In this regard it is critical to start from the understanding that both customary law and Islamic Law offer potential opportunities in favour of children and that stakeholders should therefore explore the positive potential of each. On the other hand, where certain aspects of culture and religion are likely to negate the principles of human rights law and even the constitution itself, the latter should provide guidance on how to

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<sup>171</sup> The Charlottetown Accord was a package of constitutional amendments proposed by the Canadian Federal and Provincial government in 1992. It was submitted to a public referendum on October 26 of that year and was defeated.

handle conflicts which, in all cases, should be resolved in favour of children.

### *1.6.1 Country Case studies on Constitutions and Customary Law*

It is to be noted that, due to historical, political and cultural differences, the treatment of customary law in relation to country constitutions will vary. The importance of customary law within a constitution would depend upon whether it has matured to the level of *law*. As noted above, the integration of customary law within the legal definition of “law,” is unique to common law countries. What is needed, in the process of integrating such provisions, is the inclusion of specific clauses to resolve possible conflicts between modern law (including the constitution) and customary law.

The constitutions of Ghana, Iraq, Nigeria, South Africa, Timor-Leste and Uganda provide for the right of the individual to enjoy, practice and profess any culture of his or her choice, provided this does not conflict with the provisions of the constitution, particularly those which pertain to Fundamental Human Rights and Freedoms.

**Box 21: The supremacy of the constitution over custom:**

**Case studies from Ghana, Timor-Leste and Uganda**

Ghana: “Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution. All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited” (Article 26).

Timor-Leste: “The State shall recognize customary laws of East Timor, subject to the Constitution and at any legislation dealing with specifically with customary law” (Section 2 (4)).

Uganda: “If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall to the extent of the inconsistency be void” (Article (2) (2)).

The approach taken by these countries strengthens the fundamental position of the constitution as supreme to all law, including customary law. Indeed, the ratification of international instruments provides further basis for a State to situate local customs and traditions within the authoritative framework of the constitution.

Article 5 (a) of CEDAW specifically mentions that “States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for and men and women.”

Many customs and traditions are based on patriarchal principles, placing males in a superior position to females. In Botswana, for instance, customary law treats women as minors subject to the guardianship of the male head of family. In Ghana, patrilineal principles of succession in selected parts of the country (for example in Ewe communities) subjugate the inheritance rights of females to that of males even where the latter are younger than the former.

**Box 22: How judges have treated conflicts between customary law and the constitution: From the Botswana case of *Unity Dow vs. Attorney General*<sup>172</sup>**

“A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is custom not the Constitution which must go.

-extracted from the decision of Justice Amissah, the presiding judge.

“Customs, traditions and culture of a society must be borne in mind and afforded due respect, but they cannot prevail when they conflict with the express provisions of the Constitution. In relation to the protection of personal and political rights the primary instrument to determine the heartbeat of Botswana is its Constitution.”

-extracted from the concurring decision of Judge Bizos.

Systems which fail to provide equal opportunities for men and women are discriminatory in content, purpose and effect, and must be eliminated. The following provisions from CEDAW provide ample legal justification for incorporating provisions against discrimination occasioned by custom.

**Box 23: Definition of discrimination by CEDAW**

“For purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (Article 1).

<sup>172</sup> Cited in Court Documents, Judgements Cases and Materials, edited by Unity Dow (1995), p20.

**Express prohibition of discrimination through constitutional reform by CEDAW**

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) to embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle” (Article 2 (a)).

The Constitution of The Gambia makes express provisions for equality before the law and non-discrimination. However, the Constitution appears to give with one hand and take with the other: In one section provisions are made to proscribe discrimination and at the same time exceptions are created in relation to personal law which negate the essence of the same section.

**Box 24: The effect of ambiguities in constitutional provisions:**

**The case of The Gambia**

Article 33 (2) and (3) of the 1997 Constitution states as follows:

“Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect.”

“Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.”

Subsection 5 states as follows:

“Subsection (2) shall not apply to any law in so far as that law makes provision- (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.”

These provisions clearly suggest that customary law and religion (as the case may be) will trump the Constitution when they are in conflict. This is bound to have a negative impact on women and girls, whose lives are often compromised by matters of adoption, marriage, divorce, burial and devolution of property, due to the inherent tendency on the part of customary law to discriminate against them.<sup>173</sup> Hawa Sisay-Sabally notes in connection with article 33 of the Constitution of The Gambia that “this constitutional provision, which is contained in the entrenched fundamental human rights chapter, implies that a person’s

<sup>173</sup> The UN system and counterparts operating in the country arrived at a general consensus to reform this aspect of the Constitution at a workshop on mainstreaming gender into the CCA in October 2005.



personal or customary law may discriminate against him or her and such person shall have no recourse under the Constitution or any other law.”<sup>174</sup>

For the purposes of implementation of customary law, the Constitution of Nigeria makes provision for Customary Courts of Appeal of a State with appellate and supervisory jurisdiction in civil proceedings involving questions of customary law. A judge of such a court is required to possess considerable knowledge of, and experience in, the practice of customary law (articles 265-269). State Councils of Chiefs are also provided for under the third schedule of the Constitution to advise the Governor on matters relating to customary law, cultural affairs and other related matters. Similar provision has been made under article 272 of the Constitution of Ghana, which provides for the continued existence of the National House of Chiefs with the mandate to *inter alia* undertake the “progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law and an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful.” Although these provisions call for representation of female traditional rulers in the National House of Chiefs for effective review of customary law, female participation has remained an illusion.

The existence of such institutions, however, calls for effective training of personnel and panel members in matters of human rights and constitutional law to ensure that activities and decisions result in improvements in both the status of women and children, given the fact that these two groups are the hardest hit by harmful traditional practices.

### ***1.6.2 Country Case Studies on Constitutions and Islam***

A distinction is to be made between States that profess Islam as a State religion and those that provide for the practice of other religions but make special provisions for Islam on account of its dominance among

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<sup>174</sup> Sisay-Sabally, Hawa, *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women*, ed. Akua Kuenyehia (1998), P. 123 at p. 128.

the general populace. Iraq represents an example of an Islamic State, with specific constitutional provisions on Islam. By article 2 of the Constitution of Iraq, "Islam is the official religion of the State and is a basic source of legislation." By virtue of 2 (a) and 2 (c), no law can be passed "that contradicts the undisputed rules of Islam and the rights and basic freedoms outlined in the Constitution."

In The Gambia, *Shari'a* forms part of the main body of law in "matters of marriage, divorce and inheritance among members of the Communities to which it applies" (article 7 (f)). To facilitate the implementation of Islamic principles, Islamic States, in addition to those that recognise the practice of Islam, have made provision for Islamic Courts with the mandate to apply Islamic law in all matters brought before them. In The Gambia and Nigeria, justice administration includes Islamic or *Cadi* Courts. In the specific case of The Gambia, the independence of all courts is guaranteed and, in the exercise of their functions, they are subject to the Constitution, which includes article 33 (5) cited above. Specifically, a *Cadi* Court has jurisdiction to apply the *Shari'a* "in matters of marriage, divorce and inheritance where the parties or other persons interested are Muslims." It also has the power to review its own decisions where an application is made by a grieving party (article 137 (4) and (5)).

"Another set back is that Section 6 of Cap 6:04 (Mohammedan Recognition Act) permits a *Cadi* to sit alone to preside over issues of marriage, divorce and inheritance. It is therefore possible for his decision to be subjective. The Constitution of the second Republic, which is now in force, requires a *Cadi* to sit with two scholars of the *Shari'a* or *Ulamas* for hearing at first instance. In order for section 137 to effectively amend or repeal section 6 of the Mohammedan Law Recognition Act, the Constitution requires that the President may by Order published in the Gazette and made with the approval of the National Assembly, at any time within twelve months of the coming into force of this Constitution make such provision as may appear necessary for repealing, modifying, adding to or adapting any existing law for purposes of bringing it in accord with the provisions of this Constitution. Since this action has not yet been taken, the *Cadi* continues to sit alone though the panel came into existence on 4<sup>th</sup> November 1997.

In the case of *Harding v Harding*, in which one Mohammed H. Harding (deceased), a Muslim and citizen of The Gambia died intestate, leaving two sets of issues from his widow and former wife. A *Cadi* Court sitting alone at the Kanifing Muslim Court, administered the deceased intestate estate. Although all sets of children were catered for, the former wife, believing that her children were short changed applied for an order of certiorari. She wanted the proceedings to be transferred to the High Court so that they might there be quashed. The judge ruled that there was no error of law on the face of the record to suggest that the *Cadi* sitting alone exceeded or lacked jurisdiction for which certiorari can be applied.”<sup>175</sup>

Islamic law is subject to varied interpretations. Inasmuch as it has been recognised under constitutions of States which profess Islam, an opportunity exists for ensuring consistency of interpretation with the constitution in its general form rather than the treatment of Islamic law as a separate text.

## **1.7 The Interface between International Law and Constitutional Reforms**

As stated in the introduction, the ultimate goal of a constitution should be the fulfilment of human rights. For this to occur, constitutions must find ethical and substantive expression in the principles and provisions of international human rights law. While constitutions are political documents, the fact that they possess a legal character also provides considerable opportunity for the incorporation of child rights considerations. In other words, it is possible for constitutions to be pro-children by reflecting the principles of the CRC and CEDAW. In the design of constitutions, States should observe that children are subjects of both general international law and of specific treaties affecting them.

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<sup>175</sup> Gaye et al. *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women*, ed. Akua Kuenyehia. P. 2 at p.7-8.

A rights-based approach to constitutional formulation takes into account both general and specific international norms in favour of children, as children are subjects of both sets of standards. Because it would not be possible to adopt a wholesale incorporation of international human rights law, States should be guided more by the general and specific principles associated with these standards.

The following provides an overview of the general and specific human rights treaties affecting children and the principles that guide them. Countries are to note that the list is not exhaustive and that many other guidelines, declarations and conventions may be used as tools during constitutional review processes.

**Box 25(a): General treaty obligations affecting children**

- The International Bill of Rights (encompassing the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights)
- The Convention on the Elimination of all Forms of Racial Discrimination
- The Convention on the Elimination of All forms of Discrimination Against Women
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

**Box 25(b): Specific treaty obligations affecting children**

- The Convention on the Rights of the Child
- The Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography
- The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- ILO Convention on Minimum Age (no. 138)
- ILO Convention on the Worst Forms of Child Labour (no. 182)
- The Hague Convention on the Protection of Children and Cooperation in respect of inter-country adoption
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The following principles apply to the overall body of general and human rights law:

- Universality
- Indivisibility
- Accountability
- Participation

Whereas the following principles apply in specific relation to child-specific treaty standards:

- Non-discrimination
- The Right to life, survival and development
- The best interests of the child
- Respect for the views of the child.

In keeping with the underlying fact that children's rights are human rights, States are enabled by these broad principles to design two broad sets of constitutional provisions: One derived from the principles of general human rights law and the other from the principles of specific human rights law affecting children. This approach will ultimately result in the formulation of constitutions that reflect the general corpus of human rights treaties in favour of children. The aforementioned general and specific principles will therefore constitute the foundation for the consideration of proposals under Parts II and III.

## **Part 2 GENERAL CONSTITUTIONAL PROVISIONS IN FAVOUR OF CHILDREN**

### **2.1 Principle 1: Universality**

Provisions that capture the principle of universality of rights should be aimed at ensuring inclusiveness, especially in favour of traditionally excluded groups. In keeping with human rights instruments such as the UDHR, the Convention on the Elimination of all Forms of Racial Discrimination and CEDAW, provisions could be created to capture non-discrimination (including the meaning of discrimination), affirmative action (for purposes of creating a level playing field for the excluded) and equal protection (to reinforce equality before the law and equal opportunities for all). In addition to provisions on discrimination with respect to CEDAW already discussed above, States are also to take account of those contained in the Convention on the Elimination of All Forms of Racial Discrimination. Below is the full text of the definition contained in the latter.

“The term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (Article 1).

A definition of discrimination leads the way towards identifying specific grounds or basis for discrimination to prevent the denial of rights of any group. Examples of grounds for discrimination are expressed in the definition of racial discrimination cited above. However, in declaring that “everyone is entitled to all the rights and freedoms set forth in this declaration” the UDHR sets more grounds for discrimination by citing the following categories under article 2:

- Race
- Sex
- Language
- Religion
- Political or other opinion
- National or social origin
- Birth
- Or other status

By providing for *or other status*, the declaration makes it possible for States to derive additional categories or classifications based on local circumstances. These provisions have indeed made it possible for states to craft comprehensive provisions on non-discrimination based on their specific needs and priorities. Below are case examples from Ghana, followed by South Africa:

“For purposes of this article, ‘discriminate’ means give different treatment to different persons attributable only mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not

made subject or are granted privileges or advantages which are not granted to persons of another description” (article 17 (3)).

**South Africa** has model provisions which take holistic advantage of the *or other status* clause of the UDHR. Article 9 (3) on non-discrimination takes critical account of children, women and other potentially excluded groups:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

The inclusion of both sex and gender within the South African Constitution connotes the desire of the State to eliminate discrimination against women and girls on the basis of both their biological and perceived status within society. This means that the existence of pervasive forms of gender stereotyping and traditional roles for the sexes cannot be an excuse for depriving women and girls of equal protection before the law. Additionally, the inclusion of pregnancy, age and birth as grounds for non-discrimination further reflects an attempt on the part of the State to ensure respect for the reproductive status of women and girls, whereas those on age and birth seek to protect all categories of children and youth.

In line with the need to support traditionally excluded groups, constitutions could also have express clauses that permit positive discrimination or affirmative action under special circumstances. In India, for example, the State is constitutionally empowered to make special provisions for women and children and for the advancement of any socially and educationally disadvantaged classes of citizens or for the Scheduled Castes and Tribes<sup>176</sup> within its non-discrimination clause.<sup>177</sup> In Ghana, a similar clause is being used as the constitutional justification for the attainment of gender parity in education. The government is enabled by article 17 (4) “to implement policies and

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<sup>176</sup> Similar provisions are contained in article 22 (4) of the Constitution of Pakistan.

<sup>177</sup> Part III, article 15 (3) and 10 (4).

programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society.”

Equal Protection clauses lend complementary support to provisions on non-discrimination. Equal protection can cover equal access to social services and equal opportunities for participation. Some states also express this in relation to the law. The provisions of the Constitution of Iraq state, for instance, that “Iraqis are equal before the law without discrimination because of sex, ethnicity, nationality, origin, colour, religion, sect, belief, opinion or social or economic status.”<sup>178</sup>

## 2.2 Principle 2: Inalienability, Indivisibility and Interdependency

The principles of inalienability, indivisibility and interdependency afford States the opportunity to create a “basket of rights” that incorporates those enshrined in human rights conventions, declarations and commitments. This basket should include the broad range of civil and political rights, and economic, social and cultural rights afforded by these treaties and required for the proper and harmonious development of the individual. As such these rights immensely impact the rights of the child. This is manifest in the following two ways:

1. *As a collective*, human rights treaties while unique in their purpose and direction, are also interrelated to and interdependent on each other. For example, the CRC and CEDAW are separate instruments, but are nonetheless linked by virtue of the impact they both have on specific groups, such as the girl child, pregnant women and nursing mothers. For purposes of this handbook, the process of using the broad spectrum of human rights instruments for the formulation of constitutional provisions may be referred to as the *inter-convention approach*.
2. *As separate instruments in themselves*, the provisions contained within them are also deeply connected to each other, to the extent that recognising and fulfilling one and neglecting

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<sup>178</sup> Article 14.



another would result in a distortion of implementation of that particular treaty. For instance, denying the child the right to birth registration as contained in article 7 of the CRC could affect the child's right to education as set out under articles 28 and 29. For purposes of this handbook, the process of using the broad spectrum of provisions within a particular human rights instrument for the formulation of constitutional provisions may be referred to as the *intra-convention approach*.

The combined effect of both approaches would result in the identification of the following four key areas around which constitutional provisions may be formulated:<sup>179</sup>

- Civil and political rights
- Economic, Social and Cultural Rights
- The Rights of Women
- The Rights of Children

The ensuing will focus on the first three, as “children’s rights” are covered separately under part 3 of this chapter.

### ***2.2.1 Civil and Political Rights***

The Covenant on Civil and Political Rights makes provision for the right to life, protection from torture or from cruel, inhuman or degrading treatment or punishment, protection from slavery and the slave trade, protection of personal liberty, the right to fair trial, respect for human dignity, and respect for general fundamental freedoms (freedoms of speech, thought, conscience, belief, assembly, association, information and movement). The Covenant allows for derogation of rights during periods of public emergency, but only under very restricted circumstances (see article 4). It also makes special reference to children in specific situations. For example, under article 6 (5), the death penalty cannot be imposed on children and pregnant women and under article 10(2)(b), “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” All these provisions are critical for ensuring the well-being of children and

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<sup>179</sup> These thematic areas have been chosen to meet the desired objectives of this Handbook. However, countries should expand or reduce based on local circumstances.

should therefore be incorporated into country constitutions to the greatest extent possible.

- Ireland, on the right to life: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right” (Article 40 (3) (iii)).
- Sweden, on the death penalty: “There shall be no capital punishment” (Article 4).
- South Africa, on the right to human dignity: “Everyone has the right to bodily and psychological integrity, which includes (a) the right to make decisions concerning reproduction” (Article 12 (2) (a)).
- Pakistan, on the abolition of slavery: “Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into Pakistan in any form” (Article 11 (1)).
- Ghana, on the protection of juveniles: “A juvenile offender who is kept in lawful custody or detention, shall be kept separately from an adult offender” (Article 15 (4)).

In some cases, children have to be protected from the civil and political activities of adults. The decision of the court in the Nigerian case of *Cheranci v Cheranci* presented below suggests that children can be protected from engagement in political activity where it is established that they will be vulnerable to abuse.

**Box 26: A Nigerian judicial case study on the interface between constitutional derogation and child-related legislation**

In the Nigerian case of *Cheranci v Cheranci*, [1960], NRNLR 24, Dahiru Cherananci had been prosecuted for inciting a child to participate in politics contrary to the provisions of the Northern Region, Children and Young Persons Law, 1958 (Part VIII), which prohibited children aged 15 and below from participating in political activity. The accused applied to the High Court Northern Region, by way of motion to have the provisions in question declared void, on grounds of being in derogation of the freedoms of expression, peaceful assembly, association and conscience guaranteed by the Constitution.

The Court held that a restriction upon a fundamental human right must, before it may be considered justifiable, (a) be necessary in the interest of public defense, public order, etc. and (b) must not be excessive or out of proportion to the object which it sought to achieve. It held this law to have passed the test. If juveniles are

allowed to take part in politics, their receptive and uncritical minds make them easy victims of thoughtless or unscrupulous people who wish to take advantage of their youth in order to indoctrinate them with a particular ideology before they are old enough to form their own opinions on the matter. Juveniles may be attracted to ideas that are presented in an interesting form; They have neither the experience nor the standards of comparison to enable them to fully discriminate. Their enthusiasms are easily aroused and their natural high spirits lead them to thoughtless excesses.

## **1. The Right to Identity**

The right to identity through birth registration and citizenship is an important component of civil and political rights and very pertinent to children because it ensures access to basic social services and minimises social exclusion.

### *Birth Registration*

#### **Box 27:**

##### **Article 24 of the Covenant on Civil and Political Rights notes that:**

“(1) Every child shall have, without any distinction as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State; (2) Every child shall be registered immediately after birth and shall have a name; (3) Every child has the right to acquire a nationality.”

##### **Article 7 of the CRC states that:**

“[T]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.”

Constitutional provisions on birth registration would positively impact a State’s provision of registration services by compelling relevant agencies to accelerate attainment of universal registration. General constitutional provisions with respect to discrimination as already discussed, would facilitate the review of legislation with clauses which discriminate against women and girls in the registration process. Brazil and Uganda are among very few countries with constitutional provisions on birth registration. Each of them places an obligation on the State to fulfill this right and in the case of Brazil, to provide this free of charge where necessary. The Constitution of Uganda states that “[t]he State shall register every birth, marriage and death occurring in Uganda” (Article 18). Similarly, the Constitution of Brazil contains the

following provision: “The State provides free birth registration to those who are acknowledged to be poor” (Section LXXVI).

### *Citizenship*

Based on global experience, the following section presents the possible ways by which citizenship or nationality may be acquired:

Citizenship by birth: Children born within or outside the country may become a citizen where either parents or grandparents *is* or *was* a citizen.<sup>180</sup>

Citizenship by registration: The Registration of different categories of persons as citizens: (i) a married partner of a citizen may register as a citizen upon fulfillment of specific legal requirements, (ii) persons born within the State, neither of whose parents or grandparents is a citizen and (iii) a migrant, who has spent a specified number of years within the State.

Presumption of citizenship: A child found within the jurisdiction of unknown parentage can be presumed to be a citizen.

Citizenship by adoption: A child,<sup>181</sup> neither of whose parents is a citizen of the State, but is adopted by a citizen of the State can, by virtue of that adoption, become a citizen.

Citizenship by naturalization: A non-citizen may apply to be a citizen through naturalization upon meeting specific requirements (for example, residence over a period of time and good behaviour).

Foreigners and stateless persons: Foreigners and stateless persons who are in the country on legal grounds can enjoy the same rights and freedoms and also bear the same duties as citizens.

The presumption of citizenship is a unique child protection provision, which serves to support children affected by conflicts. States are,

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<sup>180</sup> In Brazil, citizenship by birth to foreign parents is also possible, provided they are not in the service of their country of origin.

<sup>181</sup> Limited to children below 16 years of age in the case of Ghana (article 6 (4)) and below 18 years of age in Uganda (article 11 (2)).

however, encouraged to integrate the full range of options provided to minimise opportunities for exclusion of marginalized children. The Botswana case of Unity Dow vs. Attorney General, already cited, demonstrates the reality pertaining in some countries, of overlooking constitutional provisions in the formulation of legislation on citizenship. It presents a classic test case on the interface between constitutions, gender, children's rights and citizenship legislation.

**Box 28: In this case, Unity Dow challenged the Citizenship (Amendment) Act of 1984 which provided among other things that:**<sup>182</sup>

“4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth:

- a. his father was a citizen of Botswana; or
- b. in the case of a person born out of wedlock, his mother was a citizen of Botswana

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

- a) his father was a citizen of Botswana;
- b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

5. (1) A person born outside Botswana shall be a citizen of Botswana by descent, if at the time of his birth;

his father was a citizen of Botswana

in the case of a person born outside wedlock, this mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.”

Among other things, Unity Dow questioned the constitutionality of the above provisions by advancing the following arguments, among others:

- That section 4 (1) of the Citizenship Act precluded her from passing citizenship to her two children on grounds of sex.
- That she was prejudiced by the discriminatory effect of the law given that her children were aliens though born in her native country (Botswana) and thus enjoyed limited rights and legal protections.
- The discriminatory effect of Sections 4 and 5 is in conflict with Section 3 (a) of the Constitution of the Republic of Botswana.
- Section 13 of the Citizenship Act only makes special provision for application for naturalization by a woman married to Botswana citizen men and no such special provision exists for foreign husbands of Botswana citizen women.
- That she was desirous of being afforded the same protection of law as a male Botswana citizen and in this regard, desirous that her children be accorded Botswana citizenship and that her spouse be in a position to

<sup>182</sup> Summarised from *Unity Dow v. Attorney General of the Republic of Botswana*; found in *Court Documents, Judgements Cases and Materials*, edited by Unity Dow (1995).

make application for Botswana citizenship, should he so wish as provided for under Section 13 of the Citizenship Act.

- Furthermore Sections 4 and 5 [and 13] relegated her, by reason of being female to the status of a child or an idiot and that the cited sections are in contradiction of section 7 of the Constitution of the Republic of Botswana insofar as they subject her to degrading treatment.”

By referring to both local statutes and international treaties (for example, CEDAW, the CRC, the UNDHHR and the African Charter on Human and Peoples Rights), both the High Court and Court of Appeal (the highest court) found among other things that the Act discriminated against women and therefore was inconsistent with the Constitution.

### 2.2.2 *Economic, Social and Cultural Rights*

Closely linked to civil and political rights are economic, social and cultural rights, which are critical for the survival and development of the child. The Covenant on Economic, Social and Cultural Rights provides general guidance to States on material issues to consider in the formulation of provisions on economic, social and cultural rights.

**Box 29: Critical areas of concern expressed in the CESCR include:**

- Protection and assistance to the family as the basic unit of society and responsibility for the care and education of the child (Article 10 (1)).
- Social protection measures for mothers during, before and after pregnancy (Article 10 (2)).
- Protection of children and young persons from economic and social exploitation (Article 10 (3)).
- Provision of social protection in the areas of adequate standard of living (including food, housing and clothing) (Article 11(1)), the right to the highest attainable standard of physical and mental health (Article 12), and the right to education (Article 13).

Brazil’s constitutional provisions on economic, social and cultural rights have been formulated within the context of social protection. Within the public sector, social protection is a policy framework that fosters support for vulnerable and excluded groups such as ethnic minorities, the disabled and rural communities. This ensures inclusion, and makes exclusion of special groups of children a constitutional violation, thereby strengthening the principle of universality and non-discrimination. Social protection is increasingly becoming the most

effective way of protecting vulnerable groups from shocks and risks (for example, illness and natural disasters).

Brazil serves as an example of a country with an elaborate social protection programme founded on the Constitution. From its chapter on Social Rights (chapter II), “education, health, work, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth by this Constitution.” Some of the social protection clauses include maternity and paternity leave, free assistance for children and dependants from birth to six years of age, day care centres and pre-school facilities, prohibition of night, dangerous or unhealthy work for minors under 18 years of age and of any work for minors under 14 years of age except as an apprentice. Under a special chapter on the Family, Adolescents and the Elderly, the Brazilian Constitution also places an obligation on the family, society and the State to ensure children and adolescents are given priority: “the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression” (article 227).

The Covenant also sets out provisions on cultural rights within the broad context of cultural life and scientific progress (article 15). Countries beset by problems of harmful traditional practices should not feel restricted from providing appropriate constitutional provisions to deter such practices under this umbrella.

### **2.2.3 *Women's Rights***

Specific provisions on non-discrimination on the basis of gender as already discussed, would pave the way for specific legislative and policy reforms in line with CEDAW. In accord with the principle of interdependency of human rights treaties, the linkages between women and children can be underscored through relevant provisions such as those pertaining to the right to health. However, while upholding the principle of interdependency will be necessary, ensuring that specific provisions are included to advance the political, economic, social and cultural rights of women as a distinct group will be imperative. This approach would result in a holistic expression of

women's rights as the letter and spirit of CEDAW demand. In its preamble, CEDAW gives expression to the important role of women in "the welfare of the family" and in particular, the "the social significance of maternity." In so doing, however, it acknowledges that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women." This suggests that constitutional provisions reinforcing the maternal roles of women alone will not suffice and that States, must move towards a more holistic approach to addressing women's rights within their respective Constitutions.

**Box 30(a): Examples of provisions which demonstrate the complementarity between CEDAW and the CRC**

- Ghana: "Special care shall be accorded to mothers during a reasonable period before and after childbirth; and during those periods, working mothers shall be accorded paid leave."
- Ghana: "Facilities shall be provided for the care of children below school-going age to enable women, who have the traditional care of children, realise their full potential" (Article 27 (1) and (2)).<sup>183</sup>

**Box 30(b): Examples of Specific Provisions on Women's Rights without Reference to Children**

- Uganda: "Women shall have the right to equal treatment with men in all aspects of political, economic and social life" (Article 33 (4)).
- Ghana: "[T]he State shall take steps so as to ensure the full integration of women into the mainstream of economic development" (Article 36(6)).
- Kenya has also taken advantage of its recent constitutional review to accord more economic (for example, access to land) and political rights to women.<sup>184</sup>

Clauses that may result in the perpetuation of discrimination or uncertainty in interpretation, as the case may be, should be removed or excluded. In Pakistan, for instance, sex discrimination in appointments in the service of the country is not permissible. However, "specified posts or services may be reserved for a member of either sex if such

<sup>183</sup> Duncan has criticized the inclusion of the phrase "women, who have the traditional care of children," in a study on Women and Agriculture (2004, sponsored by Freidrich Erbert and Stiftung and the Federation of International Women Lawyers), suggesting that the provision perpetuates the perception that childcare is a role strictly reserved for women. This is contrary to commitments made at the 1994 Cairo conference on population and development, during which childcare was categorized as a joint responsibility between men and women.

<sup>184</sup> For instance, the draft constitution introduced a Mixed Member Proportional system, requiring that 50% of "top-up" members be women and also ensures fair representation of women in the second legislative chamber and in district and local councils. See the Report of the Constitution of Kenya Review Commission (short version, p. 16, 2002).



posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex” (Article 27 (1)). Such a provision may result in acts of direct or indirect discrimination against women.

#### ***2.2.4 Constitutional Redress in Cases of Violations of Fundamental Human Rights***

##### **1. Redress in matters of a civil and political nature**

The case of *Unity Dow*, cited above, demonstrates that it is possible to address constitutional violations of rights through due process. Remedies can be made available to victims of such violations and additional provisions made for expeditious execution of due process to prevent further violations. The following constitute examples of remedies appropriate in constitutional cases:

1. *Habeas corpus*: to produce the body of a victim
2. *Certiorari*: to overturn the decisions of a person or body
3. *Mandamus*: to compel a person or body to perform its functions
4. *Prohibition*: to prevent a person or body from breaking the law
5. *Quo warranto*: to maintain the status quo
6. *Declaration*: an explicit formal pronouncement by the court on the issue in question

Ghana, India, Ireland, Nigeria, South Africa, Timor-Leste, Uganda and Ukraine are examples of States with specific constitutional provisions that allow individuals or group of persons (for example, interest groups) to seek redress in a court of competent jurisdiction on the ground of actual or potential violation of a fundamental human right. In South Africa, for instance, it is possible under article 38 for:

1. anyone acting in their own interest;
2. anyone acting on behalf of another person who cannot act in their own name;
3. anyone acting as a member of, or in the interest of, a group or class of persons;
4. anyone acting in the public interest; and
5. an association acting in the interest if its members.

Fundamental Human Rights are to be interpreted in accordance with the Universal Declaration of Human Rights (Timor-Leste, section 23). In seeking judicial redress, insufficient economic means cannot be used as an excuse or the denial of justice (See Constitution of Timor-Leste, section 26 (2)).

These provisions make it possible for individuals or groups of persons to initiate action within an appropriate legal forum for the purposes of correcting an abuse of the constitution. It must be noted, however, that constitutional cases in relation to the rights of children have generally not been common. South Africa appears to be an example of a country with progressive constitutional judicial reforms in favour of children. It is hoped that this Handbook and other materials on human rights law would contribute to changing this state of affairs.

## **2. Redress in matters of a social, economic and cultural nature**

Although many States have incorporated social, economic and cultural rights in their constitutions' Bills of Rights or separate sections on Fundamental Human Rights, issues of justiciability and enforcement have been less clear. This may have been the reasoning behind article 2 (1) of the International Covenant on Economic, Social and Cultural Rights which states that "[e]ach State Party...undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant."<sup>185</sup>

However, after 40 years of global operation of this Covenant and an almost equal period of international assistance and cooperation, an evolution of the application of this principle appears to be taking place under the auspices of the UN Committee on the Covenant of Economic, Social and Cultural Rights.<sup>186</sup> The Committee has considered the question of justiciability in connection with the role of

<sup>185</sup> See article 4 of the CRC for similar provisions.

<sup>186</sup> The beginning of this analysis, including the extract in Box 3, is to be credited to *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*, produced by the Office of the High Commissioner for Human rights in collaboration with the International Bar Association, Professional Training Series No. 9 (2003).

legal remedies in its General Comment No. 9. Although it considers that “the right to an effective remedy need not be interpreted as always requiring a judicial remedy” and that “administrative remedies will, in many cases, be adequate,” it is also of the view that “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”

In this General Comment, the Committee regrets that, in contrast to civil and political rights, the “assumption is too often made” that judicial remedies are not essential with regard to violations of economic, social and cultural rights, although “this discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.” The Committee notes that it has already made clear “that it considers many of the provisions in the Covenant to be capable of immediate implementation,” for instance, articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3). These provisions, which the Committee cites by way of example, contain rights in relation to children:

1. 1. The right of children and young people to special measure of protection and assistance, to be taken without discrimination (article 10 (3));
2. 2. The right to free compulsory primary education for all (article 13 (2) (a)) and;
3. 3. The right of parents or legal guardians to choose for their children, schools other than public schools to ensure religious and moral education in conformity with their convictions (article 13 (3)).

The Committee considers that “it is important to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by the courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right, which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the various branches of government must be respected, it is appropriate to

acknowledge that courts are generally already involved in a considerable range of matters, which have important resource applications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”<sup>187</sup>

These important observations demonstrate that interpretation of the enforcement of social, economic and cultural rights is evolving and that countries need to take note of emerging international guidelines.<sup>188</sup> Kenya took advantage of its recent constitutional review to remove the perceived rift between civil and political rights and economic, social and cultural rights within its former constitutional provisions. By making extensive reference to the General Comment of the Committee, the Constitutional Commission expressed the view that there was no hierarchy of rights with some being more important than others.<sup>189</sup> Kenya also recognised the existence of new international procedures for enforcing human rights that would need to be reflected in the new Constitution as well as corresponding institutions to oversee their enforcement.<sup>190</sup>

### 2.3 Principle 3: Accountability

During constitutional formulations and reviews it is important for stakeholders to agree on what mechanisms will be used to hold governments accountable to their constitutional obligations. In addition to other criteria, countries could consider the following:

- Commitment to international law
- Commitment to good governance
- Duties and responsibilities of the individual, family and society

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<sup>187</sup> *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*, produced by the Office of the High Commissioner for Human rights in collaboration with the International Bar Association, Professional Training Series No. 9 (2003), p. 707-710.

<sup>188</sup> Mosikatsana (supra) asserts that judicial constitutional developments in South Africa may not rule out such a possibility in South Africa (see footnote 63).

<sup>189</sup> Report on the Constitution of Kenya Review Commission (short version), (2002), p. 30.

<sup>190</sup> Ibid. p. 29.

### 2.3.1 *Commitment to International Law*

Constitutions should indicate the relationship between international law and domestic law and at which stage of the legal process the former becomes integrated into the latter. The introduction to this Handbook has shown that the monist and dualist approaches are the principle means by which States with civil and common law traditions have expressed the interface between international law and domestic law. In addition to these broad distinctions, it is also important to recognise how constitutional monarchies incorporate international law into domestic law, when such an approach differs from the two that have already been outlined. Below is an overview of the constitutional provisions of some countries:

#### 1. Examples of the monist approach

**Ukraine:** “International treaties that are in force, agreed to be binding by the *Vekhovna Rada* of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine” (Article 9).

**Timor-Leste:** “The legal system of Timor-Leste shall adopt the general or customary principles of international law. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of Timor-Leste following their approval, ratification or accession by the respective competent organs and after publication in the official gazette. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system shall be invalid. The state also recognizes the application of customary international law in matters of child protection” (Section 18 (2)).

**Venezuela:** “The Convention on the Rights of the Child is thus incorporated into the national law at the highest level, as part of the Constitution” (Article 78).<sup>191</sup>

#### 2. Examples of the dualist approach

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<sup>191</sup> This is contained under its special provisions for children.

**Ghana:** “A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by (a) Act of Parliament; or (b) A resolution of Parliament supported by the votes of not more than one-half of the all the members of Parliament” (Article 75 (2)).

**Ireland:** “(1) Every International agreement to which the State becomes party shall be laid before Dail Eireann. (2) The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dail Eireann. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas” (Article 29 (5) and (6)) (Similarly, in the Russian Federation, before an international treaty is ratified by the State Duma, the constitutionality of the treaty must be determined by the Constitutional Court.)

For countries such as Timor-Leste, Ukraine and Venezuela the monist approach represents an opportunity to begin enforcement of international human rights law once ratified. Further parliamentary and legislative interventions would be important but not a *sine qua non* to CRC implementation. Venezuela’s explicit reference to the CRC is particularly unique and worthy of consideration during future constitutional reform initiatives.

### **3. Constitutional Monarchies**

An analysis of the considerations that pertain to constitutional monarchical jurisdictions generally results in a blend of the dualist and monist approaches. The general practice is that a treaty obligation once ratified becomes part of the domestic law of the State, unless the treaty in question requires the passage of domestic law for purposes of giving effect to the treaty.

The general rule in most constitutional monarchies, such as the Canada, Monaco and the United Kingdom, is that treaty-making power is vested in the Crown. In Canada,<sup>192</sup> this is executed through

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<sup>192</sup> An explanation of the Canadian example was extracted from Dupras, Daniel, Government of Canada, Law and Government Division, Depository Services Programme (2006) in an article entitled: “International Treaties Canadian Practice.”

the federal executive branch of government as the Crown's representative. Although the Governor in Council (Cabinet) retains final effective control over the ratification of treaties, it may appoint any person it wishes to negotiate and sign them. Apart from the Prime Minister, these persons are usually the ministers, deputy ministers, diplomatic representatives or negotiators of the Canadian government. A treaty entered into and signed for and on behalf of Canada by a representative of the Government of Canada and subsequently approved by the Governor in Council is binding on Canada. Approval usually takes the form of an order in council. Furthermore, the Governor in Council may approve the text of an international treaty that has not yet been signed and designate a representative of the Government of Canada to sign it on behalf of Canada. However, where amendments must be made to Canadian legislation in order for a treaty to be implemented, the ministers concerned give instructions for an implementation bill to be drafted. After receiving Cabinet approval, the bill is tabled in Parliament and goes through the parliamentary legislative process.

In the case of *Attorney General for Canada vs. Attorney General for Ontario* [1937] AC 326, the court made the following important observation about the linkage between international treaties and domestic law: "Within the British Empire, there is well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law requires legislative action. Ratification of a treaty alone does not give it the force of law."<sup>193</sup>

### 2.3.2 *Commitment to Good Governance*

The office of the UN High Commission for Human Rights has established an inseparable link between good governance and the enforcement of human rights. It defines governance as "the process by which public institutions conduct public affairs, manage public resources and guarantee the realization of human rights. Good governance accomplishes this in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of

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<sup>193</sup> For the full text, see the judgment of Lord Atkin. p. 347.

‘good’ governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.”<sup>194</sup>

There ought to be commitment to good governance if constitutions are to be effective frameworks for the implementation of human rights, including the rights of children. This can be expressed through the effective and efficient running of the three arms of government, namely the executive, legislature and judiciary. The executive has the responsibility for all actions of government through Ministries, Departments and Agencies. It also has the function of drafting and proposing legislation and setting the budget and implementation of activities, once the budget has been approved. In addition to approving the budget, the main function of the Legislature is to consider legislation proposed by the executive branch and to pass it into law. The main function of the Judiciary is to administer the law. While each branch of government has its specific function, in most democracies these functions often overlap. For instance, as the Handbook as already shown, under common law jurisdictions, the judiciary plays a key role in the development of the law through interpretation. There are also overlaps between the executive and legislative branches in the Parliamentary system, because the chief Executive (the Prime Minister) is also part of the legislature.

In addition to the key organs of government, some countries have established specialised independent institutions under their respective constitutions that are responsible for monitoring the overall implementation of the constitution in favour of children. Such bodies are also needed to ensure implementation of human rights treaties and timely submission of country reports to relevant treaty committees. Country constitutional provisions demonstrate the existence of a broad array of such bodies.

- **Councils of State:** Available in Ghana, Ireland and Nigeria with the mandate to advise the President in the performance of his or her functions.
- **Commissions on Human Rights and Administrative Justice:**<sup>195</sup> Available in Ghana, South Africa, Timor-Leste and

<sup>194</sup> UNOHCHR (1996-2002) Human Rights in Development.

<sup>195</sup> Function summarized from article 52 of the Constitution of Uganda. The provisions of the South African Constitution permit its Human Rights Commission to require relevant organs



Uganda, with the mandate to investigate, at its own initiative or in response to a complaint made by any person or group of persons a violation of any human right; visit jails, prisons and places of detention to assess conditions of inmates; recommend to Parliament effective measures to promote human rights; human rights education among the general populace and monitoring of overall Government compliance with international treaty obligations.

- **National Primary Education Commission:** Available in Nigeria, with the mandate to prescribe the minimum standards of primary education, advise Federal government on the financing of primary education and integrate master plans for a balanced and coordinated development of primary education in Nigeria (Article J (24)).
- **National Commission on Civic Education:** Peculiar to Ghana, with the mandate to create awareness on the provisions of the Constitution and rights and duties of the citizenry (article 233).<sup>196</sup>
- **Commission for Gender Equality:** Peculiar to South Africa, with the mandate to promote respect for gender equality and the protection, development and attainment of gender equality (Article 187). This serves as an additional institutional framework for the monitoring and implementation of the MDGs.

### 2.3.3 *Duties and Responsibilities of the Individual, Family and Society*

Individuals, the family, society and the State should be made responsible for the full implementation of their constitutions in favour of children. Express provisions are therefore to be made which place an obligation on all duty bearers to perform their roles and responsibilities as outlined in the supreme law. The Constitution of Nigeria (Article 24) and the Constitution of India (Article 51) possess

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of State “to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment” on an annual basis (Article 184 (3)).

<sup>196</sup> The Commission has created civic clubs in several second cycle institutions in Ghana, with a view to inculcating a sense of responsibility among children and awareness of their rights, including those enshrined in the CRC.

elaborate provisions on all aspects of national life. Broadly speaking, they can be classified under the categories of duties towards self, the environment, State and society. The eleventh fundamental duty of the Indian Constitution states that a parent or guardian is “to provide opportunities for the education of his child or, as the case may be, ward between the age of six and fourteen years” (added by the 86<sup>th</sup> constitutional amendment in 2002). The Constitutions of Ukraine and Cambodia contain further provisions on the duty of children towards society and their parents. Ukraine, however, limits this to adults towards children whereas no age limit is set in the case of Cambodia.<sup>197</sup>

## 2.4 Principle 4: Participation

For purposes of this section, participation is defined as the process by which individuals and groups are provided with the necessary tools to take part in the political, economic, social and cultural affairs and activities of the State. All of the issues discussed under the principles of universality, indivisibility and accountability are essential to creating an enabling environment for effective participation to take place. The right to vote (essential for good governance, as discussed above) is key to participation. Mention could be made of the right of association (for example, the right to join a trade union) and the right to move freely. The Covenant on Civil and Political Rights contains essential provisions linked to the right to participation.

### **Box 31: Relevant provisions on the right to participation in the CCPR**

Article 19: The right to hold opinions without interference, freedom of expression (including freedom to seek, receive and impart information)

Article 21: The right to peaceful assembly

Article 22: The right to freedom of association with others, including the right to form and join trade unions

Article 25: The right to take part in the conduct of public affairs, to vote and to be elected and to have access on general terms of equality, to public service

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<sup>197</sup> Leaving such provisions open-ended could result in the perpetuation of exploitation within the domestic environment.

## Part 3 SPECIFIC CONSTITUTIONAL PROVISIONS IN FAVOUR OF CHILDREN

According to UNICEF, well over 20 national constitutions possess the characteristic of “child rights” constitutions, with provisions dedicated to the protection of the rights of the child.<sup>198</sup> It would be reasonable to assume that the existence of a reference to the rights of the child is an indication that the CRC has had at least some impact, especially in constitutions adopted since 1989. However, the degree of penetration by the CRC in the text of each provision dealing with the rights of the child differs for each constitution. While some constitutions, such as that of Brazil, have elaborate provisions on the rights of the child, others, such as that of Thailand, have relatively brief provisions.<sup>199</sup>

The incorporation of special provisions on the rights of the child will follow the evolution of human rights law, starting with the more general (the International Bill of Rights) and later considering the more specific (for example, CEDAW in relation to women and the CRC in relation to children). States should therefore be encouraged to consider special clauses or chapters on children during future constitutional reforms. For guidance, reference is to be made to the principles and key thematic areas of specific child-related international norms already cited.

### 3.1 The Relationship between Specific and General Provisions

The relationship between specific and general provisions should be governed by the principles of the interdependency and indivisibility of rights. The two broad provisions should be seen as complementary and mutually supportive of each other through an application and

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<sup>198</sup> UNICEF, ‘Laying the Foundation for Children’s Rights’, Innocenti Insight (2005), p. 25. The report cites Andorra, Azerbaijan, Belarus, Brazil, Bulgaria, China, Congo, Croatia, Ecuador, Eritrea, Estonia, Germany, Ghana, Hungary, Ireland, Italy, Kyrgyz Republic, Lithuania, Macedonia, Mexico, Moldova, Mongolia, Mozambique, Paraguay, Peru, Portugal, Romania, Russian Federation, Rwanda, Senegal, Slovenia, South Korea, Spain, Uganda and Ukraine as examples of jurisdictions with such constitutional provisions on children; See p. 26.

<sup>199</sup> Ibid. p. 25-6.

interpretation that would ensure that children receive the maximum protection. Where a provision in one area affords greater protection, such provision should be used to correct the violation in question. Specific provisions on children should preferably be cited within the more general provisions on human rights. This approach would underscore the fact that children's rights are human rights, and can therefore draw on the remedies available for human rights violations. Where a country chooses to place its provisions regarding children's rights within another section or as a separate section, care must be taken to use words and phrases that would readily place them within the context of human rights and fully integrate them into the larger document. This would ensure that specific provisions are not perceived as mere appendages to the constitution.

The following checklist must be used when formulating a Children's Bill of Rights or Charter:

- Does it follow the key principles of the CRC?
- Can it serve as the basis for future legislative reform?
- Is it consistent with the general content of the constitution?
- Did children participate in its formulation?

### **3.2 Definition and Legal Status of the Child**

The CRC provides States Parties with an opportunity to define "child" within their respective Constitutions. Article 1 states that "For the purposes of this present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier." In applying this provision, States should not peg the legal age at too low a level as this could expose children to situations of vulnerability or harm, such as early marriage and undue exposure to the criminal justice system. For this reason, the age of 18 is to be preferred in line with other international standards such as the Optional Protocol to the CRC on Children in Armed Conflict. This should not, however, prevent a country from stipulating lower ages with respect to employment and definition of a juvenile, in line with international treaty obligations. Below is a brief analysis of how some countries have treated definition of child within their respective constitutions.

- **South Africa** and **Ghana** define ‘child’ to mean “a person under the age of 18 years” (Article 28 (3) in the case of the Constitution of South Africa; and Article 28 (5) in the case of the Constitution of Ghana).
- For purposes of protection from child labour, **Uganda**, defines a ‘child’ to mean “persons under the age of sixteen years” (Article 34 (4) and (5)).
- The interpretation section of the Constitution of **Nigeria**, however, moves beyond age as a criterion for defining a child to categories of children. ‘Child,’ therefore, “includes a step-child, a lawfully adopted child, a child born out of wedlock and any child to whom any individual stands in place of a parent” (see Section 19 of the fifth Schedule). The Nigerian example is a reflection of values and traditions accorded to children of different categories and the all-inclusive nature of the African concept of childhood.

### 3.3 Application of the Principles of the CRC

This subsection deals with the application of the principles of the CRC already outlined above to the formulation of constitutional provisions.

#### 3.3.1 *Principle 1: Non-discrimination*

As it is likely that a non-discrimination clause would have already been incorporated into the general provisions, specific provisions may focus on a limited range of situations or categories of exclusion. Stakeholders are to agree on the category of children to be provided for. Given the high potential for exclusion resulting from the impact of HIV/AIDS and war, countries may consider special protection for orphans. Additionally, the stigma accorded to children born out of wedlock leaves room for consideration of provision for such children. Children of minorities are another example. The Handbook provides case studies on provisions made with respect to orphans.

**Box 32: Special provision on orphans: Case studies from Uganda, Ireland, Ukraine and Brazil**

- Uganda: “The law shall accord special protection to orphans and other vulnerable children” (Article 34 (7)).
- Ireland: “[The law shall] safeguard special care, the economic interests of the weaker sections of the community, and where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged.”

Brazil provides for a process by which families are encouraged to foster children through various forms of incentives such as tax rebates and subsidies. Its relevant provision states that “government fostering, by means of legal assistance, tax incentives and subsidies, as provided by law, of the protection, through guardianship, of orphaned or abandoned children or adolescents” (Article 227 (V)). These incentives as stipulated, serve as a disincentive to institutionalization of children in need of special care and protection and a promotion of family environment placements.

The following are case studies on the constitutional treatment of children born outside wedlock.

Express provisions in favour of children born outside wedlock exist in some texts. This has been inspired by article 25 (2) of the UDHR, which states that “all children, whether born in or out of wedlock, shall enjoy the same protection.” This provision seeks to remove discriminatory tendencies against children due to the circumstances of their birth or social origin.<sup>200</sup> Below is a summary of five country case studies on the treatment of children born outside wedlock within the context of constitutional law development in favour of children.

**Ethiopia:** “Children born out of wedlock shall have the same status and rights as children born in wedlock” (Section 36 (4)).

**Timor-Leste:** “Every child born in or outside wedlock shall enjoy the same rights and social protection” (Section 18 (3)).

**Brazil:** “Children born inside or outside wedlock or adopted shall have the same rights and qualifications, any discriminatory designation of their filiation being forbidden” (Section 227 (VII) (6)).

<sup>200</sup> In the case of *Fraser v Children’s Court*, the Constitutional Court of South Africa had occasion to rule that the legislative command in section 8 establishing equality between children born in wedlock and those born extramaritally, was binding and required the lawmaker to comply (*Mosikatsana (supra)*, 60).

**Ukraine:** “Children are equal in their rights regardless of their origin and whether they are born in or out of wedlock” (52 (a)).

**Ghana:** “Every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents” (Article 28 (1) (b)).

### 3.3.2 *Principle 2: The Best Interests of the Child*

Article 3 of the CRC on the best interests of the child is key to all aspects of constitutional law development and interpretation in favour of the child. The existence of such a provision provides a yardstick for all stakeholders to measure the appropriateness of their actions in favour of children. Therefore embodying this as a constitutional right is indispensable. Countries with specific chapters or clauses on the rights of the child tend to incorporate provisions on the best interests of the child. Notable examples include South Africa and Ethiopia.

- **South Africa:** “A child’s best interests are of paramount importance in every matter concerning the child” (Article 28 (2)).
- **Ethiopia:** “In all actions concerning children undertaken by public or private institutions of social welfare, courts of law, and administrative bodies, the primary consideration shall be the best interests of the child” (Article 36 (2)).

### 3.3.3 *Principle 3: The Right to Life, Survival, Development and Protection*

This principle covers a broad range of rights, such as the right to education, health, adequate nutrition and protection from violence. Inherent in the principle is the important role of the family in the provision of basic services and the protection of children. The subsection is thereby structured as follows:

- Access to basic social services and social protection
- The role of the family
- Protection from violence, abuse, neglect and exploitation

## **1. Access to basic social services and social protection**

To ensure the right of the child to survival and development, provisions are to be made to guarantee access to basic services. Given that detailed provisions would have been created under general provisions in relation to services such as education, health and nutrition, special provisions are to be brief, specific and focused on the special needs of children in the country.

For instance, under article 53 of its provisions on education, the Constitution of Ukraine provides for free pre-school education, although this is not provided for under the CRC. The implication of guaranteeing pre-school education as a constitutional right is to secure an early start in life for all children. In addition, where countries have low school enrolment, constitutionally guaranteeing pre-school would also assist in accelerating implementation of Education For All (EFA) goals as well as gender parity in education in favour of girls.

### **Box 33: The Constitution of South Africa**

The Constitution of South Africa spells out its social services programme to include basic nutrition shelter basic health care services<sup>201</sup> and social services (Article 28 (1) (c)). Some Constitutions prohibit depriving any child of “medical treatment, education and other social economic benefit by reasons of religious or other beliefs”. This is stated in these terms by Uganda (Article 34 (3)). Similar provisions have been framed by Ghana (Article 28 (4)) and are in response to bottlenecks encountered by States in the delivery of primary health care and formal education among specific communities and groups.

## **2. The role of the family**

In all countries, the family, as variously defined, serves as the front line for protection of the child. Yet in many countries, the breakdown of the family has either taken place or is imminent. Given its role in child protection, survival and development, the institution of the family must be safeguarded by specific provisions. Where possible, while emphasizing the role of the family, steps must also be taken to include provisions on the responsibility of parents and the community as building blocks for the creation of a protective environment. Below are

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<sup>201</sup> Kenya defines the right to health to include reproductive health care (Article 61(1) of the 2004 Draft Constitution).



country examples of constitutional provisions on the protection of the family.

- **Azerbaijan:** “The family as the foundation of society shall be under the special protection of the State. To take care of the children and their upbringing shall be the obligation of parents. The State shall see to it that this obligation is followed” (Article 17).
- **Ireland:** “The State recognises the Family as the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law (Article 41 (1)). The primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education for their children” (Article 42 (1)).
- **Uganda:** “Children possess a constitutional right to know, and be cared for by their natural parents or those entitled by law to bring them up” (Article 34 (1)).
- **Timor-Leste:** “recognises the special protection afforded to children by the family, community and State against all forms of abandonment, violence, oppression, sexual abuse and exploitation” (Section 18 (1)).
- **Ukraine:** “Parents are obliged to support their children until they attain the age of majority. The family, childhood, motherhood and fatherhood are under the protection of the State” (Article 51).

### **3. Protection from violence, abuse, neglect and exploitation**

The CRC, its two optional protocols and the ILO conventions listed above constitute compelling normative grounds for the inclusion of clauses on violence, abuse, neglect and exploitation within child-specific provisions of constitutions. The growing incidence of the use of children in armed conflict also requires definitive constitutional prohibition across all jurisdictions.

Broadly speaking, specific clauses could cover the following:

- Sexual and economic exploitation
- Involvement of children in armed conflict
- Juvenile justice administration.

#### **4. Sexual and economic exploitation: Case studies from South Africa, Ghana, Ethiopia, Ukraine and Iraq**

Article 28 (1) (d)-(f) of the Constitution of **South Africa** provides that: “Every child has the right ...(d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that (i) are appropriate for a persons of the child’s age or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development.”

Ghana (Article 28 (2)) and Ethiopia (Article 36 (d)) also include references to work, which is hazardous or harmful to his or her education, health or well-being. In the case of Ukraine, however, provisions on child labour have been integrated into constitutional provisions related to employment. This provision is unique in the sense that it links child and maternal labour together: “The employment of women and minors for work that is hazardous to their health is prohibited” (Article 43 (e)). Under its special clause on children, however, Ukraine has a much broader sub article, which states that “any violence against a child, or his or her exploitation, shall be prosecuted by law” (Article 52 (b)).

The Iraqi Constitution broadens the scope of location of violence to include “the family, school and society” (Article 29 (4)) and possesses a more categorical provision which proscribes “forced labour, slavery, commerce in slaves, the trading in women or children of the sex trade” (Article 35 (c)).

#### **5. Involvement of children in armed conflict: Case studies from South Africa, Kenya and Cambodia**

Constitutional provisions on children in armed conflict are limited. South Africa currently serves as one of the best examples of a State with constitutional provisions on children involved in armed conflict. According to Article 28 (1) (i), “every child has the right not to be used directly in armed conflict, and to be protected in times of armed conflict.” Through its recent constitutional review, the Constitution of Kenya Review Commission took full advantage of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict by including a prohibition within its Draft Bill of Rights against “the participation of children in hostilities or their recruitment into armed conflicts and their protection in such situations” (Article 40 (on children) (6) (h)). Cambodia has also integrated a provision on this within its special clause on children, by stipulating their protection during wartime (Article 48). Other constitutional provisions, such as those that deal with abuse, exploitation, neglect, detention and the best interests of the child, may also be used as references for the protection and prevention of the use of children in armed conflict.

**6. Juvenile justice administration: Case studies from Nigeria, Fiji, The Gambia, Uganda, Ethiopia, Ghana, South Africa and Brazil**

Children are entitled to protection under general provisions dealing with persons deprived of their liberty. Specific provisions on juvenile justice administration must however conform to the broad provisions of article 37 of the CRC on the subject of the treatment of juveniles. More specific standards such as the United Nations Minimum Standard Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines") and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty can be provided for under specific legislation. Case studies of various levels of juvenile justice provisions are presented below:

- **Nigeria:** protects juveniles accused or convicted of offences by ensuring that they are “kept in remand homes or reformatory centres and their treatment, including rehabilitation shall be the underlying principle of their custody” (Article 34 (8)).

- **Fiji, The Gambia, Uganda, Ethiopia and Ghana:** have common constitutional provisions on the separation of detained children from detained adults (Section 26 (6), Article 29 (3)), Article 34 (6), Article 36 (3) and Article 15 (4) respectively).
- **South Africa:** provides direction on the significant role of diversion in the system of juvenile justice administration, by making express reference to detention as a “measure of last resort” (Article 28 (1) (g)).
- **Brazil:** also has in place the following for consideration:
  - provisions which ensure that female prisoners are assured of “adequate conditions to stay with their children during the nursing period” (Article 5 (L)).
  - provisions on the “prevention and specialised treatment programmes for children and adolescents addicted to narcotics” (Article 227 VII).
  - Stipulation on the minimum age of criminal responsibility, stating that “[m]inors under eight years of age may not be held criminally liable, subject to the rules of special legislation” (Article 228).

Ethiopia is among the few to have made express provisions against corporal punishment (Article 36 (1) (e)) within the context of the rights of the child and extends this to “schools and other institutions responsible for the care of children.” Other States (for example, Ghana, Article 28 (3)) focus on “torture, or other cruel, inhuman or degrading treatment or punishment.” In the South African case of *State v Williams*, the Constitutional Court of South Africa contributed to the effort of bringing juvenile penal laws into conformity with international jurisprudence by declaring corporal punishment unconstitutional on the grounds that it is cruel, inhuman and degrading (Mosikatsana, 363).

#### ***3.3.4 Principle 4: Respect for the Views of the Child***

Allowing children to make their views known and heard in matters affecting them has yet to gain full acceptance across the globe. Given this general cultural and social limitation, constitutions could advance the cause of participation of children by including express provisions that require child participation. Children should be covered under the general provisions of civil and political rights, which expressly provide

for the rights to free expression, association and information. However, a provision on child participation in line with Article 12 of the CRC would provide States with the impetus to place this culturally sensitive issue in constitutional perspective. Article 12 (1) of the CRC states as follows: “States Parties shall assure to the child who is capable of forming his or own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

Expressions of the right to participation are rare within child specific provisions across countries. However, it would be worth mentioning how States have treated the issue under other provisions. Examples include case studies from Brazil and Uganda:

**Brazil:** under its provisions on “Political Rights,” has made an important inroad by including a constitutional provision which makes it possible for children aged between 16 and 18 years to exercise the constitutional option to vote (Article 14 II (c)).

**Uganda:** also makes special references to all-inclusive participation in national affairs by stipulating that “every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law” (Article 38 (1)). Minorities also have “a right to participate in decision-making processes and their views and interests shall be taken into account in the making of national plans and programmes” (Article 36).

Constitutional provisions in Nigeria (Article 55), which require that “the business of the National Assembly shall be conducted in English, Hausa, Igbo and Yoruba,” could be extended to the country’s Children’s Parliament to ensure effective and inclusive participation of the broad mass of children in national affairs.

Opportunities for child participation are also presented by constitutional reviews. Being the supreme law of the State, constitutions are generally perceived of as serious documents and the constitutional reviews preceding their promulgation as serious processes which cannot involve the participation of children. The 2002 Special Session on Children and other events have shown, however, that children have the capacity to make effective contributions towards

matters affecting their welfare, provided appropriate mechanisms are put in place. Another successful example of child participation comes from Timor-Leste. Children in that country made history when, in November 2001, over one hundred of them appeared before their country's Constituent Assembly with a request to pay attention to their rights. The children delivered a letter from the Working Group for Child Rights to the members of the Assembly, asking that the Constitution specifically refer to "the core rights of children," including the addition of guarantees of basic education and healthcare, and special assistance for vulnerable children. This resulted in the promulgation of a rights-based and child-centred Constitution.<sup>202</sup>

To facilitate the effective participation of children in such reviews, States could make use of existing child participation-related structures such as Children's Parliaments (for example, Cameroon, Nigeria and The Gambia), in-school clubs (for example, Ghana) or alternatively, through the creation of all inclusive National Children's Constitutional Review Commissions.

## **Part 4 POST-CONSTITUTIONAL REFORMS: THE NEXT STEPS**

The subsections above provide tools to consider the formulation of constitutions in a manner that reflects the concerns of children. Once constitutions have been formulated, the primary challenge becomes for States to ensure that these documents do not become symbolic gestures towards the citizenry but rather living tools towards the realisation of human rights.

Among post-constitutional reform measures to consider are 1) wide dissemination through appropriate means, 2) constitutional litigation and interpretation by the courts and 3) monitoring of implementation of constitutional provisions. These processes would involve a wide range of stakeholders with whom these milestones must be met.

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<sup>202</sup> South Africa and the Philippines provide additional examples.

## 4.1 Who Are the Stakeholders and What Should They Do for Children?

- **Judges:** Judges develop and interpret the law in favour of children, mindful of international treaty obligations. In the case of the United States as with many other common-law jurisdictions, the courts are the central points for the interpretation of the constitution. In the case of *Marbury vs. Madison*,<sup>203</sup> the US Supreme Court made the following fundamental observation: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>204</sup>
- **Lawyers:** Lawyers can provide constitutional and public interest litigation in favour of children, including legal aid in constitutional cases.
- **Parliament:** Parliament ensures that resources are made available for the prevention of constitutional violations and protection and redresses when they do occur. The legislature is also to be proactive in the identification of laws needed to give effect to constitutional provisions. Parliamentary sub-committees and private members are encouraged to spearhead passage of legislation and regulations to correct social anomalies affecting implementation of the CRC and CEDAW.
- **Legislative drafters:** Drafters ensure that legislation is worded in a manner that is faithful to the intent of constitutional provisions.
- **Governmental agencies working for children:** Sectors working for children are to familiarize themselves with constitutional provisions and ensure that obligations outlined with respect to their functions are fully met.
- **Civil Society Organizations:** These groups have a role in initiating dialogue for constitutional reforms.
- **Children:** Children should appreciate the constitutional provisions affecting their rights and make their views heard in matters affecting them as part of the constitutional process.
- **Teachers:** Teachers can instruct on issues of civic education and ensure that pupils and students become familiar with constitutional provisions.

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<sup>203</sup> Cited supra.

<sup>204</sup> Ibid. p. 175.

- **International Organisations:** Using national constitutions as frameworks for the provision of technical and financial support, international organisations can support the design and implementation of key national instruments (for example, UNDAF, PRSP's, Social Protection Strategies and legislation).

## 4.2 Wide Dissemination of the Constitution through Appropriate Means

Given the status of the constitution as the supreme law and the standard by which all actions of State and non-State actors are to be judged, it is critical to ensure that the document is disseminated by appropriate means. Widespread knowledge of the contents of constitutions and other legal frameworks increases their effectiveness. Uganda and Ukraine both have constitutional provisions that indicate that knowledge of the law is key to effective fulfillment of duties and responsibilities:

**Uganda:** “The State shall promote public awareness of this Constitution by:

- (a) translating it into Ugandan languages and disseminating it as widely as possible; and
- (b) providing for the teaching of the Constitution in all educational institutions and armed forces training institutions and regularly transmitting and publishing programmes through the media generally” (Article 4).

**Ukraine:** “Laws and other normative legal acts that determine the rights and duties of citizens, but that are not brought to the notice of the population by the procedure established by law, are not in force” (Article 57 (3)).

This suggests the need for a dissemination strategy that would ensure that the constitution is packaged to suit specific audiences.<sup>205</sup> In the case of rural communities, for instance, translating the constitution into local languages would serve their purpose, whereas in the case of

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<sup>205</sup> As an example, Ghana has succeeded in reducing its 1992 Constitution into a simplified pocket-sized version, being sold at vantage points (e.g. book shops and news paper stalls) at a subsidised price and is suitable for use by adults and children above 11 years.



children, countries could consider simplified or illustrated versions. Effective dissemination of country constitutions would be in line with the spirit of Article 42 of the CRC on the issue of State responsibility “to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

### 4.3 Constitutional Litigation and Interpretation

Public and private organisations and individuals are encouraged to pursue constitutional litigation in favour of women’s and children’s rights. This would promote the growth of the law and affirm the very existence of the constitution as a living document. Constitutional litigation within many jurisdictions commences in specially designated Constitutional Courts (for example, South Africa and the Russian Federation) or in regular Superior Courts of Judicature (usually assigned to a designated High Court, Court of Appeal or Supreme Court, as the case may be (as in Ghana, where the Supreme Court has sole jurisdiction for determining constitutional issues)).

Procedures adopted for filing constitutional cases will differ among States. Interested persons should examine the procedural rules applicable to ensure that their respective courts do not dismiss any case even before the substantive issues are heard. Lawyers (especially those well versed in constitutional litigation and human rights) are encouraged to provide legal aid, while the State should consider waiving filing fees, especially in cases which relate to causes of the indigent and other vulnerable groups such as children.

Child-related constitutional litigation should lead to the growth of constitutional law in their favour. The Courts (whether designated Constitutional Courts or not) play a primary role in interpretation, enforcement and implementation. Provisions from the Constitutions of the Russian Federation and Madagascar demonstrate the potent force of Constitutional Courts in ensuring constitutional compliance:

- **Russian Federation:** Article 125 empowers the Constitutional Court to declare laws (both federal and state) and presidential and governmental decrees inconsistent with the Constitution (i.e. they violate certain rights and freedoms of citizens

enumerated in and protected by the Constitution). In such situations the law becomes unenforceable and implementing agencies are thereby barred from applying it. The law may be submitted to the Constitutional Court by the President of Russia, the government of Russia, the State Duma, the Federation Council of Russia, one-fifth of members of the State Duma or the Federation Council, the Supreme Court of the Russian Federation or the Supreme Arbitration Court of the Russian Federation. In a similar vein, any Federal Court may request that the Constitutional Court determine the constitutionality of a law. Additionally, any private citizen may submit a claim to the Constitutional Court, challenging the constitutionality of a particular law.

- **Madagascar:** Article 118 grants jurisdiction to the Constitutional High Court to determine the constitutionality of treaties, laws (central and provincial) and ordinances. In the process, the Court is to manage constitutional conflicts between two or several Institutions of the State or between the State and one or more autonomous provinces or between two or several autonomous provinces.

The independence of the judiciary must be expressly stipulated in constitutions in order to ensure that the courts do not feel impeded by political or other factors in the exercise of their functions. Judges are to facilitate the realisation of human rights by referring to and applying relevant treaties on the subject in question. In other words, for judges to give effect to general and specific constitutional provisions affecting children, they must become familiar with the international human rights instruments and principles outlined above.

Judges could also refer to the following additional tools:

- Constitutional Commission Proposals (in relation to past and present Constitutions);
- UN Committee concluding observations and recommendations to States Parties;
- UN Committee General Comments; and

- Local and international judicial precedent.<sup>206</sup>

#### 4.4 *Monitoring of Implementation of Constitutional Provisions*

Monitoring of constitutional implementation is needed for two reasons: firstly, States need to ensure that the provisions are being applied. Secondly, it will provide stakeholders with a body of evidence-based information to justify future constitutional amendments. It would be advisable to proceed with this in a holistic fashion, as part of a broad framework for monitoring implementation of all legal standards and not just the constitution. This could be spearheaded by a government agency, with the mandate to undertake periodic reviews of laws, such as Law Reform Commissions or their equivalent.

Indicators for measuring the effectiveness of Constitutions would have to be agreed upon by stakeholders. The following may be considered key measurement points:

1. The number of times the Constitution is used as a reference point for issues affecting children by: Parliament (in debates, statements, comments, questions and proposals); Judiciary (in judgments (concurring and dissenting), obiter dicta and practice notes); The Executive (through Cabinet, Ministries, Agencies and Departments); Lawyers (constitutional cases initiated in favour of children); Schools (in curriculum development, teaching, debates and civic education) and teacher training institutions; Media (in reportage, dissemination and follow up); Children (for in-school and out of school activities); Civil Society Organizations (in monitoring and public interest litigation); The UN system (in the design of, Country Assistance Strategies, Common Country Assessments and UNDAF)
2. The number of references made to the constitution in State reports to the UN CRC Committee and other UN Committee Reports

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<sup>206</sup> The case of *Unity Dow* already used in text, presents a good example. Reference could also be made to the judgment of Lord Wright in the case of *James v Commonwealth of Australia*, [1936] AC 578, p. 613-614.

3. The number of capacity-building programmes on the constitution conducted
4. The number of professional and non-professional groups with knowledge of the constitution
5. The number of first-, second- and third-cycle institutions with aspects of the constitution integrated into their curricula
6. The existence, number and types of simplified versions of the Constitution and for which audiences

## **Part 5 CONCLUSIONS AND LESSONS LEARNED FROM CONSTITUTIONAL REFORM EXPERIENCES**

The following conclusions and lessons may be drawn from the above:

1. Constitutions are potent tools for the enforcement of human rights in favour of children. They set the tone, direction and priorities of government policy, statutory reform and budgeting required for CRC and CEDAW implementation. They serve as sustainable frameworks for the continuation of policies and programmes in favour of children, regardless of which party is in power. Short of military interventions and political expediency, civilian governments are generally bound to continue with the policies and programmes of previous regimes. In other words, constitutions do not change with change of governments unless accompanied by a legitimate constitutional review process. This allows for continuity and sustainability of major interventions and investments that have been made in favour of children.
2. Supremacy clauses in most constitutions create an opportunity to test the constitutionality of various acts and omissions spanning across political and civil rights, on the one hand, to economic, social and cultural rights on the other. States are to review clauses and policy directives on the non-justiciability of the second category of rights in line with Recommendation No.

9 of the UN Committee on the Covenant on Economic, Social and Cultural Rights.

3. Opportunities are presented by global human rights frameworks to make children the central subjects of both general human rights law and specific norms affecting children. This is to be done with the objective of locating the rights of the children within the context of human rights and ensuring that they are guaranteed holistic protection.
4. Best practices could be learned across jurisdictions. Examples are in relation to:
  - Recognising children as subjects of rights (for example, Venezuela);
  - Expanding the definition of the child to include orphans and children born out of wedlock (for example, Nigeria);
  - Protecting the family and keeping it sacrosanct in favour of children (for example, Ireland);
  - Providing for an array of basic services (for example, Brazil);
  - Recognising pre-school as a constitutional right (for example, Ukraine);
  - Protecting children from slavery and institutions similar to slavery (for example, The Gambia);
  - Protecting children born out of wedlock (for example, East Timor);
  - Protecting children from participation in armed conflict and those affected by it (for example, South Africa);
  - Ensuring birth registration (Brazil);
  - Protecting children in conflict with the law (for example, Ethiopia); and
  - Protecting orphans (for example, Uganda).
5. States are to invest in constitutional bodies which have been set up to protect the rights of children, with a view to making them effective tools of change in favour of children. This is to be done by enhancing their financial, technical and human resource capacities.

6. The existence of a national constitution in any country will require a pragmatic programme of social mobilization and sensitisation as would ensure widespread appreciation and understanding of its contents. A national intervention of this kind creates a window of opportunity for children, as citizens, to appreciate their rights and responsibilities under their respective constitutions. In some countries, for example Ghana, this has worked through existing in-school constitution clubs, the creation of constitutional games, the publication and dissemination of abridged versions of the constitution and the celebration of national constitutional week.
  
7. Constitutional review initiatives serve as opportunities for child participation in the law reform process through existing child participation structures or the creation of Child Constitution Review Commissions. The experience of Timor-Leste has shown that child participation can make a difference in ensuring that child-specific concerns are addressed during the review process. Experience in Kenya has demonstrated that constitutional reviews also serve as opportunities to affect change in the content of previous frameworks for the purpose of giving effect to international treaty obligations through broad participation. The constitutional review of that country witnessed the consideration of more elaborate provisions on human rights (Bill of Rights), citizenship<sup>207</sup> and the creation of a Commission on Human Rights and Administrative Justice to monitor implementation of human rights treaties.

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<sup>207</sup> Among the defects in the previous constitutional provisions on citizenship was the fact that it was gender discriminatory. A wife of a Kenyan man had the right to be a Kenyan, but not the husband of a Kenyan woman. Moreover, a child born of a Kenyan father outside the country automatically became a citizen, but the child of a Kenyan mother in the same situation did not (Constitution of Kenya Review Commission (2002), p. 26).

Constitutions used in the text:

1. Constitution Act of Canada (1982)
2. Constitution of Azerbaijan (1995)
3. Constitution of Cambodia (1993)
4. Constitution of Fiji (1998)
5. Constitution of France (1958, as amended)
6. Constitution of India (1950 as amended)
7. Constitution of Iraq (2005)
8. Constitution of Madagascar (1960)
9. Constitution of the Federal Republic of Nigeria (1999)
10. Constitution of the Islamic Republic of Pakistan (1973 as amended)
11. Constitution of the Republic of Brazil (1988)
12. Constitution of the Republic of Ghana (1992)
13. Constitution of the Republic of Ireland (1937, as amended)
14. Constitution of the Republic of Kenya (proposed, 2005)
15. Constitution of the Republic of South Africa (1996)
16. Constitution of the Republic of The Gambia (1997)
17. Constitution of the Republic of Ukraine (1996)
18. Constitution of the Russian Federation (1993)
19. Constitution of the United States of America (1787, as amended)
20. Constitution of Venezuela (1999)

## Chapter 4

# LEGISLATIVE REFORM FOR THE PROTECTION OF THE RIGHTS OF CHILD VICTIMS OF TRAFFICKING

Legislative reform in the area of trafficking is particularly complex because trafficking itself constitutes an elusive notion. The definition of trafficking revolves around multiple concepts, and their interpretation remains poorly defined and prone to confusion. First, trafficking activities are very diverse. Trafficked children mostly end up in unregulated sectors such as domestic labour or prostitution. They can be sold for adoption or marriage. As a consequence, its components may overlap with other elements. How can trafficking be differentiated from smuggling? What is the boundary between work and exploitation? The constantly changing nature and dynamics of trafficking add to the difficulty of grasping this reality. It is both an international and domestic phenomenon. While trafficking has been most visible at a global level when it involves the crossing of a border, it also occurs within a country's boundaries, making it even more difficult to detect. It affects developed and developing countries. Trafficking trends represent a very complex web of countries of origin, transit, and destination, in which the same country can belong to all three categories and one country can easily switch from one category to another over time. Likewise, new forms of trafficking keep emerging, requiring constant adaptation of responses. Yet, trafficking can and should be addressed through comprehensive legislative reform.

Legislative reform aiming to address child trafficking must encompass the many dimensions of this phenomenon and take into account the existence of child specific forms of trafficking. While most actors, especially governments, tend to focus on the elimination of trafficking, in particular through its criminalization, what matters from a child



rights perspective is primarily prevention as well as the protection of the rights of victims. Therefore, legislative reform must concentrate on the child's experiences and give primary consideration to the best interests of the child.

This may not necessarily require the creation of new laws. Reform of existing laws may ensure adequate protection for child victims, and also avoid differentiated treatment between child victims of exploitation and child victims of trafficking. Laws and institutions may already exist with respect to specific issues related to trafficking such as guardianship when the child is unaccompanied, refugee status, laws and enforcement mechanisms to address child labour, etc. However, it is important that the legal framework be properly equipped to address all situations of trafficking.

The approach to legislative reform in the area of trafficking varies from country to country. Provisions related to child trafficking may be included in one special law on trafficking or incorporated in other relevant codes or laws. For instance, the protection of victims as witnesses in a trial may be included in the criminal procedure code, and issues related to the victims' status addressed in immigration laws. Civil lawsuits, on the other hand, usually belong to civil law. Many States have considered it useful, for the sake of simplicity and consistency, to gather in one Act all the provisions related to victims, even if this Act modifies several other laws.

Regardless of the approach taken, legislative reform should focus not only on the drafting of the law, but also on measures to ensure effective implementation through the establishment of adequate structures, including the attribution of precise responsibilities to relevant actors and institutions.

This chapter will focus therefore on the rights of child victims and the legislative processes for protecting these rights, rather than on criminal/prosecution issues. It should be read in conjunction with UNICEF's Guidelines on the Protection of Child Victims of Trafficking.<sup>208</sup> Like other chapters of the Handbook, this chapter indicates the standards towards which one should aspire. Depending

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<sup>208</sup> Forthcoming.

on the level of development of a given country and the state of the rule of law, some recommendations presented here may be more difficult to implement than others. Examples featured were chosen because they constitute good practices on a specific issue.

While international treaties, due to their very nature, tend to focus on international aspects of, and responses to, child trafficking, they draw less attention to trafficking within State borders, is a serious problem in many countries. This type of trafficking is likely to be less visible than international trafficking and is sometimes socially accepted as a necessity, due to poverty. However, the legal framework of the State needs to address these situations and not limit itself to addressing cross-border trafficking. Definitions, guiding principles, rights of victims and prevention strategies are similar for both cross-border and internal trafficking, with the necessary adaptations to be made depending on the context. Wherever relevant, the chapter will allude to the specificity of internal trafficking.

## **Part 1    DEFINITIONS**

The definition of trafficking contains several elements that must be explored in order to ensure that law is comprehensive enough. A proper definition is important, as it may determine the status of a child as a victim and ensure a set of protection measures. It is also important from a criminal law perspective, as it forms the basis for prosecuting and sentencing traffickers. Consistent definitions in various countries, in particular within the same region, are crucial to ensure a common understanding of child trafficking and coordinate responses.

In many countries, laws intended to combat trafficking only tackle trafficking for the purpose of sexual exploitation. A broader definition is needed in order to ensure that all forms of trafficking are prevented. While international treaties that provide the basis for anti-trafficking laws deal primarily with international trafficking – involving the crossing of a border - national laws should also encompass trafficking within the State's territory.

## 1.1 General Definition

While many international treaties have tackled various aspects of trafficking, the first internationally agreed definition of trafficking is included in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, adopted in 2000 (Palermo Protocol), supplementing the UN Convention against Transnational Organized Crime. Since it is a binding instrument for governments which have ratified it, and contains an extensive definition of trafficking in persons, it can be used for advocacy and guidance. It has to be highlighted, however, that the Palermo Protocol is not a human rights treaty as such; it was adopted within the framework of the fight against organized crime. As a result, it should be considered along with human rights treaties to ensure the full protection of victims. Its definition of trafficking in persons is as follows:

- a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

The Protocol adds a specific definition of trafficking in children, which is even broader. While the general definition of trafficking requires the existence of a threat, use of force, other forms of coercion, including abuse of power, or a payment, the definition of trafficking in children suppresses this condition:

- c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered

"trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.

The rationale is twofold. On the one hand, it recognises the specific vulnerability of children. On the other hand, it ensures that no child victim is excluded from the protection framework offered by the Protocol.

**Box 34: The Anti-Trafficking in Persons Act in the Philippines**

The Anti-Trafficking in Persons Act of 2003 in the Philippines (Republic Act 9208) contains a definition of trafficking in persons and child trafficking that reflects virtually word for word the definition adopted in the Palermo Protocol. It goes even further by including persons over 18 who cannot fully protect themselves due to a physical or mental disability or condition in the definition of a child, thus giving access to increased protection.

While adopted in the context of the Convention on Transnational Organized Crime, the definition of the Palermo Protocol can apply to both internal and international trafficking. The adoption of a similar definition in the national legal framework should include the internal dimension and not be conditional on the crossing of a border.

Yet, this definition raises several questions. It focuses on the crime of trafficking rather than on the situation of the child. Therefore, one would have to prove the intention of exploitation if a child is found while transiting from one country to another. Otherwise, the transfer may be qualified as migration or smuggling, and the child will not be afforded protection under the Palermo Protocol. Another set of issues relate to the definition of a child and of exploitation, which will be explored below.

## 1.2 Regional Instruments

Some regional instruments also contain a definition of trafficking that differs from the definition provided in the Palermo Protocol. This is due to the fact that regional definitions tend to be adjusted to the most pressing issues in the region.

The Inter-American Convention on International Traffic in Minors, adopted by the Organization of American States in 1994 and entered into force in 1997, defines trafficking as:

[T]he abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means (Article 2).

This definition implies that trafficking may have a lawful purpose but be carried out by unlawful means, for instance in adoption cases, or have an unlawful purpose carried out by lawful means, as would be the case of a minor transported by a legal guardian to be exploited. One concern is that this definition leaves a wide margin of appreciation to national laws of participating States, since what is considered lawful or unlawful varies from one country to another. Proactive measures would therefore need to be taken to ensure harmonisation of laws in the region to ensure consistency.

The African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Unity in 1990 and entered into force in 1999, requires States Parties to prevent:

- a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- b) the use of children in all forms of begging (Article 29).

### **1.3 Definition of a Child**

As stated by the Protocol, the definition of a child is anyone under 18 years old. While the Convention on the Rights of the Child contains the same definition, it adds a limiting condition: “unless under the law applicable to the child, majority is attained earlier” (Article 1). In other words, in some areas, such as minimum age for marriage, voting rights or criminal responsibility, the age of majority can be lower. However, given the definition of the Palermo Protocol, the possibility to lower the age of majority offered by the CRC does not apply to trafficking. Concretely, any anti-trafficking legislation should provide for the protection of every human being under 18 years old, without exception. For instance, provisions for child protection should apply to a girl victim of trafficking who is married, even though domestic law may regard her as an adult due to her marital status.

However, a practical problem may arise when child victims of trafficking do not have proper documents such as birth certificates – or the documents they do have are not reliable, as is often the case. In such cases the age may be difficult to ascertain. In case there is a doubt as to the age of the victim, the law should establish a presumption that the person is a child and entitled to corresponding protective measures, unless proved otherwise.<sup>209</sup>

#### **1.4 The Notion of Exploitation**

While the Palermo Protocol provides some examples of possible forms of exploitation, it does not give a definition of this term and neither does the CRC. As a consequence, one needs to look at a number of treaties dealing with related issues to construct a spectrum of the many forms child exploitation can take. From a legislative reform perspective, it is essential that not only all these elements be included in the law, but also that the law be broad enough to include new forms of exploitation.

In the context of internal child trafficking, the notion of exploitation is particularly important. Often, indeed, children are trafficked internally and forced into various forms of child labour. In many instances, the trafficker lures families and children by promises of good work and working conditions, to engage children in exploitative activities and/or exploitative conditions. A strong legal and institutional framework addressing child labour is therefore essential to address internal trafficking.

Economic exploitation is mentioned in Article 32 of the CRC, which states:

“States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development”<sup>210</sup>.

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<sup>209</sup> Guidelines for protection of the rights of children victims of trafficking in Southeastern Europe, UNICEF, May 2003.

<sup>210</sup> CRC Article 32(1).

In 1993, the CRC Committee held a Day of General Discussion on the Economic Exploitation of Children. In the opening remarks, a member of the Committee spelled out a conceptual definition of exploitation:<sup>211</sup>

Exploitation means taking unjust advantage of another for one's own advantage or benefit. It covers situations of manipulation, misuse, abuse, victimization, oppression or ill treatment. [...] We are confronted with a situation of exploitation essentially when the human dignity of the child or the harmonious development of the child's personality is not respected.<sup>212</sup>

The reference to any work that is likely to be hazardous or harmful in CRC Article 32 can also define a standard for determining whether a situation is exploitative or not.

Additional international instruments can also be used to complement the list provided by the Palermo Protocol, and tackle the multiple faces of child exploitation.

**Box 35: International instruments providing guidance on child exploitation:**

- The sale of children, child prostitution, and use of children in the production of pornography, as defined under the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography;
- The compulsory recruitment and participation in hostilities of children under 18, defined under the Optional Protocol to the CRC on Children in Armed Conflict;
- Harmful or hazardous work, defined under ILO Convention 182 to include: slavery or practices similar to slavery (such as sale of children, forced and bonded labour, and the recruitment of children in armed conflict); child prostitution and the use of children in the production of pornography; the use of children for illicit activities; and work that is harmful to the child's health and morals;
- ILO Convention 138, concerning the minimum age for admission to employment;
- Adoption for financial gain, contrary to the Hague Convention on Inter-Country Adoption;
- Forced or early marriage, defined as a "practice similar to slavery" under the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

<sup>211</sup> Remarks by Marta Santos Pais (former member of the CRC Committee).

<sup>212</sup> CRC/C/20, Annex V, available at

<http://www.unhcr.ch/html/menu2/6/crc/doc/days/exploit.pdf>.

It follows from the foregoing that the central elements of a definition of child exploitation that need to be reflected in legislation are:

- the actual harm caused to the child and his or her development, be it physical, mental or psychological;
- the fact that a third person is benefiting from that situation;
- labour laws setting limits in terms of the type of work, working age(s), and working conditions for children.

**Box 36: The Romanian Law on the Prevention and Fighting of Trafficking**

The Romanian law on the Prevention and Fighting of Trafficking in Human Beings (Law 678 of 11 December 2001) defines “exploitation” as performing forced labour in violation of the legal requirements on labour conditions, pay, health and security; keeping a person in a state of slavery or depriving that person of freedom; compelling a person to engage in any form of sexual exploitation including prostitution and pornography; and drawing human organs. Importantly, the law includes in its definition of exploitation “other similar activities that are violating fundamental human rights and freedoms,” thereby paving the way for the inclusion of new forms of exploitation that may emerge, on the basis that they violate human rights.

## Part 2 GUIDING PRINCIPLES

As in other areas, the four guiding principles of the CRC should be taken into account and provide a useful framework in legislative reform aimed at addressing child trafficking. In its General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin,<sup>213</sup> the Committee on the Rights of the Child analyses the importance of each of the guiding principles for the protection of unaccompanied children’s rights and this analysis can provide useful guidance to the issue of child victims of trafficking. These principles also apply to internal trafficking.

### 2.1 Right to Non-discrimination

While national legislations often expressly assert the principle of non-discrimination, frequently inscribed as a constitutional principle, some

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<sup>213</sup> CRC/GC/2005/6.



specific grounds for discrimination must be addressed in anti-trafficking legislation.

Many children who are victims of trafficking often find themselves unaccompanied, in a country of which they are not citizens, in an “illegal” situation. This may prevent them from having access to services and enjoying other rights.

## **2.2 Jurisdiction**

The CRC expressly mentions that the Convention applies to all children in the State Party’s jurisdiction. The principle is also contained in the Palermo Protocol. In its General Comment No. 6 on unaccompanied and separated children, the CRC Committee reiterates the importance of this provision:

[T]he enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.

Adequate provisions should therefore be included in the law to ensure that all child victims have an equal right to protection and support, regardless of their nationality or immigration status. Legal provisions relating to social benefits such as health, housing and education should be reviewed to ensure that they are not restricted to children who are nationals. Children’s specific needs in terms of age and gender should also be addressed.

This principle has broader implications. For instance, the State where a child is located has the responsibility to provide for that child’s needs and make arrangements as relevant if return to their state of origin is in their best interests. The issue of jurisdiction is particularly important when negotiating international agreements, as the lack of agreement on which State bears the responsibility – and costs – for the return of the child may lead to endless procedures and negotiations.

### 2.3 Best Interests of the Child

As stated in the CRC, the best interests of the child should be a primary consideration in all actions concerning children. In the area of trafficking, this provision has even more importance, as many interests are competing with children's best interests. For instance, States may be first and foremost interested in arresting and prosecuting traffickers, who are part of networks of organized crime. To that end, they may pressure child victims to testify, even when it is not in the child's best interests in light of the trauma they have suffered. States may be concerned about illegal immigration, thus preferring to repatriate victims to their country of origin, even if they do not have absolute assurances that they will be safe there.

As explained in this Handbook, a country's legal framework must integrate the best interests of the child as a cross-cutting principle, and in laws related to trafficking issues that principle should be reiterated as superior to all other considerations.

**Box 37: The Federation of Russia's Draft Federal Law against Trafficking**

The Federation of Russia's Draft Federal law against trafficking in Persons and Measures to Protect Victims of Trafficking states that in the event child victims of trafficking are provided assistance, all measures should be taken in the best interests of the child and in accordance with the CRC.

### 2.4 Right to Life, Survival and Development

Child trafficking represents a violation of a child's right to life, survival and development, as children forced into exploitation perform tasks that are harmful to their health and harmonious development. Fighting child trafficking is therefore an obligation for States for the fulfilment of this CRC provision. It does not mean prosecuting traffickers at all costs, in particular when it puts children in danger or carries the risk of further traumatizing them. It implies, first and foremost, setting up prevention programmes and policies aimed at addressing the root causes of trafficking. In this regard, the law constitutes a useful tool to mandate specific institutions and ministries with the responsibility for the design and implementation of such programmes (see section 1.4 on prevention).

The implementation of the principle of the right to life, survival and development also implies the obligation for States to ensure that child victims of trafficking have access to appropriate social services, in particular physical and mental health services and education (See section 1.3 on the rights of victims).

## 2.5 Respect for the Views of the Child

A child victim of trafficking has the right to express his or her views in all matters affecting him or her, including the legal process, interim care and protection and the identification and implementation of a durable solution, in particular in decisions concerning the child's possible return to the family or country of origin. These views must be sought and given due weight in accordance with the child's age and maturity.<sup>214</sup>

Concretely, this means that the legislative framework should require all responsible authorities to seek and consider the views of the child during the decision-making process. The law should explicitly state that principle and indicate at each stage of the process how the views of the child will be sought. The law can provide for possible sanctions, including the nullity of relevant acts, if children's views are not heard – unless adequate justification is provided. For the children's right to participate to be meaningful, processes and procedures should be adapted to create an environment where the child feels free to express him or herself and has the necessary support to do so. Children should have the option not to express their views if they so choose.

Appropriate child-friendly institutional settings should be established by law to ensure the realisation of this right. This implies that courts must be equipped with a special room to receive child testimony and, where possible, video should be used to record these testimonies to avoid repetition of trauma. During administrative or legal proceedings, interviews must be conducted with child victims by specially trained staff, preferably of the same gender as the child, and the views expressed in these interviews must be taken into consideration when decisions are made.

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<sup>214</sup> UNICEF guidelines, p. 10.

For example, in London, UK, new police headquarters have been established to lead the fight against child abuse in four boroughs. The building has two conference rooms furnished with video and recording equipment as well as toys to create a child-friendly environment. The objective is to allow children to give their testimony in a comfortable setting rather than in an intimidating – and likely traumatizing – court environment.

## **Part 3    RIGHTS OF VICTIMS**

A law on trafficking should aim to ensure that victims are protected. Victims of trafficking are particularly vulnerable as they may find themselves in a country or region they do not know and where they do not speak the language, far from their family, without proper documentation, and may be at risk of re-trafficking and/or stigmatisation back home. The CRC Committee General Comment on unaccompanied and separated children outside of their country of origin, while not addressing only cases of trafficking, provides useful guidance in defining States' obligations with respect to child victims.

Legislative reform for the protection of child victims of trafficking extends to a wide range of areas of law and law implementation. A fully protective legal system may require amending a number of texts, such as family law/civil codes, criminal procedure codes, education laws, immigration laws, etc. As already mentioned, the legal system may already contain adequate provisions in some areas but not in others. For this reason, a thorough law review is necessary.

See Chapter 2 on law review.

### **3.1    Guiding Principles Specific to the Rights of Victims**

While the guiding principles of the CRC as they relate to legislative reform in the area of trafficking have already been examined, this section presents some of the more specific principles that apply to the rights of victims, which the law should clearly state to ensure that they are respected. As a general principle, it is essential that the situation of each and every child be assessed individually.

### 3.1.1 *Right to Express Views*

The right of children to express views in all matters affecting them, as provided by the CRC, should obviously apply to child victims of trafficking. Child victims must be able to express their views and concerns related to their involvement in the justice process, in particular regarding their safety, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process. If their requests cannot be accommodated, professionals should explain the reasons to children.<sup>215</sup>

### 3.1.2 *Right to Information*

Child victims have the right to accessible information regarding their situation and their rights, as mentioned in the Palermo Protocol and in the Optional protocol on the sale of children. This right should be clearly reflected in the law and adequate measures be taken to ensure its realization. Its fulfillment implies an obligation to tell children about available services, the law applicable to them and the various options available in terms of criminal prosecution, immigration status, return, asylum, etc. In the criminal proceedings, providing children with adequate information is crucial to ensure that they fully understand the issues at stake. Child victims must be informed on the services to which they are entitled, including legal representation. They must know about the procedures, their scope and timing, the possibility to obtain compensation, as well as ways to be heard. They must be informed of their role in the process, the way questioning will be conducted, and the availability of protective measures. Throughout the proceedings children are entitled to be notified on the progress of the case, including the arrest of the accused, the prosecutorial decision, and the outcome of the case. They should also be aware of mechanisms for review of decisions.<sup>216</sup>

The realisation of this right implies making sure that adequate institutional mechanisms are in place. Importantly, information must be explained to children in a manner that is appropriate to their age

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<sup>215</sup> Ibid., Section 4.

<sup>216</sup> See Guidelines on Justice for Child Victims and Witnesses of Crime, Section 3.

and maturity and in a language that they understand. The legal guardian of the child should have the primary responsibility for informing the child victim of his/her rights and guide the child in light of his/her best interests. This obligation should be stated in the law that addresses the appointment of legal guardians. With respect to access to services, institutions responsible for the care of child victims should be held accountable for ensuring that children are aware of their rights. This can be done by including relevant provisions within the mandate of the institution. With regard to criminal proceedings, law enforcement personnel should be obligated to inform the child of his/her rights, the proceedings, and the expectations in terms of outcome.

### ***3.1.3 Right to Privacy and Confidentiality***

Privacy is essential to protect child victims and prevent them from being stigmatized by society or their communities. Children need to be particularly protected as they are more vulnerable to stigmatization. The publication of information on their situation in the mass media can have a very negative impact on their development and represent a significant obstacle to their reintegration. The Palermo protocol stipulates that the privacy and identity of victims of trafficking should be protected “in appropriate cases and to the extent possible under [the] domestic law” (Article 6.1). The Optional Protocol on the sale of children insists on the importance of protecting the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to the identification of child victims. The protection of privacy and confidentiality is vital to guaranteeing the safety of victims and ensuring that they will not be deterred from filing a complaint. One way of doing this is by excluding the public and the media from the courtroom. When children are involved, all information regarding children should remain confidential, and violation of this principle should entail civil and possibly criminal sanctions.

### ***3.1.4 Non-refoulement and Internal Displacement***

While the principle of non-refoulement can provide guidance to handle cases of international trafficking, internal displacement can help in addressing cases of internal trafficking.

It should be clear at the outset that the principle of the best interests of the child should always prevail. Consequently, the principle of non-refoulement should only be used as a safety net and/or advocacy tool, should the best interests of the child principle not be respected.

While due to immigration concerns, States may be tempted to send children back to their State of origin, they are nonetheless bound to respect international obligations. The principle of non-refoulement represents a key provision of the Geneva Convention relating to the Status of Refugees of 1951. The Geneva Conventions belong to the realm of international customary law, meaning that all States, whether they are party or not, are bound by their provisions, which are recognised as universal. The Palermo Protocol makes express mention of the Refugee Convention and the principle of non-refoulement in Article 14. That Convention defines a refugee as someone who has:

“[A] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (Article 1).

According to the principle of *non-refoulement*, when someone is recognized as a refugee, a State cannot expel that person, as he/she would be in danger in his/her home country:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Article 33).

Court decisions in several States have accorded the status of refugee to victims of trafficking, basing their decision on the “membership to a particular group,” a group defined, for instance, as “young women from the former Soviet Union recruited for exploitation in the

international sex trade.”<sup>217</sup> Lawyers involved in trafficking cases should be aware of that case-law.

The CRC Committee in its General Comment No. 6 reiterates that principle. It states in particular that:

“States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention (...). Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner (...)”

In the context of internal trafficking, some experts have advocated for an approach drawing on the similarity between the situation and vulnerability of internationally displaced persons and victims of trafficking.<sup>218</sup> In this view, human trafficking shares with internal displacement the element of a coerced, forced or involuntary movement – even if the movement is initially voluntary, the exploitative situation is not. Internally displaced persons are vulnerable to trafficking and promises of better situations elsewhere. Displacement disrupts family and community networks which represent key elements of the child’s protective environment. In this context, the Guiding Principles on Internal Displacement<sup>219</sup> offer useful and detailed guidance on the measures necessary to protect victims of trafficking. It states the need to provide adequate protection and assistance to children, taking into account their special needs. It refers to family reunification and the right to education. Importantly, it includes principles related to long-term solutions such as return, local

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<sup>217</sup> UK, Immigration Appeal Tribunal, CC-50627-99 (00TH00728), 17 May 2000. Quoted by Kartusch, Angelika, *Reference Guide for Anti-Trafficking Legislative Review* [with particular emphasis on South Eastern Europe], OSCE (September 2001).

<sup>218</sup> S. Martin, *Internal Trafficking*, *Forced Migration Review* 25 (May 2006), p.12-3.

<sup>219</sup> Special Representative of the Secretary-General on Internally Displaced Persons, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2.



integration, or resettlement and assigns responsibility to national authorities. The document is however not child-specific and should therefore be read in conjunction with child rights instruments.

## 3.2 Concrete Steps for the Protection of Child Victims

### 3.2.1 *Recognition of the Status of Victim*

The first step is to have a procedure to ensure that victims have their status officially recognised. There are several means to do so:

1. Allowing courts dealing with trafficking cases to identify victims and certify their status;
2. Allowing a judicial or administrative decision based on reports of law enforcement, border-control or other officials who encounter victims;
3. Allowing a judicial or administrative decision based on the application of the alleged victim or his/her representative.<sup>220</sup>

The recognition of a child as a victim should in no circumstances be linked to his/her willingness to testify or to the arrest of a criminal and/or to the arrest of traffickers or criminal. It should solely be based on the child's experience and this should be explicit in the law.

### 3.2.2 *Appointment of a Guardian*

The law should provide for the appointment of a guardian as soon as a child victim is identified to accompany the child throughout the entire process until a durable solution has been identified and implemented. If a child is not unaccompanied and already has a guardian, the law should require an assessment and include the possibility that another guardian be appointed, should the assessment conclude that the current one may not fully act in the best interests of the child.

These provisions should be accompanied by the designation, in the law, of the authority responsible for appointing the guardian and the

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<sup>220</sup> United Nations Centre for International Crime Prevention, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, Draft 3, Vienna (March 2003), p. 38.

establishment of accountability mechanisms for that authority. The authority can be specifically established to deal with trafficking issues, or it can be a child protection agency with a broader mandate (For more information see section VII on institutional reform).

The law should spell out the legal responsibilities and obligations of the guardian, which in civil law countries are often found in the civil code.

### *3.2.3 Medical and Psychological Care*

Trafficking can have serious medical and psychological consequences on children. As discussed in Section II on definitions, child exploitation is defined by the fact that it is harmful to the child's health and development. Access to appropriate medical and psychological care is thus essential for the child's recovery. These services should also address the special needs of girls. States should make sure, through legal provisions, that their health system is open to child victims of trafficking, even if they are not nationals of that State.

### *3.2.4 Housing*

Child victims of trafficking are often separated from their parents and family. They have no place to go, other than to return to their trafficker, which victims sometimes do when they do not receive enough support. Providing appropriate housing that is safe, child-friendly, and operated by child-sensitive staff is essential. To that end, children should be separated from adults unless these are their parents or care-takers and a gender sensitive-approach to their needs should also be employed, in particular with respect to the gender of the staff that are taking care of them. Furthermore, to remain safe, the existence and location of such housing should be kept confidential.

### *3.2.5 Education*

Victims need to return to a sense of normalcy in their lives. Besides, children who have been trafficked have most likely not had access to education. The right to education of child victims needs to be fulfilled by the receiving State, whatever the nationality of the victim of trafficking. The fulfilment of this right may require the adaptation of

education laws to ensure that education is accessible to all children within the State's jurisdiction.

For example, the Russian draft law provides that the Federal Commission, regional commissions, asylums and centres must immediately notify executive authorities in charge of the issues of care and guardianship, if they receive any information about a child victim of trafficking, to ensure and protect the child's rights. The draft law also states that child victims of trafficking must be provided an opportunity to attend school in compliance with the federal law on education.

### **3.3 Rights of Victims in Judicial Proceedings**

#### *3.3.1 Non-criminalization of Victims*

Under no circumstances should laws hold children who have been trafficked criminally responsible. Children who have been trafficked and exploited must be treated as victims, not as offenders. Unfortunately, victims of trafficking are often prosecuted, based on legislation on prostitution or immigration, for example. However, the criminal is the trafficker and the law should not be ambiguous in that regard. In the case of child victims, this is even clearer as there is no need to prove the use of coercion, deception or any other means, as per the definition of child trafficking (See section II on definitions).

Therefore, a court considering a child trafficking case should not look at whether the child has given any form of consent. If the child is a victim of trafficking, his/her performing of illegal activities is irrelevant. The responsibility falls with the trafficker(s). For instance, it is irrelevant to consider whether a child has agreed to be smuggled or has accepted a certain kind of employment. Often times however, due to poverty, parents give their consent to send their children to exploitative labour. This situation needs to be addressed, by setting up safeguards against re-trafficking. It is the State's responsibility to provide parents with appropriate support measures to avoid re-trafficking. Parents cannot and should not be held criminally responsible if they gave their consent to exploitative labour conditions for their child because criminal responsibility lies with the trafficker.

However, civil sanctions should be provided in the law to deter parents from giving their consent and applied with due regard to the circumstances. Such sanctions should be linked to the exercise of parental authority – and adequate limitations thereof if the child is at risk – but used only in extreme cases.

### ***3.3.2 Right to Assistance***

Assistance throughout the proceedings can take many forms. Some legal systems provide that free legal assistance will be afforded to people who do not have a certain minimum of resources. Child victims should always have access to free counsel and this right should be explicit in the law and adequate resources allocated. They should also have access to physical and psychological health services as well as other necessary services, including the presence of the family when appropriate and possible, to accompany the child in the proceedings.

### ***3.3.3 Fair Trial***

While taking into account the rights of victims, all proceedings must comply with human rights standards, in particular the right to a fair trial for the suspect or accused.

### ***3.3.4 Right to Safety***

All necessary measures should be taken to ensure that law enforcement authorities are aware of the safety risks faced by child victims and take appropriate action. Staff working with children should have the obligation to notify authorities if they suspect that a child victim has been harmed or is at risk. This obligation should be inscribed in relevant legislation regulating the practice of several professions involving work with children, including teachers, social workers and medical doctors.

### ***3.3.5 Right to an Effective Remedy***

The right to a remedy for human rights violations is a cornerstone for the implementation of human rights standards. Article 4 of the Convention on the Rights of the Child obliges States to take all necessary measures to implement the Convention. In its General

Comment on this issue, the Committee on the Rights of the Child states that this provision includes the obligation for States to ensure that effective remedies are in place for child rights violations and that child-sensitive procedures are available.<sup>221</sup>

For the remedy to be effective, several conditions are required. Victims must be informed of their rights, have their confidentiality respected, be protected against retaliation and feel that they will be listened to and that law enforcement authorities are sensitive to their situation. Children are especially entitled to justice mechanisms that take into account their specific needs and give due regard to their age and maturity. One essential condition is that children who do not speak or master the official language be provided with appropriate translation services in their mother tongue, especially for all information regarding the proceedings and their testimony.

The Guidelines on Justice for Child Victims and Witnesses of Crime elaborated by the NGO International Bureau for Children's Rights provide very useful and comprehensive information on ways to ensure that justice procedures are child-friendly.<sup>222</sup>

### ***3.3.6 Right of Victims to Compensation***

An effective remedy includes the right to seek compensation for the damage suffered. Victims of trafficking have often endured physical and psychological damage, as well as unfair remuneration for their work. Compensation enables them to fulfil their material needs for their rehabilitation. It also provides an acknowledgement of the victim's suffering.

Depending on the legal system, procedures to obtain compensation vary.<sup>223</sup>

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<sup>221</sup> CRC Committee, General Comment on General measures of implementation for the Convention on the Rights of the Child, CRC/GC/2003/5, 3 October 2003.

<sup>222</sup> International Bureau for Children's Rights, *Guidelines on Justice for Child Victims and Witnesses of Crime* (January 2003); available at <http://www.ibcr.org/>.

<sup>223</sup> The following information is based on: Anti-Slavery International, *Human traffic, human rights: Redefining victim protection* (2002), p. 57-9, available at <http://www.antislavery.org/homepage/resources/humantraffichumanrights.htm>.

In countries belonging to the civil law tradition, a civil action for compensation can be joined to the criminal case. The criminal case will establish whether the suspected trafficker is guilty and whether the trafficked person is indeed a victim. The judge will then allocate compensation based on the damage and economic losses suffered by the victim. This way of obtaining compensation is much simpler and faster than seeking compensation in civil courts.

However, the civil action is not systematically linked to the criminal case in these countries. It requires that victims take specific separate legal action. Yet, victims are not always informed of this possibility, as public authorities tend to focus on criminal aspects and lawyers may not deem it necessary, including because chances to actually collect compensation are usually slim. While it is true that traffickers' insolvency often makes it difficult to obtain compensation, the recognition of the right to be compensated often operates as a form of recognition for the victim and is important for the healing process.

In common law countries, a civil claim cannot be linked to criminal action. However, judges have discretion to award compensation to victims as part of sentencing.

Another possibility in both systems is to bring separate civil actions against traffickers before civil courts. Civil lawsuits tend to be lengthier and often require the criminal case to be completed first.

One general problem related to civil lawsuits, whether or not linked to a criminal lawsuit, lies in the notion of compensation for the unfair retribution of work performed. In many instances, activities performed by victims were illegal. However, victims did work, often in exploitative circumstances. Can a court recognise a right to fair retribution for an illegal activity and/or exploitative situation? One approach to this question is to consider that child victims of trafficking are entitled to compensation for the pain they suffered, rather than remuneration for the actual work performed.

In practice, however, the fact that many traffickers may not be arrested and prosecuted or are not solvent makes it difficult to obtain compensation. As mentioned in the section on criminalization, assets and materials seized and confiscated by the State should be used for

victims' compensation. This implies that mechanisms for seizure and confiscation should be quick and effective so as to ensure that the trafficker does not have time to make arrangements.

One solution to ensure compensation is to create a trust fund for victims. For example, such funds were created in the Netherlands and in the UK. Yet once again, victims need to be informed of its existence and amounts awarded are usually low compared to the damage suffered by the victim.

### **3.4 Status of Victims in Receiving States**

For child victims, the best interests of the child should always guide decisions related to the victim's stay in the country or return to the country of origin. While States often link the residency status of victims to victims' willingness to testify against their traffickers, for children the condition of cooperation with law enforcement authorities should never play any role in the decision to grant a residency permit.

#### **3.4.1 Reflection Delay**

The reflection delay is a mechanism instituted by some States as a middle ground between respect for the rights of victims and States' need to arrest and prosecute traffickers. It is supposed to ensure that victims of trafficking can recover from their trauma, have access to support and assistance including medical care and legal advice, and can thus make an informed decision about whether they want to testify against the trafficker. Anti-Slavery International has concluded that those who benefit from the reflection delay are more likely to press charges against their trafficker, as right after their interception by authorities, victims are still under the influence and fear of their trafficker, who can be someone they know well – a “boyfriend”, a “protector”, an “employer”, or someone who has threatened them and their families if they talk to authorities.<sup>224</sup> After some time and when they feel supported, they will be more willing to testify against their traffickers.

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<sup>224</sup> Ibid., p. 41-2.

However, as repeatedly stated, only the best interests of the child should guide decisions regarding child victims. The notion of “delay” should in no case entail that protection mechanisms will be lifted at the end of the “delay.”

### ***3.4.2 Long-term Residency Permits***

Long-term residency permits are delivered by some States if the victim is likely to be harmed back in the country of origin and/or if he/she cooperates with the justice system. However, when it comes to children, it should be clear in the law that the best interests of the child is to be the primary consideration for the attribution of long-term residency permits. As a consequence, consideration of requests from children for such permits should be dealt with on a case by case basis, and decisions duly motivated. The process for making long-term arrangements for children should be subject to a judicial decision, and the views of the child must be heard and given due weight. Such provisions must be included in the law so as to limit the discretionary power of relevant authorities.

In this context, several aspects must be taken into consideration, including their degree of integration in the receiving State and the fact that if they remain in the country of destination, they will probably be separated from their parents. However, in some instances, they may be rejected or stigmatized by their parents/family if they return, because they have been obliged to participate in “shameful” activities such as prostitution, or because their family cannot offer them financial and other necessary support.

### ***3.4.3 Long-term Arrangements***

If a child is granted long term or permanent residency status in the State of destination, arrangements need to be made to ensure his/her protection in the long term. In many cases, the child is unaccompanied and separated from his/her family. If so, relevant authorities should assess the child’s situation and determine the appropriate long-term arrangements, in consultation with the child and his/her guardian.<sup>225</sup>

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<sup>225</sup> CRC Committee General Comment no. 6.



The law should designate the authority responsible for making such arrangements and adequate resources should be allocated to that end.

#### *3.4.4 Repatriation of Victims*<sup>226</sup>

The question of repatriation is very sensitive. Receiving States tend to prefer that victims return to their country of origin, where victims may end up in the same situation that led them to be trafficked in the first place. The ability of the country of origin to protect them is key, as repatriated victims are at high risk of being re-trafficked or retaliated against. At the same time, family reunification, when possible, is the best solution to ensure the child's harmonious development.

The Palermo Protocol tries to balance these imperatives. It provides that the State of origin should facilitate and accept the return of victims of trafficking. Conversely, the receiving State should pay due regard for the safety of the victim and legal proceedings underway, and it is preferable that the return be voluntary. Consequently, national laws should make it clear that the best interests of the child should prevail.

Should repatriation be deemed in the child's best interest, one serious issue encountered is that countries of origin may re-victimize trafficking victims upon entry into their territory, by detaining them, forcing them to take HIV/AIDS tests and prohibiting them from travelling abroad again. The law should make it clear that victims of trafficking should have their rights, including their right to privacy, respected, and should have access to basic services. Children should be reunited with their parents and family if it is in their best interests, or taken care of by experienced and recognised organizations.

The protection system can indeed rely on NGOs and associations on the ground, which have experience in supporting and protecting the rights of trafficking victims. The role of organisations involved in the protection and rehabilitation of victims is recognised in the Optional Protocol on the sale of children. It provides that States should adopt measures to protect these persons and/or organisations. This recognition is important as States may not have the expertise or the capacity to care for victims. The special status of such organisations

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<sup>226</sup> This section is informed by the Anti-Slavery report, p.60-2.

should therefore be reflected in the law. The law can provide for a process of accreditation by the State of the capacity of specific organisations to care for victims and designate institutions responsible for monitoring the work of these organisations.

Non-governmental organisations could be contacted by the country of destination prior to the repatriation of victims, to ensure that they provide appropriate care when victims arrive. NGOs offer a good alternative when it is not appropriate for the country of destination to inform officials in the country of origin that a person has been trafficked, as corruption of officials and possible collusion with traffickers may put the victim at high risk. Likewise, victims of trafficking who remained in their home country may find it safer to turn to non-governmental organisations. In fact, The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution stipulates that States Parties may authorise recognised NGOs to provide homes and shelter for victims of trafficking and should encourage them in their efforts.

With respect to repatriation, one problem arises when victims do not have documentation proving of which country they are nationals or have permanent residence. In this case, in accordance with the Palermo Protocol, a receiving country can ask for verification to another State, and, if confirmed, that State should issue appropriate travel documents to the victim.

UNICEF's Regional Office for CEE/CIS has elaborated *Guidelines on determining whether a return to family and/or country of origin is in the child's best interests*,<sup>227</sup> based on the Committee on the Rights of the Child's General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin. The Guidelines include a step-by-step description of the requirements for repatriation. These include taking into account the general principles of:

- Safety, security and conditions, including socio-economic conditions, awaiting the child upon return;
- Availability of care arrangements for that particular child;

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<sup>227</sup> See *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF (2006); available at [http://www.unicef.org/ceecis/UNICEF\\_Child\\_Trafficking\\_low.pdf](http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf).

- Views of the child expressed and those of the caretakers;
- Child's level of integration in the host country and duration of absence from the home country;
- Child's right to preserve his/her identity, nationality, name and family relations (Article 8 of the CRC);
- The desirability for continuity in a child's upbringing (Article 20);
- Tracing suitable caregivers;
- Preventing further harm to the child;
- A security assessment focussing on possible threats from the traffickers to the child or her or his relatives;
- A risk assessment assessing the circumstances of the home and community to which the child is likely to return;
- Bilateral cooperation in responding to information requests in the country of origin;
- The duty of the country of destination to inform the country of origin of the decision made.

## **Part 4 PREVENTION**

Prevention of trafficking involves many policy tools. Prevention implies addressing the root causes of trafficking, on both the demand and the supply sides. On the supply side, vulnerability to trafficking mainly lies in poverty and lack of opportunities. Measures to prevent trafficking include education, information and media campaigns, aimed at the whole population, but also adapted to those who are most vulnerable, especially children. Legislation can further address the demand for trafficking, through the prohibition of advertisement, direct or indirect, of trafficking and exploitation and the punishment of possible customers. It can also favour the organisation of awareness-raising activities.

Major treaties related to child trafficking, in particular the Palermo Protocol, the Optional Protocol on the sale of children and ILO Convention 182, contain provisions related to prevention. They all emphasise the importance of international cooperation and assistance to address the root causes of the problem.

## 4.1 Action on Demand

The Palermo Protocol provides that States should adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation in persons, such as the demand for cheap labour and services, some of which is being met by persons, including children, who have been trafficked.

### *4.1.1 Prohibition of the Production and Dissemination of Material Advertising the Offences*

The Optional Protocol on the sale of children obliges States to take measures to effectively prohibit the production and dissemination of material advertising the sale of children, child prostitution and child pornography. Concretely, this implies that the legislation should make the production and dissemination of such material a criminal offence, and provide that prohibited materials be seized.

### *4.1.2 Criminal Responsibility and Awareness-raising of Employers and Customers*

Employers, or customers in the case of sexual exploitation, represent the demand for labour and services that involve trafficking in children. The criminal responsibility of employers and customers is only one side of the coin. There are indeed many obstacles to the enforcement of legislation in this regard. When a customer uses the sexual exploitation of children outside of his/her country of nationality – as in cases of “sex tourism” – it may be difficult to gather evidence. These behaviours should be discouraged in the first place. One way to do so is to make tour operators and travel agencies responsible for informing their clients on the illegality of sex tourism, refrain from using messages suggesting such behaviours, and train their staff on their obligations.

#### **Box 38: The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act**

The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003 constitutes a good example of the use of legislation to place obligations on tour operators, travel agents and airline companies to discourage demand for trafficking for sexual exploitation. The Act stipulates the following:

**Article 30**

“Every tour operator and travel agent shall:  
 notify its client of its obligation under this Act not to aid and abet, facilitate or promote in any way the traffic in any person,  
 (b) notify their clients of their obligations under this Act not to aid and abet, facilitate or promote in any way, any person’s pornography and other person’s exploitation in tourism,  
 insert in contracts with corresponding suppliers in destination countries, clauses requiring them to comply with the obligations stated in the preceding paragraphs of this subsection, refrain from utilizing messages on printed material, video or the Internet that could suggest or allude to behaviour incompatible with the objective of this Act, inform their staff of their obligations under this Act, and include clauses regarding their obligations under this Act to their staff in new employment contracts.

**Article 31**

Every airline company shall promote through every possible means, public awareness of the guiding principles of this Act in in-flight magazines, ticket jackets, internet units and video on long flights.

Another issue concerns the case of child domestic workers. In this highly unregulated segment of the labour market, children remain invisible. They are often exploited by their employers while being considered as “part of the home.”<sup>228</sup> In this context, employers do not perceive themselves as exploiters but rather as benefactors. Racism and prejudice against migrants and ethnic minorities also increases children’s vulnerability to trafficking. People from these groups are more easily trafficked because they tend to be marginalized and considered as “different” by their employers. As a result, usual social norms that regulate – and limit – the behaviour of employers do not apply. That is why legislative measures should be accompanied by awareness-raising activities, addressing the discrimination and prejudice against migrants and ethnic minorities. The aim of such measures is to set not only legal but also social limits to exploitative behaviours and promote the integration of marginalised groups, including through social and economic means.

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<sup>228</sup> Anderson, Bridget and Julia O’Connell Davidson, *Is trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, IOM (December 2003).

#### ***4.1.3 Travel Documents***

The first step towards increased and more effective border control is ensuring the quality of travel or identity documents, so as to prevent their falsification or alteration. In addition, international cooperation may be necessary with regard to the verification of the validity of such documents. As stated in the Palermo Protocol, States should provide assistance to one another in this respect. However, the verification procedure should be expedited within a reasonable time. If children are held at the border, child-friendly facilities should be available and their care and medical needs addressed.

#### ***4.1.4 Training of Immigration and Other Relevant Officials***

As stated in Article 10 of the Palermo Protocol, law enforcement, immigration and other officials should be trained in the prevention of trafficking. This training should include not only methods to detect and prosecute traffickers, but also ways to protect the rights of victims, including addressing the special needs of women and child victims.

#### ***4.1.5 Liability of Commercial Carriers***

The Palermo Protocol provides that States should take measures to ensure the obligation of commercial carriers to ascertain that all passengers are in possession of the necessary travel documents for entry in the receiving State. This provision is aimed at offering an additional level of protection to potential victims of trafficking, although many of them travel with valid documents.

#### ***4.1.6 Revocation of Visas, Denial of Entry of Traffickers***

Immigration laws should contain provisions forbidding traffickers or their accomplices who have been identified and sentenced to enter the State.

## **4.2 Addressing Factors of Vulnerability to Trafficking**

### ***4.2.1 Effects of Immigration Laws and Policies***

Immigration laws and policies can have a significant impact on trafficking by moving the frontier of illegality. Migration restrictions may render children and adults more vulnerable to exploitative situations, including trafficking, when they resort to forms of illegal border crossing. When immigration policies are very restrictive, more people enter in a country illegally, hence invisibly.

### ***4.2.2 Birth Registration***

Birth registration is vital for the prevention of trafficking. It ensures that children have an identity and are recognised by the State as citizens, which is essential in cases of international trafficking. It also helps provide evidence that children have “disappeared” and are unaccounted for, and it is critical for correct age determination.

### ***4.2.3 Education and Awareness-raising***

Awareness-raising and educational activities must not be left out of the legislative framework. They are the most powerful tools to prevent trafficking. Traffickers often use deceptive means to lure their victims by promising a good job and a better future. Communities, parents and children, especially those in a vulnerable situation, must be informed about these techniques. From a legislative perspective, this can be achieved by entrusting an institution with the task of carrying out and promoting such activities. The institution may be an independent agency, as will be examined in the following section, a ministry or a ministerial office. In any case, it is important that these activities be included in the mandate of such institutions and that they be required to report on them.

In Romania, for example, the anti-trafficking law provides that the Ministry of Education, with support from the other relevant ministries and in cooperation with relevant NGOs, shall develop educational programs for parents and children, especially groups highly at risk of becoming trafficking victims, with a view to preventing trafficking in

human beings. It recognises the special vulnerability of women in very poor areas. In Bulgaria, it is the responsibility of the National Commission against trafficking to initiate and take part in the implementation of educational programs for parents and students in schools, for unemployed and illiterate individuals, high risk groups, and victims of trafficking. It is also in charge of providing public information regarding risk situations for becoming a victim of trafficking.

#### ***4.2.4 Social Policies and Incentives for the Employment of Persons at Risk of Trafficking***

One way to address the vulnerability of certain segments of the population to human trafficking is by offering opportunities for a living wage that will prevent them from being lured by promises of a job elsewhere for them or their children, thus finding themselves in exploitative situations. For example, Romanian Law 678 on the Prevention and Fighting Trafficking in Human Beings entrusts the Ministry of Labour and Social Solidarity with the task of working out and enforcing special measures for the integration into the labour market of persons highly at risk of becoming trafficking victims, especially women in poor areas and social outcasts. The Law also requires that Ministry, jointly with the Ministry of Finance, explore possible measures to provide incentives to companies to hire persons at high risk of being trafficked and trafficking victims. Under the same Law, the National Employment Agency must develop information programmes for persons at risk and for potential employers.

#### ***4.2.5 Prevention from Abuse, Violence and Neglect at Home***

Preventing child trafficking also requires ensuring the protection of children where they live, by building a protective environment.

Children, especially adolescents, who are victims of domestic violence or experience violence in their homes, are more likely to be willing to leave the family home. They may be more sensitive to the arguments of traffickers who promise a better place to live. They may also be reluctant to return home after they have been found and more likely to be re-trafficked. Laws protecting children from violence in the family are therefore a key tool for prevention. They should be accompanied



by other measures such as the creation of hotlines and procedures for addressing violence within the family.

#### *4.2.6 Free Consent for Marriage*

Marriage is a technique often used by traffickers to abduct women and girls, and exploit them. It provides a legal basis for transporting them, both within a country and outside of the country. In many countries, marriage is considered a passage to adulthood, even if the person is under-eighteen. As a result, the special protection measures recognised for children may not apply to those who are married. However, the Palermo Protocol clearly applies to anyone under eighteen years of age, without exception, therefore anyone under eighteen years of age, married or not, is protected by its provisions.

With respect to the freedom of marriage, in accordance with the International Covenant on Civil and Political Rights, “No marriage shall be entered into without the free and full consent of the intending spouses” (Article 23). It can be argued that “consent” is not genuine, if the spouse is, as a result of marriage, trafficked and exploited. The law should provide that if marriage is performed for the purpose of trafficking, it is void. When an officer has reasons to think that marriage is performed for trafficking, he/she has the duty to postpone the marriage until proper investigations have been conducted. Adequate protection, in particular against possible retaliation, should be available for victims of such marriages or attempts of such marriages.

Proper legislation should also be adopted to prohibit early marriage and set relevant safeguards to ensure implementation of the law.

#### *4.2.7 Research on the Root Causes of Trafficking*

Research and data collection should be conducted to better understand the root causes of trafficking and fine-tune interventions to address them. Specific efforts should be made at regional and international level to elaborate child protection indicators and harmonise indicators and data collection methods with a view to ensuring comparability. Laws can contain provisions requesting a specific institution, such as

the commission established to monitor trafficking-related issues, participate in international cooperation and disseminate findings.

In Yemen, the draft National Plan of Action to Combat trafficking and Smuggling in Children has been elaborated through extensive consultations with a wide range of stakeholders, including government officials, community representatives, civil society representatives, academic institutions, universities and national and international NGOs. One of the priorities set out by the draft Plan of Action is prevention through research, initiatives addressing the economic and social vulnerability of children, awareness and a mass media campaign. These efforts are accompanied by a campaign to promote free and accessible birth registration.<sup>229</sup>

## Part 5 CRIMINALIZATION

As already stated in this chapter, from a child rights perspective, the primary concern is to care for the rights of victims of trafficking and prevent children from being trafficked. In this context, criminalization of human trafficking is an important aspect, but should not be considered as the only response to child trafficking. Too often indeed, States are primarily concerned with arresting and prosecuting traffickers as part of their fight against crime, including transnational and organized crime. Here again, the principle of the best interests of the child should rule States' actions. Prosecution of traffickers should never come at the expense of children's rights. The purpose of this section is to present issues related to the criminalization of human trafficking, which are most often part of legislative reform debates in this area.

Criminalization is indeed an important element of treaties related to trafficking. Virtually all of them contain provisions obliging States

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<sup>229</sup> Belbase, K., G. El-Khoury, D. Fall, K. Hirabayashi, N. Izumi and J. Kunugi, *Combating Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options*, UNICEF and University of Maastricht Learning Programme on Public Policy, Advocacy and Partnerships (draft).

Parties to make trafficking or related activities criminal offences in their national legislation.

The offence of trafficking needs to be clearly established in the law, and distinct from other offences related to trafficking. Often, only offences related to trafficking are criminalized, and because the sanctions are not adapted to the gravity of the crime they present a human rights violation. The punishment is minimal and as a result not dissuasive.

There are several ways by which trafficking can be criminalized. Either provisions can be incorporated into the penal code, as is often the case in countries of the Roman legal tradition, or a special law on trafficking can be adopted, typically in common law countries. While provisions to be incorporated in the penal code are usually brief and often contain only criminal dispositions, a special law is more likely to be comprehensive, including provisions related to civil law, protection of victims and witnesses, residency, etc.

In accordance with international treaties, criminal provisions should have a broad jurisdiction addressing the national or international nature of the crime, enable prosecution by legal entities and make provision for serious sanctions.

## **5.1 Jurisdiction**

The question of jurisdiction is essential for a crime often involving international elements. Traditionally, a State's criminal jurisdiction is spatial – it is limited to the territory over which it is sovereign. This means that the law of the State will only apply to criminal acts performed on the territory of that State. The Optional Protocol on the sale of children extends the jurisdiction to the persons involved – it is not only territorial anymore. The nationality or residence of the offender, as well as the nationality of the victim, also enable application of the law of that State, even if the offence was committed elsewhere. This considerably expands the scope of the law.

The reference to the nationality of the victim clearly aims at protecting children whose country of nationality is party to the Optional Protocol.

This means that the crimes committed against children nationals of the State Party are punishable, including when children are sold from a neighbouring country to a neighbouring country for instance. Very often indeed, children are trafficked through countries of transit. Even when the State of which the child is citizen has not ratified the Optional Protocol, various legal instruments such as bilateral agreements, mutual legal assistance agreements and other forms of extraterritorial jurisdiction may be used as legal frameworks.

The offender is obviously the trafficker and his or her accomplices, but also the customer in the case of sexual exploitation. "Sex tourism" is thus punished not only in the country where the offence occurred, but also in the country where the customer is from. This is especially important when law enforcement mechanisms in the country of the offence are weak.

The extra-territorial jurisdiction allows that evidence against traffickers be sought in many countries, relying on cooperation between law enforcement institutions.

## **5.2 Criminal Liability of Legal Entities**

Criminal liability should not only concern individuals but also legal entities used for the purpose of trafficking. Often, individuals may set up or use a company to cover and/or pursue their activities. The Optional Protocol on the sale of children obliges States to establish the criminal liability of legal entities, subject to their national legislation. The UN Convention on Transnational Organized Crime also contains provisions related to the liability of legal persons for participation in serious crimes involving criminal organized groups.

The criminal liability of legal persons is a concept that distinguishes the liability of the legal entity from the liability of the individuals. It is used when a criminal act was performed under the name and/or for the profit of a legal entity. Precise definitions and conditions vary from State to State. Sanctions include the payment of fines, usually much higher than for individual liability, restrictions of activity, confiscation of proceeds illegally earned, and dissolution.

It has to be noted, however, that corporate liability does not exclude individual criminal liability. Particularly in the case of trafficking, if a legal entity has been involved in such activities, it is expected that the individuals who have taken decisions and other employees involved in committing the crime will be held criminally responsible.

### **5.3 Activities Related to Trafficking**

Criminalization should account not only for trafficking but also for complicity and all other activities linked to trafficking. Complicity of trafficking should include anyone who knowingly contributed to the commission of the crime and/or benefited from it. In particular, customers engaged in sexual exploitation should be held criminally responsible.

Other pieces of legislation related to trafficking, such as labour laws, adoption laws, provisions on slavery, debt bondage, etc. should also be criminalized, both separately and in conjunction with trafficking. The objective is to ensure that offenders be prosecuted and punished, even if the crime of trafficking per se cannot be proved.

#### ***5.3.1 Trafficking and Adoption***

Laws on adoption are essential to prevent illegal adoptions and punish those who sell children or participate in the trafficking of pregnant women for the purpose of selling their newborn babies.

#### ***5.3.2 Trafficking and Child Labour***

Laws on child labour must attempt to identify exploitative situations. These laws must make it a crime for an employer to hire children younger than the minimum age of legal admission to work and under-age children with working hours exceeding the limit set by the law and/or make them perform hazardous tasks or tasks that impair their development, in accordance with Article 32 of the CRC and ILO Convention 182 on the Worst Forms of Child Labour.

## 5.4 Sanctions

Sanctions need to be dissuasive, and include fines and imprisonment for traffickers and for customers. The seriousness of the crime should be taken into account. For instance, many States have laws that impose harsher sentences if the child was younger than a certain age, usually 14 or 15, if the child has a disability, if the trafficker was a person close to the child such as a parent, guardian or law enforcement official, or if the perpetrator was an organised criminal group. Aggravating circumstances should be part of the sanction framework in order to further protect vulnerable children.

Yet sanctions should not be too harsh, as they may deter police officers and judges from prosecuting and condemning traffickers.<sup>230</sup>

## 5.5 Evidence

Because trafficking is often a crime committed across several countries, evidence from all these countries needs to be gathered for the prosecution and conviction of offenders. This implies that effective and swift mechanisms of international judicial cooperation for gathering evidence need to be in place.

Another possibility is for the law to resort to a system of presumption. In this system, if certain conditions are established, even if there is no substantial evidence against a particular person, that person is presumed guilty. For instance, if someone lives or frequents a victim of trafficking, and cannot provide justification for his/her resources, that person can be presumed to be guilty of the crime of trafficking. In this case, it is up to the alleged offender to prove he/she is innocent. Presumptions significantly broaden the scope of the law and are a useful tool to arrest criminals, provided that they are used as part of a fair trial.

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<sup>230</sup> See Dottridge, M., *Kids as Commodities? Child trafficking and what to do about it*, Terre des Hommes (2004), p. 54.

## 5.6 Extradition

Extradition is an essential element of international judicial cooperation and is particularly relevant in the case of trafficking, as traffickers may try to take refuge in countries where the law enforcement system is weak and where the legislation is less severe.

Extradition is the process by which one State (the requested State) surrenders an individual found on its territory to another State (the requesting State) where he/she is wanted either to stand trial for an offence he/she is alleged to have committed, or to serve a penal sentence already pronounced against him/her.<sup>231</sup>

Extradition can find its source either in international courtesy, bilateral extradition treaties, multilateral extradition conventions, which are most often concluded at the regional level, or other treaties that contain provisions related to extradition, such as the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. One traditional limitation to extradition is the refusal by many States to extradite their nationals. In that case, under the Optional Protocol, they have the obligation to prosecute and try themselves the suspected individual.

Most often, extradition agreements contain a “double incrimination” clause, which requires that the offence be criminalised in both the requested State and the requesting State. This can be an obstacle to extradition if one of the States does not recognise the crime of trafficking or an equivalent that can be assimilated to the crime of trafficking. For that reason, criminalization of trafficking in national laws – in accordance with international standards – is key to ensuring effective international judicial cooperation. The European arrest warrant, applicable to European Union Member States, is a good example of an effective extradition agreement, as it waives the double incrimination condition for a number of serious crimes, including trafficking, sexual exploitation of children and child pornography.

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<sup>231</sup> Interpol, Legal Fact Sheets, Extradition – Some benchmarks, available at <http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS11.asp>.

With a view to facilitating extradition, the Optional Protocol on the sale of children provides that when there is an extradition request between two States Parties to the Protocol, this treaty is a sufficient ground for extradition. In addition, the Optional Protocol specifies that the jurisdiction to take into account for the purpose of extradition is not only the territory of the State – which is the usual jurisdiction in criminal law – but also the nationality/resident status of the offender or the victim, even if the crime was committed outside of the requesting State's territory. Concretely, it means that Country A can request the extradition of one of its nationals located in Country B, because it suspects that this individual has been linked to child sexual exploitation activities in Country C.

Most extradition treaties, including the UN model treaty on extradition adopted in 1990 that is the basis for most extradition treaties, define extraditable offences according to their gravity and the penalty which may be incurred. One criterion is often the minimum duration of a prison sentence. Specific offences are usually not mentioned. However, the criterion of the gravity of the crime can be used to include trafficking or related offences such as child sexual exploitation and slavery. This is one more reason why it is important that serious sanctions be established for the crime of trafficking and related activities.

In conclusion, extradition treaties are key instruments for both international cooperation and efficient justice and law enforcement mechanisms in the fight against trafficking. When they are negotiated, attention should be paid to including either a list of crimes that does not require double incrimination, or ensuring that the two countries have laws that would allow the extradition of an individual prosecuted for trafficking in human beings. Advocacy for the ratification of the Optional Protocol on the sale of children, child prostitution and child pornography is also an important activity to promote extradition in certain cases of trafficking.



## Part 6 INSTITUTIONAL REFORM

### 6.1 Creation of a Specific Institution

As shown in this chapter, trafficking in human beings is a complex issue that involves many different aspects, from prosecution to protecting the rights of victims, to prevention and international cooperation. These dimensions are strongly interrelated. Yet, they are often dealt with by different institutions in a given State. In broad lines, prosecution is a function of the judiciary, protection of the rights of victims involves law enforcement officials and welfare institutions, and international cooperation is usually the prerogative of the Ministry of Foreign Affairs. For the implementation of anti-trafficking legislation, it is thus not sufficient for the law to comprehend all aspects and attribute specific responsibilities to institutions for its implementation. Effective coordination between all sectors is essential to ensure that there are no gaps in the process.

In Pakistan, for effective coordination and enforcement of the Prevention and Control of Human Trafficking Ordinance, 2002, several coordination mechanisms have been created at different levels. At the policy level, a Ministerial level National Committee regularly holds meetings to review progress. At the administrative level an Anti-Trafficking Unit (ATU) Coordination and Monitoring Cell has been established in the Federal Investigation Agency's headquarters, with sub-offices in the four zonal Directorates. At the law enforcement level, an Inter-agency Task Force (IATF) consisting of all the Law Enforcement Agencies including the Federal Investigation Agency, Frontier Constabulary Baluchistan, Coast Guards, Maritime Security Agency and the Police has been created.

One way of guaranteeing the coordination among all actors and ensuring the design of sound policies is to create an institution – be it an agency, a department, a commission or a council – with the mandate to coordinate all anti-trafficking activities and more broadly, ensure the implementation of the law in all its aspects. The format of such institutions varies from State to State, but some common aspects, in terms of structure, mandate, and accountability can be drawn.

## 6.2 Structure

The institution should be an entity able to effectively coordinate several ministries or other actors. Depending on the administrative system of the country, several options can be envisaged. An independent body can be created but it risks having limited authority in guiding national institutions, especially such powerful ministries as the Ministry of Interior, of Justice or Foreign Affairs. One other possibility is to set up a special office within a relevant Ministry. This option enhances the authority of the body, including financial and human resources. It also tends to concentrate the responsibility to fight trafficking within one ministry. While an institution should be set up at the national level, institutions can also be established at the local level in order to work in closer contact with the population and local institutions, particularly in geographic areas at higher risk.

The institution should be composed of people or representatives of institutions and organisations with various skills who work on trafficking from different perspectives, thereby covering all of the different aspects of anti-trafficking activities. It is useful to include representatives from various ministries, the Government, the judiciary, teachers, psychologists, lawyers and doctors, as well as non-governmental organisations or other civil society institutions. Overall, the functioning should be transparent and participatory.

Adequate resources, both human and financial, should be allocated for the institution to accomplish its tasks. Such resources should also be available in all sectors involved in addressing child trafficking. One way to accomplish this is to require that each ministry or institution working on this issue allocate a portion of its annual resources to anti-trafficking activities by law.

In Bulgaria, the law establishes both a National Commission and Local Commissions for Fighting Trafficking in Human Beings. The National Commission is composed of high level representatives from the ministries of labour, interior, justice, health, and education, as well as the State Agency for Child Protection and the Commission for counteracting the Anti-Social Behaviour of Juveniles and Minors. The National Commission also includes members of the Supreme Court,

Prosecutor General and National Investigative service, as well as representatives of NGOs and international organisations represented in the country working in the area of preventing and combating human trafficking. Local commissions are composed of three to seven members appointed by the Mayor and involving representatives of the local government involved in education, health issues and social policy, departments for child protection, representatives of the police, NGOs, teachers, psychologists, lawyers, doctors, etc. A representative of the Regional Prosecutor's Office must attend the sessions of the Local Commission. The law also provides that Local Commissions shall be funded by the budget of the municipality.

The mandate of the institution should be broad enough to ensure it encompasses all dimensions of the implementation of the law. Following are the potential major areas of activity for such institutions.

One of the main roles of the institution should be the coordination of the activities of all actors involved in combating trafficking. It should aim at facilitating the exchange of information between various ministries and institutions, encouraging collaboration of these bodies in undertaking activities for the implementation of the law as well as communicating on the implementation of national policies. As a coordination mechanism, it should also ensure that there is a coordinated and effective response to cases of trafficking.

The mandate of the institution should include research activities and data collection and analysis in order to inform policies on trafficking and to facilitate monitoring and evaluation of the implementation of national laws and policies.

Based on its coordination and research functions, the institution should be in charge of advising on and developing comprehensive and integrated policies to address trafficking in human beings and should monitor their implementation. It should be mandated to formulate strategies and adopt specific measures as necessary for the implementation of the law. This should include the design of programmes aimed at the reintegration of victims of trafficking.

One of the obstacles to international cooperation is the difficulty to identify the appropriate counterpart in another State. The institution

should thus deal with international requests, by directing them to the appropriate department as relevant and following up on them. It should also facilitate the exchange of information and overall collaboration between States. For example, the bilateral agreement between Côte d'Ivoire and Mali provides for the creation of a Permanent Commission for follow-up on the implementation of the agreement. The agreement stipulates that the Commission will meet at least once a year.

The institution should be responsible for the training of law enforcement officials and other relevant actors on trafficking and children's rights issues.

The institution should be mandated to undertake communications campaigns to sensitise the population, especially those most at risk and potential offenders, on trafficking issues.

### **6.3 Accountability**

Like all institutions, the anti-trafficking institution should be accountable and its actions monitored. The standard procedure is the submission of an annual report to the government and the parliament presenting activities undertaken and results achieved.

### **6.4 Strengthening Law Enforcement**

Strengthening the country's institutional capacity implies setting up efficient systems of accountabilities of all actors, in particular law enforcement officials. To that end, appropriate trainings and capacity-building activities should be undertaken and aimed at improving the skills of police officers, judges, social workers and other actors involved with child victims to take into account their specific situation.

For example, the government of Yemen, with support from UNICEF and IOM, trained police officers on techniques to recognise and properly handle trafficking cases. Security officials working in border areas and international airports acquired skills on victim identification, registration and monitoring of child trafficking. Government officials

were trained on shelter management and assistance to victims of trafficking.<sup>232</sup>

## **Part 7 PROCESSES AND ENTRY POINTS FOR LEGISLATIVE REFORM IN THE AREA OF TRAFFICKING**

As in other areas, a participatory and open process, involving all stakeholders, is essential to ensure that the law responds adequately to the challenges posed by trafficking in a specific country. Such a process also helps raising awareness of issues related to trafficking, including the situation of victims, and contributes to training those who will be on the frontline for the implementation of the law.

### **7.1 A Human Rights-based Approach to Legislative Reform in the Area of Trafficking**

The principles of a human rights based approach to legislative reform can be applied as follows in the case of trafficking.

#### **7.1.1 Accountability**

Advocacy efforts should focus on ensuring that States have ratified relevant international treaties to combat trafficking, including regional treaties and agreements.

The implementation of these instruments should then be promoted with the government, and emphasis be placed on the legal obligations they entail. As highlighted in this chapter, these instruments provide a strong basis for advocacy for legislative reform addressing all the dimensions of child trafficking. Law review and legislative reform should therefore be conducted in light of these treaties. It should be made clear that for a law to contribute to fulfilling the State's obligations, it must be enforced and implemented.

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<sup>232</sup> See *Combating Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options* (draft). Op.cit.

### ***7.1.2 Universality***

The principle of universality implies that the law must address the rights of all children, in particular the special needs of girls. As highlighted above with respect to the principle of non-discrimination, it is especially important with respect to international trafficking that children who are not citizens of the country have their rights protected like the nationals of that country, and enjoy even greater protection due to their situation and the fact that they are often unaccompanied. The universality principle further implies that measures aimed at preventing child trafficking take into account the most marginalized and excluded, who are the most vulnerable to trafficking.

The principle of universality also means that the process of drafting of the law should involve all stakeholders, with a particular attention to including sectors of the population that are traditionally marginalized, excluded and discriminated against.

### ***7.1.3 Indivisibility***

As indicated throughout this chapter, legislative reform on trafficking should take into consideration the entire legal framework of the country. It should build on, and strengthen, existing laws and institutions that are indirectly related to trafficking, but are key to combating child trafficking and caring for victims, preventing proliferation of laws and institutions, and integrating existing laws and institutions into a comprehensive approach to safeguard children's rights.

### ***7.1.4 Participation***

Participation and transparency are essential for drafting a law that is sound, informed, and effective. As in other areas, participation in the elaboration of the law and its implementation should be as broad as possible. While a full overview of participation mechanisms are provided in Chapter II, in the area of trafficking, particular attention should be placed on including at least the following:

- **Relevant ministries.** The drafting and implementation of the law and accompanying policies addressing child trafficking should not be prepared only by the Ministry responsible for children's issues, most often the Ministry of Social/Family Affairs. The Ministry of Labour, the Ministry of Justice, the Ministry in charge of the police such as the Ministry of the Interior, and the Ministry of Foreign Affairs should be actively involved as well. The Ministry of Finance also represents an essential partner to allocate resources and implement economic policies aimed at addressing the root causes of trafficking, in particular poverty, which makes some groups of the population vulnerable to trafficking.
- **Members of Parliament.** The Parliament should contribute to the drafting of the law, even if the law is eventually presented by the Head of Government's office. More specifically, relevant parliamentary Committees should be consulted, such as the Committee dealing with children's rights, the Committees on labour, justice, internal security, criminal matters, civil matters, foreign affairs, etc.
- **Members of the judiciary.** Judges and prosecutors can identify legal gaps in the legislation and inform the drafting of the law to make sure it is effective, applicable in legal cases, and legally coherent.
- **Lawyers.** Lawyers can also provide useful legal expertise. Lawyers involved should have experience in the areas tackled by the law, in particular in children's rights, women's rights, criminal law, and civil law, as well as private international law.
- **Children and youth.** Children and youth should be consulted in the preparation of the law and in the implementation. Children and youth who have been victims of trafficking should be listened to, especially with respect to the protection and care of victims. Yet, appropriate measures should be taken to ensure that their participation does not put them at risk.
- **Community leaders.** Community, traditional or religious leaders, in particular in areas particularly affected by trafficking can be instrumental in preventing trafficking and ensuring the reintegration of children victims of trafficking.
- **Non-governmental organizations.** Both domestic and international NGOs working in the area of trafficking should be

consulted. In particular, associations running care centres for victims should be involved.

- **Inter-governmental organizations.** UN agencies and regional organisations present in the country and/or in the region and working in the area of trafficking should be consulted.
- **Media.** The media plays an essential role in sensitising the population on trafficking and deconstructing the myths of a better life promised by traffickers. Public authorities should partner with the media for public awareness campaigns. It is particularly important that appropriate media of communication be chosen depending on the groups most at risk. In areas with high illiteracy rates, for example, radio spots may be more efficient than newspapers to convey a message. In addition, messages should be tailored to the language and culture of the communities in which they are broadcast. When minority groups speaking a different language from the official language of the country are vulnerable to trafficking, information should be communicated in that language. Receiving countries should also ensure that information reaches child victims in a language they can understand, especially when trafficking trends show that child victims come from a specific country/region. Furthermore, some communication strategies should be specifically addressed at children, taking into account their special communication needs to ensure that they understand the message.

### *7.1.5 Training and Capacity Building*

Training and capacity-building are critical to ensure that participation is genuine and informed, and that the law is implemented. Training and capacity-building activities can even take place before the law is adopted, during the preparation phase. Once the law is adopted, such activities are important to ascertain whether it will indeed be applied, or if it is misinterpreted. Training is often a component of the mandate of national/local commissions in charge of dealing with trafficking.

### *7.1.6 Training of Judges and Lawyers*

Judges and lawyers should be trained both on the international legal framework and on the content of the law. Where appropriate, they



could be given examples of jurisprudence in countries with a similar legal tradition. The focus should be placed on the experience of child victims and the human rights violations they have suffered. Emphasis should be placed on the need to adapt judicial proceedings to the fact that victims are children and tools provided to do so, in line with relevant international guidelines in this area, as mentioned above.

### *7.1.7 Training of Staff Dealing with Victims*

Training of all staff dealing with victims is essential in order to avoid dealing with victims in an inappropriate way that may deepen their trauma. Often times indeed, law enforcement officials consider victims as criminals, or want to use them as witnesses and put them under pressure to speak. This may be due to a lack of understanding of issues related to trafficking. Training of staff dealing with children is also crucial. While it should already be part of the training of law enforcement officials and other staff dealing with children, it is key that this aspect be taken into consideration with respect to trafficking.

### *7.1.8 International Cooperation*

As mentioned throughout this chapter, international cooperation is critical for addressing international child trafficking. International agreements, either bilateral or multilateral, constitute both important elements of the legislative framework and at the same time entry points for legislative reform at national level.

Bilateral and regional agreements are multiplying around the globe. The South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, for example, while limited to trafficking for prostitution, was adopted in 2002 and provides a good example of international cooperation at sub-regional level. It focuses on common responses and mutual assistance in fighting trafficking and protecting the rights of victims.

The six nations of the Greater Mekong Sub-Region signed an agreement in 2004, committing themselves to coordinated action on trafficking prevention, law enforcement, the prosecution of traffickers, and the recovery, reintegration and support of trafficking victims.

Likewise, a sub-regional agreement for West and Central Africa was signed in July 2006 under the auspices of ECOWAS to address child trafficking through strengthened cooperation in the region.

## Chapter 5

### REALISING CHILDREN'S RIGHTS TO ADEQUATE NUTRITION THROUGH NATIONAL LEGISLATIVE REFORM

Inadequate nutrition early in life can cause irreparable damage to the developing brain and body. Among other ills, results can include improper mental and physical development, diminished mental and physical capacity, mental retardation, blindness, impaired ability to fight infections and increased risk for obesity and the chronic diseases associated with it. Malnutrition underlies and contributes to approximately 53 percent of all child deaths.<sup>233</sup> The right to adequate nutrition, therefore, is a fundamental, foundational right for children. Its fulfillment is essential for life, health, development and dignity. Without these, a child will have difficulty learning, playing, engaging in other childhood activities, becoming a productive member of society in later years and enjoying the full range of human rights to which all humans are entitled.

General Comment No. 12 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) clarifies that every state is obligated to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe to ensure freedom from hunger. The right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. General Comment No. 12 recognizes, however, that the right to adequate food will have to be realised progressively in many countries.

A comprehensive solution to achieving adequate nutrition for children calls for multiple strategies involving interventions for the whole population. As proclaimed in the Universal Declaration on the

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<sup>233</sup> Bryce, J. et al. Child Health Epidemiology Reference Group, "WHO estimates of the causes of death in children." *Lancet* vol. 365 (2005); p. 1147-52.

Eradication of Hunger and Malnutrition,<sup>234</sup> governments should integrate appropriate food and nutrition policies within socio-economic and agricultural development plans, stressing the importance of human milk in this connection. Paragraph 4 of the Declaration provides that each State has the responsibility to: provide effective measures for socio-economic transformation by agrarian, tax, credit and investment policy reform, reorganisation of rural structures, such as reform of the conditions of ownership, encouragement of producer and consumer co-operatives, mobilisation of the full potential of both male and female human resources, involving small farmers, fishermen and landless workers, and ensuring that appropriate education, extension programmes, and financial facilities are made available to women on equal terms with men.

A thorough discussion of the full range of measures and legislative interventions in these spheres is beyond the scope of this chapter subchapter. Instead, the subchapter addresses four focused nutrition interventions that are crucial components of the mix that guarantees children the right to adequate nutrition: 1) combating micronutrient malnutrition, primarily through food fortification; 2) protecting, promoting, and supporting breastfeeding; 3) enacting or strengthening accompanying social policies to enable women to breastfeed; and 4) promoting healthy diets and physical activity to reverse the alarming trend of childhood obesity and resulting chronic diseases in developed and developing countries alike.

These interventions were chosen because they are critical for preventing the irreparable harms that can result from inadequate nutrition during the most critical period of child development, they are clearly achievable over the shorter term and are inexpensive, and they require legislative measures for implementation. According to the WHO/UNICEF Global Strategy for Infant and Young Child Feeding, the majority of children's deaths from malnutrition could be prevented through low-cost interventions like these.<sup>235</sup>

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<sup>234</sup> The Declaration was adopted and endorsed by General Assembly Resolution 3348 (1974).

<sup>235</sup> Global strategy for infant and young child feeding, WHO and UNICEF, Geneva (2002).

### *Socio-economic Benefits of Realising Children's Right to Adequate Nutrition*

In addition to grossly violating human rights, inadequate and improper nutrition have profound negative effects on nations' economic growth and poverty rates. Results can include low productivity as a result of poor physical condition, poor schooling as a result of low cognitive function, and significant care costs resulting from poor health.<sup>236</sup> Economic costs can include more than 10 per cent losses in productivity in lifetime earnings and up to 3 per cent losses in gross domestic product. Fulfilling the right to nutrition, therefore, has a direct effect on reducing poverty. It is essential to reducing extreme poverty,<sup>237</sup> as called for in the Millennium Development Goals (MDGs).

Giving effect to children's right to adequate nutrition begins with ensuring proper nutrition in utero and during the first two years. It also means ensuring the nutritional needs of girls and women of childbearing age and pregnant and lactating women are met. These groups are entitled to adequate nutrition and health for their own well-being, as reflected in Article 12 of the Convention on the Elimination of Discrimination against Women (CEDAW). Due to persistent status inequities, however, girls and women are more likely to suffer from inadequate nutrition. Their children bear the burden with them and all of society suffers.

### *Children's Right to Adequate Nutrition in International Law*

The right to adequate nutrition is established in numerous international instruments, from the Universal Declaration of Human Rights (UDHR) to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Right of the Child (CRC), and CEDAW. Breastfeeding is an essential component of children's right to adequate nutrition and to other human rights and is protected and supported in several international instruments. These include the ICESCR, CEDAW, the International Code of Marketing of

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<sup>236</sup> *Repositioning nutrition*. World Bank, Washington DC (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.

<sup>237</sup> *Ibid.*

Breastmilk Substitutes (the Code) and subsequent World Health Assembly (WHA) Resolutions,<sup>238</sup> the 1990 Innocenti Declaration on the Protection, Promotion, and Support of Breastfeeding and the 2005 Innocenti Declaration on Infant and Young Child Feeding (Innocenti Declarations), the Global Strategy on Infant and Young Feeding (Global Strategy), and the ILO Maternity Protection Conventions and Maternity Recommendations (1919, 1952, and 2000) (Maternity Protection Convention).

Together these instruments establish a web of nutrition, health, social and economic human rights protections that obligate governments to ensure the right of every woman, child and person to adequate nutrition. Relevant provisions of these instruments are summarized below.

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<sup>238</sup> References in this sub-chapter to ‘the Code’ include subsequent WHA resolutions.

<b>International legal instrument</b>	<b>What it provides</b>
<b>UDHR, Art. 25:</b>	right of everyone to a standard of living adequate for health and well-being, including the right to food
<b>ICESCR, Art. 11:</b>	fundamental right of everyone to be free from hunger
<b>Art. 12:</b>	right of everyone to the enjoyment of the highest attainable standard of physical and mental health
<b>Art. 10:</b>	special protection should be provided to mothers during a reasonable period before and after childbirth; working mothers should be accorded paid leave or leave with adequate social security benefits
<b>CRC, Art. 24:</b>	right of the child to the enjoyment of the highest attainable standard of health
	states must take appropriate measures to diminish infant and child mortality and combat disease and malnutrition through, among other things, the provision of adequate nutritious foods and clean drinking water
<b>CEDAW, Art. 3 :</b>	Parties must take appropriate measures to ensure the development and advancement of women.
<b>Art. 11 and 12:</b>	States must take measures to eliminate discrimination against women in employment, with regard, in particular, to sanctions or dismissal on the grounds of pregnancy or maternity leave, and to introduce paid maternity leave. Article 12 requires states to ensure appropriate services in connection with pregnancy as well as adequate nutrition during pregnancy and lactation.
<b>The Code</b>	specific provisions for protecting, promoting, and supporting breastfeeding (discussed in detail in the section on breastfeeding)
<b>ILO Convention and Recommendations</b>	standards for maternity leave and benefits, employment protection and non-discrimination, and breastfeeding opportunities during work to support the ability of working pregnant women and mothers to breastfeed and otherwise care for their children and themselves without jeopardizing their employment

Strategies and targets for attaining children's right to adequate nutrition are contained in the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children (1990) and other documents. The Plan of Action, endorsed by signing governments, sets out strategies and measurable, time-bound targets for addressing nutrition. These include reducing the rate of low birth weight, eliminating or reducing specified micronutrient deficiencies, empowering women to breastfeed, promoting growth and its regular monitoring, disseminating knowledge and supporting services to increase food production and ensure household food security.

Finally, the UN General Assembly's Millennium Development Goals (MDGs) call for, among other things, reducing by half the proportion of people who suffer from hunger (MDG 1) and reducing by two thirds the mortality rate among children under five (MDG 4). Because malnutrition is a significant cause of under-five child mortality, this goal cannot be achieved without ensuring adequate nutrition to infants and young children, girls and women of childbearing age, and pregnant and lactating women.

### *Legislative Reform: Realising the Right to Adequate Nutrition*

While many international instruments either establish the right to adequate nutrition or reflect agreement on strategies to give effect to that right, legislative reform will be needed in most countries to implement and enforce the right. Engaging in a participatory process, governments should establish applicable legal requirements for:

- nutrition interventions, including duties (e.g., on governments, food companies, employers) to ensure their proper implementation;
- systems for monitoring nutrition goals and targets and for enforcing legal requirements;
- mechanisms of accountability and a legal right of redress in national courts (both with respect to the failure of the government to meet its legal obligations and to violation of specific obligations imposed by law upon non-state actors); and
- the commitment of necessary resources.



- Each of these elements is discussed in the sections on Specific Interventions to Fulfil Children’s Right to Adequate Nutrition, below.

### **1.1 Technical Considerations in Establishing Legal Requirements: Legislation or Regulations (Subsidiary Legislation)?**

Where there is broad legal authority under an existing food control, public health, and labour, or similar law, legislative reform to establish appropriate legal requirements for nutrition interventions may take the form of ministerial regulations or other subsidiary legislation. Establishing requirements through regulations has some advantages. It usually is less time consuming to establish regulations than to enact new legislation. Where technical requirements for nutrition interventions are likely to change due to changes in nutritional status of the population, changes in industry practices, or other factors, it will be easier and more efficient to update regulations than legislation.

Where, however, there is not adequate authority in existing legislation to address the full range of nutrition interventions, it will be necessary to enact new legislation. In addition, where there is concern that future Ministers may not fully support these nutritional programmes and requirements, it may be better to enact legislation so that the legal requirements cannot be as easily undone.

In conducting the legislative review discussed in Chapter 2 of the Handbook, these factors should be assessed to determine whether legislative reform for nutrition is better achieved through legislation or regulations, or a combination of both. The law might require, for example, that labels on breastmilk substitutes carry specified warnings and messages, with the details of exact wording, placement, size, font characteristics, and other details left to regulations. Detailed provisions to implement express legislative objectives are almost always better left to regulations to allow for flexibility to make changes as they become necessary.

As governments establish legal requirements, the framework for implementing the Convention on the Rights of the Child (CRC) should

be applied. This framework ensures: 1) non-discrimination - nutrition interventions must ensure that all children have access to adequate nutrition, regardless of gender and other status; 2) best interest of the child - legal provisions must ensure that children's rights to adequate nutrition prevail over corporate profits, for example; 3) right of life, survival development, and protection - protecting the right to adequate nutrition is a precondition for life, survival and development; and 4) respect for the views of the child.

### *1.1.1 Content Areas for Legislative Reform for Nutrition*

#### **1. Addressing micronutrient malnutrition**

Ensuring access to foods containing essential micronutrients<sup>239</sup> is a critical component of legislative reform to fulfill the right to adequate nutrition. Micronutrients, such as iodine, iron, and Vitamin A, are necessary in the diet for the proper mental and physical development and health of the fetus and young child. In the best case, children without these and other critical micronutrients in their diets may not develop to their full potential. In the worst case, they may suffer unnecessary severe disability, sickness, and death, discussed in more detail in the section, *Combating Micronutrient Malnutrition*. Therefore, the right to access foods containing essential micronutrients must be assured if the right to adequate nutrition is to be achieved.

A large proportion of people worldwide lack such access, however. As stated in General Assembly Resolution 58/186 on the Right to Food (2004), Para. 3, it is "intolerable that ...more than 2 billion people worldwide suffer from hidden hunger or micronutrient malnutrition." Para. 7 stresses that governments need to make efforts to mobilise and optimise the allocation and utilisation of technical and financial resources from all sources. Micronutrient fortification is one such technical resource. It is a practical, cost-effective way to address micronutrient deficiencies, employing a strategy clearly within reach of governments. Fortification is, along with iron and Vitamin A supplement (capsule) distribution and other micronutrient programming (e.g., improving access to and encouraging people to eat

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<sup>239</sup> Essential micronutrients are nutrients required in tiny amounts over a lifetime for proper physical and mental development and health.

foods naturally rich in micronutrients and nutrition education), an important strategy for realising children's right to adequate nutrition.

Since gender inequality subjects girls and women disproportionately to hunger, food insecurity, and poverty, it is no surprise that a large percentage of adolescent girls and women across the globe suffer also from iron deficiency and anaemia. Micronutrient programmes are important, therefore, for realising their rights to adequate nutrition and health and to improving the quality of their lives, as well as those of their children. Although a diet that provides necessary micronutrients alone will not fulfill the right to adequate nutrition, the right to adequate nutrition cannot be fulfilled without it.

Technical aspects of food fortification legislation are discussed in the section, Combating Micronutrient Malnutrition.

## **2. Protecting, Promoting and Supporting Breastfeeding**

Breastmilk provides the ideal exclusive source of nutrition for babies up to the age of six months, offering health-protective effects that cannot be matched by any other food source. Exclusive breastfeeding during the first six months is the best way to strengthen infants' immunity, reduce exposure to infectious agents, reduce the risk of obesity and other factors related to heart disease, help overcome low birth weight and reduce stunting.<sup>240,241</sup> Breastfed babies have lower rates of diarrhoea, respiratory infections, ear infections and other infections. Breastfeeding remains a critically important source of nutrition and health up to the age of two years, along with appropriate complementary foods.

There is also an important link between breastfeeding and Vitamin A. Babies who are not breastfed cannot maintain optimal Vitamin A status for more than a few weeks.<sup>242</sup> Benefits of breastfeeding extend to

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<sup>240</sup> *Quantifying the benefits of breastfeeding: A summary of the evidence*, PAHO, Washington, D.C., undated; available at [www.paho.org/English/ao/fch/bobcontents.pdf](http://www.paho.org/English/ao/fch/bobcontents.pdf) (English)/www.

<sup>241</sup> 1990-2005 Celebrating the Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding: Past achievements, present challenges and priority actions for infant and young child feeding, UNICEF, New York (2003).

<sup>242</sup> Cervinkas, J. and Lotfi M. *Vitamin A deficiency: Key resources in its prevention and elimination*. The Micronutrient Initiative Information Paper 1 (Second ed.), Micronutrient

the mother as well, including bonding between mother and child, improved postpartum recovery, reduced iron loss, reduced risk of breast and ovarian cancers and increased child spacing.

As recognised in the 2005 Innocenti Declaration, “Exclusive breastfeeding is the leading preventive child survival intervention. Nearly two million lives could be saved each year through six months of exclusive breastfeeding and continued breastfeeding with appropriate complementary feeding for up to two years or longer.”<sup>243</sup> Legislation is necessary to protect breastfeeding from practices that undermine it and support working mothers’ ability to both work and breastfeed their babies. These protections are essential for realising children’s right to adequate nutrition.

### **3. Promoting Healthy Diets and Physical Activity**

Childhood obesity is an alarming global trend that will cause significant health (e.g., diabetes) and social problems during childhood and adolescence, and chronic diseases such as heart disease and cancer in adult life. Legislative reform can create a policy environment that supports healthy eating and increased physical activity. Legislative measures can change the environment in schools and in the community that have tended to promote the consumption of unhealthy foods. It also can establish fiscal policies and other measures to encourage healthy eating and increased physical activity to counteract the adverse trends that have contributed to the growing global problem of childhood obesity.

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Initiative, Ottawa (1996); available at <http://www.micronutrient.org/resources/publications/pub21.htm>.

<sup>243</sup> 1990-2005 Celebrating the Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding: Past achievements, present challenges and priority actions for infant and young child feeding,. UNICEF, New York (2003).

## 1.2 Specific Interventions to Fulfill Children's Right to Adequate Nutrition: Combating Micronutrient Malnutrition

### 1.2.1 Health Effects of Micronutrient Deficiencies

Mild or moderate levels of micronutrient deficiencies are extremely common in almost all countries.<sup>244</sup> Iodine deficiency carries the risk of neurological, neural, and intellectual impairments, spontaneous abortion, and other health effects. The single largest cause of mental retardation and brain damage worldwide, even sub-clinical levels of Vitamin A deficiency can result in reduced IQ of 10-15 points.<sup>245</sup> It is the leading cause of blindness throughout the world. At sub-clinical levels, it impairs the body's ability to fight infection. Deficiencies in Vitamin A significantly increase illness and death from measles, respiratory infections and diarrhoea.<sup>246</sup> Children with mild Vitamin A deficiency in some countries have been found to have 25-30 per cent higher death rates.<sup>247</sup>

Iron deficiency is widespread across the globe, with women and young children the most at risk. Fifty per cent of pregnant women and up to 50 per cent of children under the age of five in developing countries are iron deficient.<sup>248</sup> Iron deficiency and anaemia are associated with low birth weight, impaired cognitive functioning, lower school achievement and lower physical capacity. It is estimated that in most developing countries, iron deficiency prevents 40-60 per cent of children from reaching their mental potential.<sup>249</sup> Iron deficiency also

<sup>244</sup> Andersen, P. *Vitamin and mineral deficiency: A global progress report*. Micronutrient Initiative, Ottawa, undated; available at <http://www.unicef.org/media/files/vmd.pdf>. Accessed August 23, 2006.

<sup>245</sup> *Enriching lives: Overcoming vitamin and mineral malnutrition in developing countries*, World Bank, Washington D.C. (1995).

<sup>246</sup> *Repositioning Nutrition*. World Bank, Washington, D.C. (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.

<sup>247</sup> Andersen, P. *Vitamin and mineral deficiency: A global progress report*. Micronutrient Initiative, Ottawa, undated; available at <http://www.unicef.org/media/files/vmd.pdf>. Accessed August 23, 2006.

<sup>248</sup> 'Micronutrients: Iodine iron and vitamin A', UNICEF web site. Available at [http://www.unicef.org/nutrition/index\\_iodine.html](http://www.unicef.org/nutrition/index_iodine.html). Accessed June 20, 2006.

<sup>249</sup> Andersen, P. *Vitamin and mineral deficiency: A global progress report*, Micronutrient Initiative, Ottawa, undated; available at <http://www.unicef.org/media/files/vmd.pdf>. Accessed August 23, 2006.

increases the risk of haemorrhage and sepsis in the mother during childbirth. Iron deficiency anaemia is the largest cause of maternal death during childbirth.<sup>250</sup>

Given the effects of micronutrient deficiencies, it is clear that the rights to adequate nutrition and health cannot be fulfilled in the face of widespread global or national prevalence of these deficiencies. Micronutrient deficiencies are a huge contributor, also, to the economic losses and poverty effects of inadequate nutrition discussed above.

### ***1.2.2 Socio-economic Benefits of Addressing Micronutrient Deficiencies***

In terms of cost-benefits, micronutrient interventions are a bargain. The World Bank has estimated that at the cost of 0.3 % of gross domestic product (GDP), sustained elimination of iodine, iron, and Vitamin A deficiencies could contribute more than 5 per cent to GDP in terms of economic, socio-economic, and health benefits.<sup>251</sup> According to the Bank, “no other technology offers as large an opportunity to improve lives... at such low cost and in such a short time...”<sup>252</sup> The returns on investing in micronutrient programmes are second only to addressing HIV/AIDS in meeting the world’s development challenges.<sup>253</sup> The World Bank suggests that governments, in their approach to addressing malnutrition, pay special attention to, among other things, “scaling up micronutrient programs because of their widespread prevalence, their effect on productivity, their affordability, and their extraordinarily high cost-benefit ratios.”<sup>254</sup>

### ***1.2.3 The Case for Food Fortification***

Fortification of foods regularly consumed by a large portion of the population is a primary, sustainable, successful and inexpensive way to address micronutrient malnutrition. Fortification, therefore, is an

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<sup>250</sup> Ibid.

<sup>251</sup> *Enriching lives: Overcoming vitamin and mineral malnutrition in developing countries*, World Bank, Washington, D.C. (1995).

<sup>252</sup> Ibid.

<sup>253</sup> *Repositioning Nutrition*, World Bank, Washington, D.C. (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.

<sup>254</sup> Ibid.

important part of any micronutrient programme. The cost of fortification can be as little as a few cents per person per year.<sup>255</sup>

Supplementation will remain an essential part of a comprehensive micronutrient strategy, however, especially for those not reached by fortified foods. Even when there is broad access to iron-fortified foods, these alone often cannot fulfill total iron needs of adolescent girls and women. As a result, iron supplements will likely continue to be necessary for them. Public education and health programmes for controlling malaria, measles, diarrhoea, parasitic infections and other diseases that interfere with the absorption and use by the body of micronutrients also are necessary strategies to complement fortification.<sup>256</sup>

Vitamin A fortification of sugar has virtually eliminated Vitamin A deficiency in Guatemala and has substantially reduced it in El Salvador and Honduras, in combination with supplementation. Iron fortification of flour has substantially reduced iron deficiency in all of Chile and Venezuela, and iron fortification of rice in the Philippines has improved the iron status of schoolchildren.<sup>257</sup> Iodised salt is the primary source of iodine in many countries across the globe. Since the initial push in the early 1990s to iodise all salt for human and animal consumption, 70 per cent of households in the developing world now consume iodised salt, up from 20 per cent. Iodine deficiency has been virtually eliminated in many countries as a result of salt iodization. There are many other fortification success stories across the globe.

#### **1.2.4 Fortification Issues**

Food fortification generally has been accepted globally as an important, cost-effective, and safe strategy for addressing micronutrient deficiencies. Because some concerns have been raised, however, it is good to be aware of them and prepared to address them when undertaking legislative reform for food fortification.

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<sup>255</sup> Andersen, P., *Vitamin and mineral deficiency: A global progress report*, Micronutrient Initiative, Ottawa, undated; available at <http://www.unicef.org/media/files/vmd.pdf>. Accessed August 23, 2006.

<sup>256</sup> Ibid.

<sup>257</sup> *Repositioning Nutrition*, World Bank, Washington, D.C. (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.

### **1. Fortified Foods Not Reaching the Entire Population**

Fortified foods have the potential in many countries to reach large segments of the population. While the whole population may not be reached, including the poorest, *supplementation* and other programmes can fill in the gaps. Because the minimal costs of fortification are absorbed by the consumer, government resources are freed up to concentrate on those segments of the population that do not have access to fortified foods and whose micronutrient needs cannot be satisfied by fortified foods alone.

### **2. The 'Right' of Consumers to Choose Non-fortified Foods over Fortified Foods**

This is a misplaced argument for several reasons. First, an essential requirement for making an informed choice is an understanding of the devastating consequences of micronutrient deficiencies and the benefits of fortified foods. Most individuals do not have this understanding. Second, free choice depends on the availability and accessibility of foods containing micronutrients in their natural state. In areas where micronutrient deficiencies are prevalent, it usually is because such foods are not available or accessible. For example, in places where iodine deficiency is widespread, it is usually because iodine has leached out of the soil and crops grown in iodine deficient soil fail to contain adequate levels of iodine. There usually is not a sufficient 'natural' source of iodine in foods in such cases.

Finally, an individual's 'right' to choose non-fortified foods, when that choice is knowingly made, must be balanced against the human right to adequate nutrition of underserved and marginalized groups. When analysing this issue using the 'best interest of the child' principle of the CRC Framework, mandatory fortification under appropriate conditions would almost always be the result. Finally, there are many examples worldwide, like mandatory vaccination and primary education, where individual choice is balanced against and cedes to the public good.



### **3. Trade Concerns**

Some concerns have been raised about whether mandatory fortification could violate the World Trade Organization Agreements or regional trade agreements. Mandatory fortification should not create a trade problem as long as: 1) regulatory measures do not treat imported foods less favourably than domestically produced foods; 2) there is sound scientific health justification for the regulatory requirements; and 3) regulations are not more trade restrictive than necessary to achieve the government's health and nutrition objectives. Most governments have adopted mandatory salt iodization requirements and many have mandated iron or Vitamin A fortification without being challenged by other governments on trade grounds. Folic acid fortification also has been required in some countries without giving rise to a trade challenge.

#### ***1.2.5 Content of Food Fortification Legislation***

##### **1. Establishing Fortification Policy**

The government must decide which foods should be fortified with which micronutrients. This decision will need to take into consideration the scope and severity of the micronutrient deficiency, other sources of the micronutrient in the diet, if any, accessibility of those sources, dietary consumption patterns and the requirements of other countries in the region (in order to support trade in fortified foods).

There has been global consensus for mandatory iodization of salt since the World Summit for Children. Consensus for mandatory iron fortification has also gained strength, and with it, folic acid (to prevent neural tube defects) and zinc (to reduce the incidence and severity of childhood infections and stunting). Where fortification will be safe for the vast majority of the population and the particular micronutrient deficiency is widespread, mandatory fortification of a specified staple food or foods will provide protection for the most people. A requirement for mandatory fortification also will make monitoring and enforcement easier.

Having a law that authorises the appropriate ministry to establish both mandatory and permissive fortification will prevent the government from having to enact a new law for each fortification activity determined to be appropriate. For example, the Philippines' Food Fortification Act of 2000, Sec. 6, requires fortification of rice (with iron), wheat flour (with Vitamin A and iron), and sugar and cooking oil (with Vitamin A). The law then authorises the National Nutrition Council to create mandatory regulations for the fortification of other staple foods and to allow fortification of other foods.

## **2. Public Education**

Imposing a requirement on the government to develop, disseminate and fund a public education programme will help ensure that such activities are carried out. The programme might include information on the importance of consuming micronutrients, the role of fortified foods, supplementation and other strategies. The law can require that this information be targeted to vulnerable groups, be culturally appropriate and address other particular concerns. Inclusion of micronutrient education in school curricula has also been popular in many countries. Public education and curriculum requirements can be decided as a matter of policy, without the need for a legal mandate; however, imposing a requirement in the law should make adoption of the policy more sustainable.

## **3. Incentives**

Government sponsored and funded public awareness and media campaigns on the benefits of fortified foods can be a powerful incentive for fortified food producer because these activities help create demand for fortified products. Other incentives, such as reduced tariffs and taxes on fortificants, fortified foods and equipment, public investment, sharing of some start up costs (e.g., equipment and fortificant premixes for an initial period), and any other appropriate local strategies should be explored. Guatemala's law, for example, exempts machinery, laboratory equipment, accessories, spare parts, specific micronutrients and chemicals needed for food fortification from import duties.<sup>258</sup>

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<sup>258</sup> Decree Number 44-92 (1992).

#### 4. Product Standards

Standards for the food (for example, salt) to which a fortificant (for example, iodine) will be added should be based on Codex Alimentarius standards. The Codex Alimentarius (Codex) is the food code established by the Codex Alimentarius Commission of the World Health Organization (WHO) and Food and Agriculture Organization (FAO). Food that will be fortified generally must meet certain quality standards in order to retain the nutrients added or restored through fortification. For example, moisture content, particle size and impurities in salt can affect the retention of added iodine. Following the Codex standards for food grade salt will address these issues.

##### **Box 39: The Role of the Codex Alimentarius**

The Codex Alimentarius is a collection of food standards, codes of practice, guidelines and other recommendations developed by the WHO and FAO. The standards in the Codex are developed by the Codex Alimentarius Commission, created in 1963 by FAO and WHO to develop food standards, guidelines and codes of practice under the Joint FAO/WHO Food Standards Programme. The main purposes of this Programme are to protect the health of the consumers, ensure fair practices in the food trade, and promote coordination of all food standards.<sup>259</sup>

Under the agreements of the World Trade Organization (WTO), Codex standards serve as the 'international standards' upon which national food regulations should be based in order to fall within requirements of applicable WTO agreements. The Codex Alimentarius is available at [http://www.codexalimentarius.net/web/standard\\_list.do?lang=en](http://www.codexalimentarius.net/web/standard_list.do?lang=en).

Standards for fortificant levels in the final product will depend on factors like the scope and severity of the micronutrient deficiency, dietary intake and food consumption patterns in the country and climatic conditions affecting micronutrient retention, among others. Because these may vary among countries or regions, the Codex does not elaborate standards for levels of fortificants in foods.

<sup>259</sup> Codex Alimentarius website homepage. Available at [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp). Accessed August 23.

## **5. Labeling Requirements**

Labelling is important for informing consumers about the product, like the fortificant content, directions for use and storage, the date by which the product should be used and similar matters. The name of the manufacturer, lot/batch number, place of manufacture, and similar items also are important components of labelling. This information helps governments with inspections and enforcement functions, allowing them to track and trace foods products. The Codex standards for labelling should be followed.

The label also can be a good source for informing consumers of the importance of the micronutrient or micronutrients supplied. Health claims about fortified foods, however, should be carefully regulated. For example, the labels of fortified beast milk substitutes, if allowed to include health claims about their fortified properties, could undermine breastfeeding. This would be detrimental to infant and young child nutrition and health and would run counter to the Code.

Guatemala's regulations require labels on packages of sugar, which must be fortified, to include the designation: VITAMIN A-FORTIFIED SUGAR and a symbol - a green or red eye in the middle of the package - that allows people who cannot read to recognise it. The regulations also prohibit advertising that attributes therapeutic properties to fortified sugar or that presents sugar as the only source of vitamin A.<sup>260</sup> Products manufactured using fortified sugar must not indicate it as a special quality of that product. South Africa's flour fortification regulations authorise the use of the claim 'Fortified for better health' along with a government logo only on the foods specified in the regulations.<sup>261</sup>

## **6. Packaging Requirements**

Packing can be important for retention of micronutrients, protecting them from moisture, direct light, and other elements that might cause their loss. Regulations should provide details for packaging material, size, and similar requirements that will help protect micronutrient

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<sup>260</sup> Regulation for Vitamin A Sugar Fortification, Government Agreement 497-93 (1993).

<sup>261</sup> Regulations Relating to the Fortification of Certain Foodstuffs (2003), Sec. 12.

content, as applicable. For example, iodised salt usually is required to be packaged in high density polyethylene or polypropylene bags or low density polyethylene lined jute bags no larger than 50kg (so that they can be lifted without hooks which might tear the bags and expose the iodine to damaging elements). The Codex Standard for Food Grade Salt, Codex Stan 150, specifically addresses packaging for iodised salt, recommending essentially the above requirements.

### **7. Requirements for Storage, Sales and Distribution Practices**

Storage conditions also can affect micronutrient retention based on exposure to the elements. Therefore, legal provisions should specify storage conditions. As a general rule, the 'First In-First Out' principle should apply to dispatch, distribution, and sale of fortified foods. South Africa's regulations require that manufacturers follow strict stock rotation procedures to prevent old stock from losing potency and to comply with the shelf life expiry date.<sup>262</sup>

### **8. Requirements for Quality Assurance Practice**

Routine practice of quality assurance (QA) procedures will help ensure the efficacy and safety of fortified food products. Therefore, the law should require that manufacturers establish a QA Programme and maintain records of their QA activities, making them available to the government on request. These records can help inform the government's monitoring and inspection processes and help the government identify problem areas where assistance may be needed.

#### **Box 40: Steps in Quality Assurance Programmes**

- 1) *Product specifications*: For fortificants, food vehicle, and any other ingredients, specifications must be documented as met, as well as acceptable deviations. These include specification of particle size, colour, potency, and level of fortification, as well as any other requirement which might be deemed necessary.
- 2) *Product safety assessment*: The assessment should address microbiological, chemical and physical hazards for all ingredients and of the finished product.
- 3) *Product analysis*: Sampling and testing procedures for all ingredients and the finished product must be explicitly stated.
- 4) *Determination of critical and quality control points*: Based on first-hand knowledge of the total process (including the plant facility, equipment and environment), stages at which inadequate control could lead to unacceptable health risk or adversely affect

<sup>262</sup> Regulations Relating to the Fortification of Certain Foodstuffs (2003), Annexure 1(3).

product quality are identified. The system of controls and actions to be taken at each control point is documented.

5) *Recall system*: The mechanism for product recall is outlined, if necessary.

6) *QA audit*: Periodic checks are necessary to verify that the QA system is effective and product quality is maintained to the time of consumer purchase.

7) *Feedback mechanism*: There should be an established mechanism to respond to consumers and other relevant groups and correct any deficiencies discovered.

8) *Documentation of QA system*: Details of the QA programme used in the production of the fortified food must be readily available to relevant individuals and organisations.

*Source*: FAO. *Micronutrient fortification of food: technology and quality control*. Available at <http://www.fao.org/docrep/w2840e/w2840e0b.htm#5.%20quality%20assurance%20and%20control>.

## **9. Licensure or Registration**

The law should require licensure or registration of all manufacturers and importers of the food that must or may be fortified. Licensure of manufacturers and importers of fortificants also should be required. These requirements will help the government keep a record of businesses it needs to monitor and trace non-complaint foods through the licensure or registration number on the label. Legal authority to suspend or revoke the license or registration in appropriate cases can be an effective enforcement tool.

South Africa's regulations require registration by any person who manufactures, imports, or supplies a fortification mix. Food manufacturers and importers may only purchase fortification mixes from registered companies.<sup>263</sup> Guatemala's law requires sugar importers, sub-dividers, and marketers to obtain a health registration number and a license from the Ministry of Health to operate. The money collected is deposited in the Ministry of Health's Food Registration and Control Department account and must be used only for Vitamin A sugar fortification control activities and costs.<sup>264</sup>

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<sup>263</sup> Regulations Relating to the Fortification of Certain Foodstuffs (2003), Sec. 8(a).

<sup>264</sup> Regulation for Vitamin A Sugar Fortification, Governmental Agreement No. 497-93, Article 2.

## 10. Inspection and Enforcement Powers and Duties

Broad inspection powers and clear duties of enforcement in the law will help with ensuring compliance, especially where multiple ministries or agencies will have inspection and enforcement roles. Inspection powers might include the right to enter premises during reasonable hours, examine and copy documents and seize goods and test products, among others. For effective enforcement, the law should provide a range of appropriate penalties for violations, including, for example, licensure or registration suspension or cancellation, fines, adverse publicity, and confiscation of non-compliant products, materials, equipment, or other items. In cases where the government takes an enforcement action and wins, the law can provide for recovery of the costs of taking the action.

Guatemala's Decree provides for a broad range of penalties. These include: a written warning; a fine which can range from 2 to 150 times the monthly minimum wage, up to 100 per cent of the value of the goods or services; for repeat violations, publication of the reason for the sanction in at least two newspapers with a high circulation; suspension of business or commercial activities and suspension of licenses and health registrations; closure of the establishment, business, or enterprise with annulment of registrations and health licenses; and confiscation of raw materials, foods, tools, materials, and objects related to the violation committed. Sugar that does not meet regulatory requirements will be auctioned for industrial use in products for export. Funds raised through this process will become part of the Food Registration and Control Department's private funds to be used exclusively for the sugar fortification control process.<sup>265</sup>

Legal requirements related to micronutrient interventions also should include funding and a mandate to implement supplement programs to target populations not reached by fortified foods. Alternatively, supplement programmes can be implemented based on a policy decision.

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<sup>265</sup> Regulation for Vitamin A Sugar Fortification, Governmental Agreement No. 497-93, Article 17.

### **1.3 Promoting Optimal Nutrition and Health during Infancy and Early Childhood: Adopting and Strengthening the International Code of Marketing of Breastmilk Substitutes**

#### *1.3.1 Health Benefits of Breastfeeding*

Exclusive breastfeeding during the first six months and the appropriate use of complementary foods have the potential to prevent more than twice as many deaths in children under five as any other intervention.<sup>266</sup> The benefits of breastfeeding to both the child and mother have been highlighted earlier in the sub-chapter.

#### *1.3.2 Risks with Bottle-Feeding*

Because breastfeeding provides unrivalled nutritional, health, and developmental benefits, bottle-feeding is a clearly inferior infant and young child feeding practice. In addition, bottle-feeding can be dangerous and deadly. In many parts of the world where water is unsafe, mixing it with powdered formula can cause infection, diarrhoea, and resulting dehydration, malnutrition and death. Improper sterilization of bottles and teats, a problem compounded by low levels of literacy, can also cause infection with serious and potentially deadly results. Additionally, powdered formula can contain microbiological contaminants (e.g., *E. sakazaki*, *Salmonella*) that can cause sickness and death.

Since formula is expensive, poor families may not be able to afford adequate amounts of it and may add water to make it last longer. Where the water is unsafe, the bad health effects discussed above will be compounded. Even where the water is safe, diluted formula will not provide the baby with adequate nutrition, potentially leading to malnutrition. Income spent on formula, when breastmilk is a more nutritious resource that is freely available, potentially diverts resources away from other foods or needed items.

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<sup>266</sup> *Repositioning Nutrition*, World Bank, Washington, D.C (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.



### 1.3.3 *The Need for the Code:*<sup>267</sup> *Practices Undermining Breastfeeding*

When infant formula companies began aggressively marketing their products in the early- and mid-1900s, worldwide declines in breastfeeding followed. Medical professionals at the time lacked adequate knowledge of the enormous benefits of breastfeeding. As a result, they undermined breastfeeding through their own practices, for example, by separating mother and baby after birth and limiting breastfeeding times. This helped set the stage for mothers' receptiveness to breastmilk substitutes and their intensive marketing.<sup>268</sup>

To address the practices contributing to the declining rates of breastfeeding and the resulting increasing rates of infant and young child malnutrition, morbidity and mortality, the World Health Assembly adopted the Code in 1981. The Code aims to limit companies' marketing practices that interfere with the protection and promotion of breastfeeding by prohibiting advertising and all other forms of promotion of breastmilk substitutes, feeding bottles and teats. It also aims to prevent inappropriate health system practices that amount to endorsements of bottle feeding, among other things.

Marketing practices at the time the Code was developed were and continue to be aggressive, misleading and deceptive. A particularly popular and successful marketing strategy has been to promote breastmilk substitutes through the health care system. Some of these marketing practices are discussed below.

**1. Donating free or reduced cost supplies and samples of infant formula.** Donated products are used in facilities and health workers pass the samples on to mothers. This tends to serve as a health system endorsement of formula feeding in general and of the brand used in the facility in particular. Babies that are bottle fed in the hospital are unlikely to be breastfed at home because breastmilk production is dependent on suckling, which bottle feeding prevents. Additionally, bottle use can cause nipple confusion. These things make breastfeeding more difficult, potentially causing mothers to lose confidence in their

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<sup>267</sup> References to the Code include subsequent WHA resolutions.

<sup>268</sup> Ibid.

ability to breastfeed and making bottle feeding the more attractive option.

**2. Employing 'mother craft nurses.'** These were employees of formula companies working in hospitals to teach new mothers about infant care and to hand out samples and sell formula. This practice was stopped after a successful campaign in the 1970s, but it has evolved into other strategies by which companies provide mothers with infant care and nutrition advice, such as through 'baby clubs,' discussed below.

**3. Making gifts to health workers.** Gifts such as office supplies and other items bearing the brand or company name or logo get displayed in health facilities, serving to promote the product. This practice continues today.

**4. Sponsoring health workers.** Paying health workers' expenses to attend professional conferences, providing research grants and giving other perquisites is another popular practice that the Code seeks to limit, but fails to prohibit. This practice is increasing in intensity and is of serious concern because it constitutes a conflict of interest.

Labelling also has been and continues to be another popular way of promoting the use of breast milk substitutes. Common labelling practices at the time the Code was adopted included, among other things, idealising breastmilk substitutes by comparing them favourably to breastmilk, making claims about their benefits to health, printing pictures of healthy, thriving babies on labels, and similar practices. More sophisticated practices have followed, including making misleading health claims, such as the benefits of fatty acids added to formula to enhance intelligence.<sup>269</sup>

A summary of the Code's provisions to address these and other practices is contained in Annex 1.

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<sup>269</sup> *Breaking the rules, stretching the rules.* IBFAN, Penang, Malaysia (2004); available at <http://www.ibfan.org/english/codewatch/btr04/btr04contents.html>. Accessed August 23, 2006.

### 1.3.4 *Issues Related to the Code*

#### **1. HIV and Breastfeeding**

It is estimated that 5-20 per cent of children who breastfeed from HIV-infected mothers become infected through breastfeeding.<sup>270</sup> While avoiding breastfeeding might lower the risk of HIV transmission through this channel, bottle-feeding can increase the risk of illness and death due to higher rates of other infections, as already discussed. A six-fold increase in child mortality can result from artificial feeding in some countries and this must be weighed against the risks of HIV transmission through breastmilk.<sup>271</sup>

UN policy on HIV and breastfeeding recommends exclusive breastfeeding by HIV-infected mothers for the first months of life where artificial feeding is not acceptable, feasible, affordable, sustainable and safe. Where these conditions cannot be met, avoidance of all breastfeeding is recommended. The policy also recommends that HIV-positive mothers be counselled about the risks and benefits of feeding options based on local assessments. Mothers also should have access to information on follow-up care and support, including nutritional and family planning support. Exclusive breastfeeding for six months is recommended for women who do not know their HIV status.<sup>272</sup>

#### **2. The Code and World Trade Agreements**

National laws or regulations incorporating the Code should not be considered illegal trade barriers for similar reasons mandatory fortification laws or regulations would not (discussed in the micronutrient malnutrition section above). In addition, the relevant provisions of the Code would likely be considered to establish 'international standards.' Since the relevant WTO Agreement on Technical Barriers to Trade requires that international standards serve as the basis for domestic regulations, regulatory provisions based on

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<sup>270</sup> *1990-2005 Celebrating the Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding: Past achievements, present challenges and priority actions for infant and young child feeding*, UNICEF, Florence (2005).

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

the Code should not violate trade rules.<sup>273</sup> It is not as clear that exceeding the minimum standards of the Code would enjoy this protection. Here again, as with fortification requirements, there should be a sound basis for demonstrating that any trade-restrictive measure is necessary to promote a legitimate purpose of the government. With regard to advertising restrictions, the WTO judicial body in an earlier case, the Thai Cigarette Case,<sup>274</sup> suggested that advertising restrictions did not violate the General Agreement on Tariffs and Trade.

### **3. Content of Legislative Provisions to Adopt the Code**

The Code represents a significant global public health policy achievement. Still, it is only a recommendation from the World Health Assembly. As a result, it must be implemented through national legislation or regulations to give it the force of law. It is worth noting that the Code was adopted as a minimum standard and countries can adopt and have adopted legislation going beyond this minimum standard in order to protect breastfeeding adequately. This section concentrates on making recommendations to prevent known or anticipated evasion tactics at the national level. Examples of strong provisions from different countries' laws also are presented as possible guidance, as applicable. *A Model Law*, developed by the International Code Document Center for implementing the Code, is an excellent resource for legislative drafting and is contained in Annex 1.

### **4. Scope of the Law**

The Code applies to products 'for use as a partial or total replacement of breastmilk.' Some companies claim to interpret this phrase to mean that the Code applies only to infant formula.<sup>275</sup> Companies also exploit the Code's definition of 'infant formula,' which refers to breastmilk substitutes formulated to satisfy 'normal nutritional requirements' of infants. Companies exploit this definition by making 'specialised' formulas marketed, for example, as high energy formula or low birth weight formula. They claim these are not subject to the

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<sup>273</sup> Mathis, J. *WTO trade issues related to the International Code of Marketing Breastmilk Substitutes: Labeling and marketing restrictions* (unpublished) (2003).

<sup>274</sup> *Breaking the rules, stretching the rules*, IBFAN, Penang, Malaysia (2004); available at <http://www.ibfan.org/english/codewatch/btr04/btr04contents.html>. Accessed August 23, 2006.

<sup>275</sup> *Ibid.*

Code's restrictions. Another tactic is marketing products as 'growing up milk' suitable for older children and, therefore, falling outside of the scope of the Code. Another product, 'mothers milk,' is marketed to pregnant and lactating women, so it clearly does not fall within the scope of the Code. The problem with these products is that they often create an association with products that are covered by the Code by using the same or similar brand names and logos, or similar techniques.<sup>276,277</sup>

Botswana's Marketing of Foods for Infants and Young Children Regulations (2005) provide a good example for addressing these tactics by defining coverage of the law broadly. The regulations apply to 'designated products,' defined broadly as: infant formula; formulas for special medical purposes intended for infants; follow-up formulas; complementary foods; beverages for infants and young children; any product marketed or otherwise presented as suitable for feeding infants and young children; feeding bottles; teats; pacifiers and dummies; breast pumps, cups with spouts or similar receptacles for feeding infants and young children; and such other products designated by the Minister.<sup>278</sup> Giving the Minister authority to designate other products is an effective safeguard, providing the government with flexibility to respond relatively quickly to improper marketing practices. Brazil's provisions also provide broad coverage. They apply to infant formulas, follow up formulas for infants and young children, milks, transitional foods and cereal based foods when marketed or presented as suitable for infants and young children, nutrient formulas presented as suitable for high-risk newborns, feeding bottles, teats, and dummies.<sup>279</sup>

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<sup>276</sup> Ibid.

<sup>277</sup> Sokol, E., *The Code Handbook*, International Code Documentation Centre, Penang, Malaysia (2005).

<sup>278</sup> Marketing of Foods For Infants and Young Children Regulations, 2005, Sec. 2.

<sup>279</sup> Decree No. 2051 of 8 November 2001 and Resolution RDC No. 222, 5 August 2002, Art. 1.

**Box 41: Suggestions for Provisions on the Scope of the Law**

National legislation or regulations could strengthen the Code's provisions by applying to:

- all types of infant formulas (not just those for meeting 'normal' nutritional needs) ;
- all other foods marketed as suitable for infants or young children (under a specified age) and foods that are likely to create an impression of such suitability or that are commonly used to feed infants or young children;
- any foods that are marketed in a way that create an association with foods covered by the Code, for example, by using the same or similar logo, package design, or other product indicia;
- teats, pacifiers, and items used for feeding infants and young children and
- other foods or items designated by the relevant Minister.

## **5. Information and Education**

The Code does allow companies to provide 'scientific' or 'factual' information to health professionals, creating a significant loophole. Brazil's measures largely avoid this pitfall by prohibiting manufacturers, importers, and distributors from producing or sponsoring educational materials that deal with infant feeding.<sup>280</sup> They also prohibit educational and technical-scientific materials, including those of health professionals or health authorities, from containing any pictures or text that recommend the use of dummies, teats and feeding bottles or the use of breastmilk substitutes, or that may lead to their use.

The regulations in Botswana and Ghana include a requirement for government approval of informational and educational materials prior to their distribution.<sup>281, 282</sup> Botswana's regulations also include a prohibition on any reference or inclusion in informational or educational materials to the brand name, name, logo, trademark or other words or graphic associated with the product, brand, manufacturer or distributor. Yemen's law prohibits any authority or institution from issuing any information or educational materials on infant and young child nutrition or on covered products. The regulations also prohibit information on nutrition for pregnant and

<sup>280</sup> Decree No. 2051, Art. 9.

<sup>281</sup> Marketing of Foods For Infants and Young Children Regulations (2005), Sec. 15(1).

<sup>282</sup> Breastfeeding Promotion Regulations, 2005, Sec. 7(3).

lactating women unless they have been previously cleared by the Ministry.<sup>283</sup>

**Box 42: Suggestions for Provisions on Information and Education**

National law could strengthen the Code's provisions by prohibiting manufacturers and distributors of covered products or anyone acting on their behalf from publishing, distributing, or otherwise providing to or through any health facility, health worker, community worker, or similar person or entity any:

- information that addresses or includes nutrition, diet, or feeding during pregnancy or preparation for pregnancy, after birth in relation to either the mother or the child, or to children below a specified age; additionally, any information that includes nutrition, diet, or feeding related to older children must specify that it does not pertain to children under that age, in a manner specified by the Minister;
- promotional, scientific or educational information or materials of any kind that contain any reference to a covered product, brand, logo, trademark, or other indicia of the product, brand, manufacturer or distributor; and
- using any person or method, other than specified information on labels, to provide any person with information or instructions about the use of a covered product.

## 6. Marketing

While the Code allows 'appropriate marketing' of breastmilk substitutes, bottles and teats, it prohibits all forms of promotion or advertising of these products. It is, thus, vital that national legislation or regulations carefully define 'advertising', 'promotion', 'marketing', and similar terms to avoid any misunderstanding or confusion.<sup>284</sup> In

<sup>283</sup> Prime Minister Decree No. 18/2002 on Regulation of Breastfeeding Promotion and Protection, Art. 21.

<sup>284</sup> Drawing from the field of tobacco control, where evasion of legal requirements, especially those related to advertising, sponsorship, and promotion, has been perfected to an art by an industry very skilled at evading regulation, definitions suggested for tobacco control regulation might provide guidance, for example:

"*advertising*": any commercial communication through any media or means, that is intended to have, or is likely to have, the direct, indirect, or incidental effect of:

- (i) creating an awareness of a tobacco product, brand, manufacturer, or seller, or
- (ii) promoting the purchase or use of a tobacco product or brand.

An advertisement includes, but is not limited to, words, names, messages, mottos, slogans, letters, numbers, pictures, images, colors, trademarks, and other graphics, sounds, and any other auditory, visual, or sensory matter, in whole or part, that is or are:

- (i) commonly identified or associated with a product, brand, manufacturer, or seller, or
- (ii) otherwise an indicia of product, brand, manufacturer, or seller identification.

"*brand stretching*": any non-tobacco product or service that contains, either on the product, or in any advertisement of the product, any writing, picture, image, graphic, trademark, message, or other matter, in whole or part, that is commonly identified or associated with, or

developing provisions to address marketing and promotion, drafters should keep in mind less overt forms of promotion, like ‘mother’s clubs’ and ‘baby clubs,’ formula logos or trademarks on non-formula products, and other tactics highlighted in Code monitoring reports and publications like *Breaking the Rules, Stretching the Rules*.<sup>285</sup>

Botswana’s regulations define ‘marketing’ comprehensively, as promoting, distributing, selling, or advertising a designated product. Also included in the term are product public relations and information services, including the use of professional service representatives or any person acting on behalf of a manufacturer or distributor. ‘Promote’ is defined as including:

- (a) any direct or indirect method of introducing a designated product or encouraging the purchase or use of a designated product;
- (b) sale devices such as rebates, special displays to promote sales, tie-in sales, loss leaders, grant of rewards, discount coupons, premiums, special sales, prizes, gifts, and giving of samples to mothers;
- (c) direct or indirect contact between marketing personnel and members of the public in furtherance of or for the purpose of promoting the business of designated products, including television and radio, telephone or internet help lines, mother and baby clubs, and baby competitions;
- (d) electronic communication, including website, internet and electronic mail;
- (e) promotional items such as clothing, stationery, or items that refer to a designated product or to a brand name of a designated product;
- (f) outdoor advertisements such as billboards;
- (g) placard and newspaper or magazine inserts;
- (h)

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is likely or intended to be identified or associated with a tobacco product, brand, or manufacturer.

“*promote*” includes any commercial act or practice that is intended to or is likely to encourage, directly or indirectly, the purchase or use of any tobacco product or brand or create an awareness of or association with a tobacco product, brand, manufacturer or seller.

(Source: Nathan, R., *Model Legislation for Tobacco Control: A Policy Development and Legislative Drafting Manual*; available at [www.ftc.org](http://www.ftc.org) and [www.gphls.org](http://www.gphls.org)).

<sup>285</sup> *Breaking the rules, stretching the rules*, IBFAN, Penang, Malaysia (2004); available at <http://www.ibfan.org/english/codewatch/btr04/btr04contents.html>. Accessed August 23, 2006.



practices that create an association between a manufacturer or distributor and breastfeeding.<sup>286</sup>

Brazil's measures include a ban on the commercial promotion of infant formulas and follow-up formulas for infants, special nutrient formulas, dummies, teats, bottles, and nipple shields, by any means of communication, including merchandising, electronic, written, or audio-visual means, promotional strategies aimed at increasing retail sales, such as special displays, discount coupons, below cost pricing, prizes, gifts, sales linked to products not covered by the regulation, and special presentations.<sup>287</sup>

**Box 43: Suggestions for Provisions on Marketing**

National laws should, at a minimum:

- carefully and comprehensively define 'advertising', 'promotion', 'marketing', and similar terms
- prohibit all direct and indirect forms of promotion, including advertising and marketing, in all forms of media, using any means, and in any place in relation to covered products, brands, manufacturers, and distributors (keeping in mind indirect forms of promotion, such as those covered in the Botswana's and Brazil's laws, especially the popular forms of direct mail, telephone help lines, newsletters associated with baby clubs, and similar methods)<sup>288</sup>

If a ban is not possible on all covered products, national measures should impose stringent restrictions on marketing and promotion of foods that complement breastfeeding after six months of age to ensure that promotion of these products does not undermine exclusive or sustained breastfeeding.<sup>289</sup> Restrictions on these products might include, for example, limits on content,<sup>290</sup> where promotion is allowed,<sup>291</sup> and the medium or form of promotion.<sup>292</sup>

<sup>286</sup> Marketing of Foods For Infants and Young Children Regulations, Sec. 8.

<sup>287</sup> Decree No. 2051, Art. 4, and Resolution RDC No. 222, Art. 4.1.

<sup>288</sup> Sokol E., *The Code Handbook*, International Code Documentation Centre, Penang, Malaysia (2005).

<sup>289</sup> Some laws, such as India's Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, No. 41 of 1992 (as amended 2003), No. 41 of 1992, prohibit the promotion of complementary foods.

<sup>290</sup> For example, they must not be promoted as suitable for infants under six months and must include a statement to this effect. In addition, they should include a statement on continued breastfeeding (the government should prescribe the required statements). The IBFAN model law provides two options for provisions on the marketing of complementary foods: One that prohibits their marketing and one that places restrictions on their marketing.

<sup>291</sup> For example, no promotion should be allowed in health facilities.

<sup>292</sup> For example, no samples or promotional gifts should be allowed.

## 7. Obligations of Health Care Systems

In response to marketing and improper practices in health facilities, UNICEF and WHO introduced the 'Baby-Friendly Hospital Initiative' in 1989 to educate health workers and promote and support breastfeeding in hospitals. A few years later, after adopting two previous resolutions on the subject, the World Health Assembly adopted Resolution WHA 45.34 (1992), calling on companies to stop giving free or low cost supplies of formula to health facilities providing maternity services. Because the practice continued and expanded to providing free supplies to paediatric wards and other health services, the WHA adopted another resolution, WHA 47.5 (1994), calling on Member States to ensure no donations of free or subsidised supplies of breastmilk substitutes and other products covered by the Code in *any part* of the healthcare system.<sup>293</sup> Despite these efforts, companies continue to provide free or low cost formula where national provisions do not prohibit the practice.<sup>294</sup> It is, therefore, important for national measures to ban free and low cost supplies.

To address gifts and sponsorships, WHO adopted WHA Resolution 49.15 (1996), stating that financial support to health workers should not create a conflict of interest. This Resolution is not strong enough, however, and the practice is increasing in intensity. Concern remains that these substantial benefits influence health workers to endorse companies' products. Resolution 58.32 of 2005 urged governments to ensure that financial support and other incentives for programmes and health professionals working in infant and young-child health do not create conflicts of interest. Banning gifts and donations to health and community workers, where enforced, should eliminate the practice, and with it, the conflict of interest.

The Code also addresses company practices of giving health workers office supplies and other items bearing the brand or company name or logo, but not in a way that prevents promotion of products covered by the Code. Article 6.3 provides that health system facilities should not

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<sup>293</sup> Until these Resolutions, the Code allowed free supplies but placed restrictions on the practice.

<sup>294</sup> *Breaking the rules, stretching the rules*, IBFAN, Penang, Malaysia (2004); available at <http://www.ibfan.org/english/codewatch/btr04/btr04contents.html>. Accessed August 23, 2006.

be used to display covered products, posters of these products, or the distribution of material provided by companies. However, Art. 6.8 allow companies to donate equipment and materials to health care systems that bear a company's name or logo, so long as these items do not include reference to a proprietary product. Because advertising, labelling, and other forms of promotion tend to associate products with their manufacturers and/or a brand-identifying logo, this Code provision allows a huge avenue for evasion. Displays of product trademarks, mascots, and the like continue to be seen health facilities.<sup>295</sup> Banning these donations is the only effective way to prevent continued displays in health facilities.

Art. 7.2 contains another big loophole by permitting companies to provide information on their products to health professionals. Although this information should be restricted to scientific and factual matters, and should contain information on the benefits and superiority of breastfeeding and warnings about the negative effect of bottle feeding, this rarely is the case. The materials tend to be highly promotional, often containing pictures of happy, healthy, 'more intelligent' babies and are not restricted to scientific and factual information. Health professionals often pass these materials on to the true intended audience - pregnant women and mothers. By allowing these materials, the Code provides a legitimate avenue for companies to promote their products to health workers under the pretence of scientific or factual information. Indeed, companies provide large volumes of attractive materials to health facilities.<sup>296</sup> To stop this practice, this type of distribution of information to health professionals or anyone else should not be permitted.

Botswana's regulations address the conflict of interest created by sponsorships of health workers comprehensively. They prohibit health workers from accepting any gift, financial assistance, fellowships, study tours, research grants, funding for conference attendance, samples of covered foods, or quantities of food for infants and young children priced at less than wholesale or 80 per cent of retail price.<sup>297</sup> The regulations also prohibit displaying designated products in any health facility and impose corresponding obligations on manufacturers

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<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Marketing of Foods for Infants and Young Children Regulations, Art. 9(2).

and distributors. In addition, they prohibit manufacturers and distributors from selling, donating, or distributing, or causing the distribution of any equipment, materials, or other services with any reference to a designated product or containing the name or logo of any manufacturer or distributor in any health facility.<sup>298</sup>

Ghana's regulations prohibit free distribution of samples of a designated product to any person. They also prohibit, among other things, donating any equipment or material that bears the name, logo, graphic, trademark or any other description of a designated product for use within a health care facility.

**Box 44: Suggestions for Provisions Addressing Obligations of Health Care Systems**

National law could strengthen the Code's provisions by prohibiting any manufacturer or distributor of any covered product, or anyone acting the behalf of either, from:

- donating supplies or providing discounted supplies of any covered product to any part of the health system;
- providing samples of any covered products in health facilities or to health or community workers for any purpose, including for professional evaluation or research; and
- giving, offering, or sponsoring, any gift, grant, sponsorship or any other contribution, loan, or perquisite to any facility of the health system or to any health or community worker.

National law could further prohibit any health or community worker, or any representative of any facility of the health system from:

- accepting any donations, discounted supplies, or samples of any covered product;
- distributing or displaying any covered product in any health care facility;
- accepting any gift, grant, sponsorship, or any other contribution from any manufacturer or distributor or any person acting on behalf of either; and
- accepting, displaying, or distributing any materials, equipment, or items of any kind from a manufacturer or distributor, or anyone acting on their behalf, including informational and educational materials, utensils, equipment and similar items.

The law also could require health and community workers and any representative of any health facility to report in writing the provision or offer of the same by any manufacturer, distributor or any person acting on behalf of either.

<sup>298</sup> Marketing of Foods for Infants and Young Children Regulations, Art. 8.3.

## 8. Employees of Manufacturers and Distributors

Although the days of ‘mother craft nurses’ have passed, companies’ employees still find ways to have direct contact with pregnant women, new mothers, their families, and others who might influence them. The Code’s restrictions on contact with the public and the provision prohibiting educational functions apply only to companies’ marketing personnel. Companies get around these restrictions by creating ‘educational departments’ to handle questions and develop materials for mothers’ and babies’ clubs.<sup>299</sup>

### **Box 45: Suggestions for Provisions Addressing Employees of Manufacturers and Distributors**

National laws could strengthen the Code’s provisions by prohibiting any employee or other person acting on behalf of a manufacturer or distributor, from directly or indirectly soliciting or initiating contact with any:

- member of the public
- any employee of the health system
- or any community worker

to promote a covered product or provide any educational, scientific, or similar information related to a covered product or to feeding or nutrition of infants, young children (under a specified age), or pregnant or lactating women.

## 9. Labeling

The Code addresses the type of information that should be part of labelling on infant formula containers. These include notice about the superiority of breastfeeding and related information, preparation instructions, warning about the hazards of inappropriate preparation, and, where applicable, risks of contamination with micro organisms. It is necessary, however, for national regulations to prescribe details as to precise wording, placement of the information on the container, size of messages in relation to the size of the container, details on font size, colour, and style, and contrast of text colour in relation to background colour.

Specifying the detailed wording and graphics that must be used for messages is one way to be sure the information is properly conveyed. For example, India’s law requires that the statement, ‘MOTHER’S

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<sup>299</sup> Ibid.

MILK IS BEST FOR YOUR BABY' must appear on all infant foods.<sup>300</sup> Yemen's regulations require a label that states "Breastmilk is a complete food containing all the essential elements for infants and it improves the immunity of infants against diseases, especially diarrhoea."<sup>301</sup>

Brazil's law requires follow-up formula for young children and specified milks to include the following: 'Breastfeeding prevents infections and allergies and is recommended up to two year of age or more.'<sup>302</sup> It also requires that transition foods and cereal based foods and other foods or beverages marketed as suitable for infants or young children state, "After the first six months continue breastfeeding your baby in addition to giving new foods."<sup>303</sup>

Prescribing in national regulations the particulars as to the placement, font type, size, and colour, background colour, size of the message in relation to the size of the package panel, and other matters will help assure the messages truly are 'conspicuous,' as required by the Code. Without these specifications, what is 'conspicuous' is a subjective judgment that is difficult to enforce. By analogy, the Framework Convention on Tobacco Control (FCTC) requires that tobacco product packages contain a warning comprising at least one third of the main display panels of the package. The FCTC urges ratifying parties to require warnings that comprise 50 per cent of the main panels.

National governments should consider prohibiting labels from containing nothing other than the labelling information provided in the Codex Alimentarius and any required messages and warnings. Prohibiting additional text or images will give full force to the Code's prohibition against text that idealises the use of formula. Accompanying this prohibition should be a ban not only on pictures of infants, as required by the Code, but on any images or designs. Iran's law, for example, allows only generic labelling.<sup>304</sup> Although the laws of

<sup>300</sup> Infant Milk Substitutes, Feed Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 (as amended), Sec. 6(1)(a).

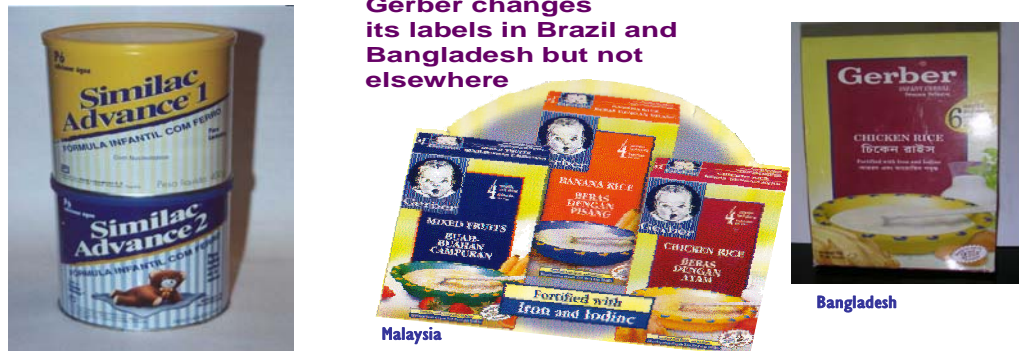
<sup>301</sup> Prime Minister Decree No. 18 on Regulation of Breastfeeding Promotion and Protection, Art. 7(1)(a).

<sup>302</sup> Resolution RDC No. 222, Art. 4.2.

<sup>303</sup> Resolution RDC No. 222, Art. 4.2.2.

<sup>304</sup> *The International Code*, UNICEF, New York, undated; available at <http://www.unicef.org/programme/breastfeeding/code.htm>. Accessed August 23, 2006.

Brazil and Bangladesh do not impose a generic labelling requirement, their prohibition on photographs, illustrations or other graphic representations has been successful in getting the Gerber baby and the Isomil and Similac bear off labels of covered products.<sup>305</sup>



Slides provided by the International Code Documentation Centre.

Labelling requirements under national law for complementary foods and other similar foods will be different than those for infant formula since proper use of complementary foods plays an important role in young child nutrition. Botswana's regulations require that labels on follow-up formula state that the product shall not be used for infants younger than six months.<sup>306</sup> They also provide that milks must contain the statement, "THIS PRODUCT IS NOT SUITABLE FOR FEEDING BABIES."<sup>307</sup> A requirement like Botswana's could be strengthened even further with a warning of the harmful effects of feeding these products to infants under a certain age.

#### Box 46: Suggestions for Provisions on Labeling

National regulations could strengthen the Code's provisions by:

- prescribing the precise size and placement of the warnings and messages (e.g., on the top on-half of the main panel, or each main panel, if more than one), and requiring them to be in the language or languages specified in regulations;
- prescribing colour(s) of the text in relation to the background and the size and style of the font;
- prohibiting the label or package from containing any text, pictures, drawing, logo, trademark, or graphics of any kind, other than that

<sup>305</sup> Resolution RDC No. 222, 5 August 2002, Art. 4.3.1.

<sup>306</sup> Marketing of Foods for Infants and Young Children Regulations, Art. 11.

<sup>307</sup> Marketing of Foods for Infants and Young Children Regulations, Art. 13.

- prescribed or allowed;
- prescribing labelling requirements for covered products like follow-up formulas, complementary foods, foods marketed for pregnant and lactating women, bottles, teats, and dummies;
  - for complementary foods, clearly stating the age of proper use, with a warning about the health effects of use at earlier ages or as a replacement for breastmilk;
  - prohibiting any health claim or claims with regard to any covered product, or alternatively, requiring approval by the Ministry of any claims and providing the evaluation criteria the Ministry should use in granting approval; and
  - prohibiting any misleading claims by manufacturers or distributors.

Additionally, governments might consider providing a template that must be used for all covered warnings and messages.

## 10. Implementation and monitoring

The law should impose clear authorities and responsibilities on the government, on manufacturers and distributors, health facilities and workers, and on agents of any of these and anyone working on their behalf. Additionally, it is important to ensure that each requirement under the law has a corresponding penalty or penalties for its violation. The authorities and duties related to inspections and enforcement also need to be clearly spelled out. (See discussion on inspections and enforcement in the section on food fortification, above.)

Monitoring is critical because it allows the government to take action to enforce the law. Through monitoring, the government and interested organizations also will be aware of the latest industry practices that violate or evade the law in their countries. With this knowledge, the government can, where necessary, amend legal requirements to close loopholes as well as take enforcement action in response to clear violations. NGOs can play an important monitoring role, enhancing the government's ability to monitor and enforce the law.

Botswana and India, for example, created a role for such organizations in their legal frameworks. Botswana's Regulations<sup>308</sup> gave the

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<sup>308</sup> Marketing of Foods for Infants and Young Children Regulations, Art. 4.



Permanent Secretary power to designate specially trained monitors to investigate, observe and record information regarding marketing practices at points of sale, in health care facilities, border posts and offices, through the media, and elsewhere. Monitors are vested with inspection and investigative authority and their reports can serve as evidence in court. India, through Ministerial regulations,<sup>309</sup> authorized specified voluntary organizations engaged in the field of child welfare, development, and nutrition to make a complaint in writing under national law adopting the Code.

### **11. Additional measures**

Additional provisions to protect, promote, and support breastfeeding might include such things as:

- registration of covered products, as is required in Nigeria, or licensure of manufacturers and distributors of covered products;
- a specific requirement for the government to both fund, as well as implement, programmes for public education and training of community and health workers on appropriate infant and child feeding practices; and
- a requirement for inclusion of such information in the curriculum of appropriate educational institutions, especially in the curriculum for medical professionals. These, alternatively, could be taken as a policy decision without necessarily incorporating the requirement into law.

### **1.4 Accompanying Social Policies to Protect, Promote and Support Breastfeeding**

The 1990 Innocenti Declaration affirmed improved breastfeeding practices as a means to fulfil children's right to the highest attainable standard of health, calling on governments to implement the Baby-Friendly Hospital Initiative and the Code, appoint a Breastfeeding Coordinator and establish a multi-sectoral Breastfeeding Committee, and enact legislation protecting the breastfeeding rights of working

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<sup>309</sup> Ministry of Human Resource Development (Department of Women and Child Development) Notifications of 27 June 1994 and 27 July 1995.

women and establish a means for its enforcement. The Global Strategy for Infant and Young Child Feeding, adopted by the World Health Assembly and endorsed by UNICEF's Executive Board in 2002, expands the Innocenti targets and incorporates the latest scientific evidence. This includes the optimal duration of exclusive breastfeeding for six months and the minimal duration for continued breastfeeding, accompanied by safe and appropriate complementary foods, for two years or longer.

The Innocenti Declaration 2005 reinforces the 1990 Declaration and Global Strategy targets as the foundation for action to improve infant and young child feeding practices and expands on them. For example, the 2005 Declaration calls on parties to also ensure the health and nutritional status of women throughout all stages of life and to give urgent attention to facilitating breastfeeding for women employed in the non-formal sector, among other supports. These documents together provide the framework for social policies for the protection, promotion and support of breastfeeding.

#### *1.4.1 The Need for Maternity Protection as an Accompanying Social Policy*

Unless maternity protection rights are provided in national law, women in paid employment who decide to breastfeed face competing demands that can make breastfeeding impossible. Additionally, a return to work too early can jeopardise the mother's health. Consequences can include anaemia, malnutrition, urinary tract infections, uterine prolapse, and physical and emotional stress.<sup>310</sup> Maternity protection as a matter of right, therefore, is a necessary component of legislative reform to protect children's and women's rights to adequate nutrition and health. It also reflects recognition that breastfeeding is a social function and its protection, promotion and support are a social responsibility.

Essential elements of maternity protection include, at a minimum, eliminating workplace discrimination on the basis of pregnancy and

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<sup>310</sup> Maternity protection coalition statement. IBFAN Press Release 5 June 2000, IBFAN, Penang, Malaysia, 200. Available at <http://www.ibfan.org/english/news/press/press5june00.html>. Accessed August 23, 2006.

maternity, ensuring income and job security and providing adequate facilities for breastfeeding and expression of milk.<sup>311</sup>

#### ***1.4.2 The Maternity Protection Convention and Recommendations***

The ILO adopted the Maternity Protection Convention in 1919, and amended it in 1952 and 2000. Although the majority of countries have not ratified the Convention, the vast majority have adopted maternity protection legislation that meets or exceeds the levels of protection elaborated in the Convention and Recommendations. A summary of the Maternity Convention and Recommendations is contained in Annex 2.

#### ***1.4.3 Incorporating the Maternity Convention and Recommendations into National Law***

Legislative provisions implementing the Maternity Protection Convention and Recommendations will be concerned mainly with providing sufficient scope, quantity and quality of benefits to protect and support breastfeeding, along with strong provisions for non-discrimination.

##### **1. Scope**

A glaring gap in the Convention and Recommendations is that they do not apply to women working in the informal economy and in rural farming who often lead the most economically fragile lives. It is important, therefore, for governments to ensure mechanisms for protecting, promoting and supporting the breastfeeding rights of women in informal, rural and domestic employment. This might be accomplished, for example, through the provision of social security, public assistance, or other government funds to women working in these sectors. The government also could fund benefits for such workers thorough programs like cooperatives and mutual benefit societies.<sup>312</sup>

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<sup>311</sup> Without frequent expression of milk, a sufficient milk supply becomes jeopardised.

<sup>312</sup> *Key elements of maternity protection at work: Maternity Protection Campaign Kit*. WABA, Penang, Malaysia; undated; available at [www.waba.org.my/womenwork/mpckit.htm](http://www.waba.org.my/womenwork/mpckit.htm). Accessed June 25, 2006.

For example, the Indian government subsidises the Self Employed Women's Association (SEWA) Integrated Insurance Scheme, which provides a range of social benefits, including a small maternity benefit. SEWA is a membership organisation for women who are self-employed, regular wage earners and casual labourers. In Bangladesh, social security coverage is extended to difficult-to-reach workers through micro-health insurance schemes, promoted through partnerships with voluntary organisations and the government.<sup>313</sup>

## **2. Maternity Leave**

Guaranteed leave is necessary to allow women to take time off around a birth event without fear of losing their jobs or suffering discrimination. Nearly one half of countries for which data are available meet the Convention's requirement of 14 or more weeks of leave.<sup>314</sup> In some countries, leave is provided for extended periods of time. Twelve countries provide 26 or more weeks of maternity leave.<sup>315</sup> Korea's law mandates the availability of a maternity leave of up to one year and requires the provision of nursing facilities for infants.<sup>316</sup> Iraq's law provides maternity leave for an official to be fully paid for the first six months and half-paid for the second six months.<sup>317</sup> Slovakia's law **grants** maternity leave for 28 weeks (37 weeks if the woman gave birth to two or more children at the same time or if she is a single mother).<sup>318</sup> Governments should consider scaling up leave over time, if not immediately, to six months, with full payment and continuation of all benefits to accommodate and support exclusive breastfeeding for the Code-recommended period of six months. At the least, R 191's recommendation of a minimum of 18 weeks should be required.

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<sup>313</sup> Social Protection Sector implementation report 2000-2001, ILO, Geneva (2001); available at [www.ilo.org/public/english/protection/info/imp2k-01/1c.htm](http://www.ilo.org/public/english/protection/info/imp2k-01/1c.htm). Accessed August 19, 2006.

<sup>314</sup> *Maternity at work: A review of national legislation*, ILO, Geneva (2005); available at <http://www.ilo.org/public/english/protection/condtrav/pdf/wf-iogpt-05.pdf>. Accessed June 25, 2006.

<sup>315</sup> *Status of maternity protection by country*, WABA, Penang, Malaysia (2006); available at <http://www.waba.org.my/womenwork/MaternityProtectionChart21May2006.pdf>. Accessed August 23, 2006.

<sup>316</sup> Equal Employment Act No. 3989 (1987) (as amended).

<sup>317</sup> Revolutionary Command Council Resolution No. 882 (1988).

<sup>318</sup> Notification No. 190/2002 of the Ministry of Foreign Affairs on the Adoption of the Convention of the International Labour Organization No. 183/2000 concerning the Revision of the Maternity Protection Convention (Revised), 1952.

### 3. Benefits

Ninety-seven percent of countries studied by the ILO provide that women must be paid during maternity leave.<sup>319</sup> Thirty-six percent of 153 countries studied meet the minimum requirement of two thirds of earnings paid for a minimum of 14 weeks. Twenty-seven percent pay at 100 per cent of previous earnings. Norway's law, for example, provides for 100 per cent pay for up to 44 weeks of parental leave or 80 per cent of pay for 52 weeks up to a maximum based on parental income.<sup>320</sup> Senegal's law requires 100 per cent payment based on the daily wage paid on the last payday prior to maternity leave. In Peru, the rate of payment is based on the average daily wage for the four months preceding the start of benefits. Peru, Finland, Ireland, and Portugal provide a minimum compensation for low wage earners.<sup>321</sup> In 91 of 165 countries surveyed by the ILO, benefits are paid by national social security schemes, as called for by R 191, to prevent discrimination by employers based on having to bear the cost of the payment. There is a mixed system of payment in about 26 countries.<sup>322</sup> Unless the leave is paid or covered by social security, coverage has been shown to be ineffective.<sup>323</sup> Governments also should strive to require paid leave at a rate of 100 per cent of earnings for the previous period, as provided in R191.

### 4. Employment Protection and Non-discrimination

All but three of the 56 countries for which ILO has information on this matter protect employment during maternity. Countries prohibit dismissal during pregnancy and leave and for a prescribed period after leave. Mongolia and Estonia prohibit dismissal from the time of pregnancy until the child is three years old.<sup>324</sup> Some countries prohibit dismissal during maternity without exception while others allow dismissal for cause unrelated to maternity. The most common grounds for dismissal include: serious fault, reasons

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<sup>319</sup> *Maternity at work: A review of national legislation*, ILO, Geneva (2005); available at <http://www.ilo.org/public/english/protection/condtrav/pdf/wf-ioept-05.pdf>. Accessed June 25, 2006.html.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

stipulated in law, cessation of the undertaking or the work, cause for dismissal that pre-dates the pregnancy, work for another undertaking while on leave, and failure to return to work on the expiration of leave. Many countries place the burden of proving a non-maternity related reason for dismissal on the employer, as required by the Convention. Some laws require judicial or administrative authorisation before giving notice of dismissal.<sup>325</sup> Some countries provide for compensation in the case of discriminatory dismissal. For example, the laws in Argentina and Ecuador provide for a year's salary as compensation. Belgium provides for six months' salary and Dominican Republic provides for five months compensatory pay.<sup>326</sup> Many countries also address rights upon return to work following maternity leave, commonly the right to return to the same or equivalent post paid at the same rate as before the leave.

### **5. Breastfeeding Mothers**

Breastfeeding breaks allow mothers to feed their babies or express their milk for later feedings. Expression of breastmilk is important for maintaining the supply of breastmilk. Legislation in at least 92 countries provides for breastfeeding breaks in addition to regular breaks, usually of 30-minute duration, two times per day. Legislation in more than two thirds of countries for which the ILO has data provides for payment during breastfeeding breaks, as required by the Convention.<sup>327</sup> The law in Estonia provides breaks for feeding children younger than 18 months at least every three hours for 30 minutes each. Colombian law provides for two 30 minute breaks but allows for additional breaks where there is a medical certificate indicating the need. In Ecuador, when a workplace does not provide a nursery, a nursing mother is entitled to work only six hours/day during the first nine months after confinement. In some countries where leave is unpaid, at a very minimum breastfeeding breaks are paid.

Colombian law requires that every employer establish in or next to the premises a room for nursing or a suitable place for childcare.<sup>328</sup> The law in Ecuador requires that any employer with 50 or more employees

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<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

provide nursing or day care facilities.<sup>329</sup> In Cambodia, employers with 100 or more female employees must set up a nursing room and daycare centre in their establishments or nearby. A nursing room must be provided in or near any place of employment with more than 25 women employees.<sup>330</sup> To address hygienic concerns, more workplaces are providing facilities for expressing and storing milk.<sup>331</sup> Governments should require employers to provide paid breastfeeding breaks often enough for women to meet their babies' feeding needs. Payment should be out of the social security fund, as it is for payment of leave, so that there is not a financial incentive for employers to discriminate.

#### *1.4.4 Suggestions for Additional Provisions*

Governments should establish and fund mechanisms for receiving, investigating and resolving complaints. As always, clear enforcement powers and duties need to be specified in the law. Finally, the law could require the government to fund public education programmes and materials for informing women of their rights under the law.

## **1.5 Establishing a Policy Environment to Protect against Childhood Obesity and Promote Physical Activity**

### *1.5.1 Introduction to the Problem of Overweight Children and Obesity*

Developing countries are experiencing an increase in overweight and obesity in children under 5 years of age. This is the case even in countries with low gross national product per capita and where child and maternal under-nutrition is widespread.<sup>332</sup> Risk for obesity starts in utero and is associated with, among other factors, both maternal under-nutrition and overweight mothers.<sup>333</sup> Populations in countries undergoing increased urbanisation and economic transition are

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<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

<sup>332</sup> *Repositioning Nutrition*, World Bank, Washington, D.C. (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

consuming diets high in energy density, fat, sugar, and refined grains, and low in cereals, fruits and vegetables. Combined with decreased physical activity among children due to more television-viewing and other sedentary activities, a favourable environment is created for children to become overweight or obese.<sup>334</sup>

Overweight and obesity increase the risk for dyslipidemia, hypertension, hyperinsulinism, insulin resistance and diabetes. These, in turn, significantly increase the risk for cardiovascular disease and some forms of cancer.<sup>335,336</sup> A US study found that an obese person experiences a 50 per cent reduction in productivity and visits a doctor 88 per cent more often than a healthy person during a six-year period. Obesity contributes to absenteeism and reduces productivity of the population.<sup>337</sup> Consequently this reduces the country's development potential, feeding the vicious cycle of poverty and the ongoing denial of human rights for both children and adults that poverty creates.

### 1.5.2 *The Need for Legislation*

Worldwide, 155 million school-age children are overweight, including approximately 40 million who are obese. Developing countries overall have seen a seven per cent increase in childhood obesity prevalence rates. Africa has seen an astounding 58 per cent increase.<sup>338</sup> The growing incidence of Type II diabetes in children is sounding an alarm that calls for action now to change social and physical environments that promote overweight and obesity. Legislative reform is necessary to create environments that promote children's access and exposure to healthy foods, decrease access and exposure to unhealthy foods through marketing, and encourage increased physical activity.

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<sup>334</sup> Hoffman, D., *Obesity in developing countries: Causes and implications*, FAO, Rome, undated; available at [www.fao.org/DOCREP/003/Y0600M/y0600m05.htm](http://www.fao.org/DOCREP/003/Y0600M/y0600m05.htm). Accessed June 25, 2006.

<sup>335</sup> Ibid.

<sup>336</sup> *Repositioning Nutrition*, World Bank, Washington, D.C. (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.

<sup>337</sup> Hoffman, D., *Obesity in developing countries: Causes and implications*, FAO, Rome, undated; available at [www.fao.org/DOCREP/003/Y0600M/y0600m05.htm](http://www.fao.org/DOCREP/003/Y0600M/y0600m05.htm). Accessed June 25, 2006.

<sup>338</sup> *Repositioning Nutrition*, World Bank, Washington, D.C. (2006); available at <http://siteresources.worldbank.org/NUTRITION/Resources/281846-1131636806329/NutritionStrategy.pdf>. Accessed August 23, 2006.



In addition to the individual, public health, and socio-economic consequences of obesity, there is the issue of manipulating children through the marketing of junk foods.

Children lack the cognitive ability to understand advertising and promotion or to distinguish programme content from advertisement. They also cannot appreciate the consequences of establishing bad eating habits that can persist over a lifetime and increase the risk of chronic diseases.<sup>339</sup> Yet, children in many countries are bombarded by direct and indirect food advertising and promotion, usually of the unhealthy variety.

Food companies and fast food restaurants spend billions marketing unhealthy and junk foods to kids.<sup>340</sup> Worse yet, schools in many places allow themselves to be vehicles for marketing these products to the children in their care. At the same time that schools teach nutrition and health education, many undermine these educational efforts by selling high-sugar sodas and high-sugar and -fat snacks in vending machines or school canteens. Many allow unhealthy fast food to compete with school-provided meals, which in many cases are also unhealthy. The CRC recognises the need to protect children from information and materials injurious to their well-being. This should include protection against marketing of junk foods to children. When the state becomes a party to this marketing through the public education system, for example by allowing sponsorships of school programs and materials, the case for legislative reform in this area becomes even stronger.

### 1.5.3 Issues

#### 1. Scant evaluation data

Most legislative and programmatic initiatives in this area have not yet been evaluated for impact on reducing obesity. For example, there is no direct evidence that increased taxation on unhealthy foods affects rates of obesity, although studies have linked food pricing with

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<sup>339</sup> Mello, M. et. Al, "Obesity - The New Frontier of Public Health Law", *New England Journal of Medicine*, vol. 354 (June 15, 2006), p. 2601-2610; available at <http://content.nejm.org/cgi/content/full/354/24/2601?query=TOC>.

<sup>340</sup> Nestle, M., "Food Marketing and Childhood Obesity - A Matter of Policy", *New England Journal of Medicine*, vol 354 (June 15, 2006), p. 2527-2529; available at <http://content.nejm.org/cgi/content/full/354/24/2527?query=TOC>.

consumption patterns. There are clear studies, by analogy, showing that higher cigarette taxes reduce tobacco consumption.<sup>341</sup> A recent study shows the relationship between advertising in *Parents' Magazine* and a reduction in breastfeeding rates.<sup>342</sup> Studies also are lacking to demonstrate the effectiveness of advertising restrictions (as compared to advertising bans). Drawing again from the tobacco control example, studies have shown that in countries where direct and indirect tobacco advertising has not been banned but merely restricted, the tobacco industry substituted its promotional activities to permitted forms.<sup>343</sup>

## **2. Content of legislation**

Because governments have only fairly recently begun taking legislative action in this arena, global guidance for specific policy and legislative content has not yet been disseminated in the same way as for the other nutritional topics discussed in this subchapter. National legislative activity has not occurred in too many countries, and effectiveness evaluation data are not yet available where it has. As a result of these factors, this subsection will simply highlight the areas for policy and legislative development proposed by some international and regional health organisations and consumer- and health-based NGOs.

Legislative topics applicable to obesity prevention and physical activity promotion might include:

## **3. Mandating and funding education and public awareness**

According to WHO's Global Strategy on Diet, Physical Activity and Health, articulated in WHA 57.17 (2004), the public needs to understand, among other things, the relationships among diet, physical activity and health, and between energy intake and output needs. Without this knowledge, healthy food choices cannot be made. Because children are exposed to food advertising and promotion almost everywhere they turn, starting at a very early age, media

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<sup>341</sup> Jha, P. and F. Chaloupka, *Curbing the epidemic: Governments and the economics of tobacco control*, World Bank, Washington, D.C. (1999).

<sup>342</sup> Foss, K. and B. Southwell, "The relationship between advertising in Parents Magazine and breastfeeding 1972-2000", *International Breastfeeding Journal*, 1:10 (2006); available at <http://www.internationalbreastfeedingjournal.com/content/1/1/10>. Accessed August 30, 2006.

<sup>343</sup> Ibid.

education (the skill of understanding the nature of mass media communications and employing critical thinking in interpreting them) should be introduced in schools early on.<sup>344</sup> The government will need to provide funding for these activities and for initiatives like mass media campaigns, school-based nutrition education, workplace healthy eating and physical activity promotion initiatives, and similar strategies.

#### **4. Banning marketing to children**

Food advertising affects food choices and influences dietary choices.<sup>345</sup> Many governments prohibit or restrict advertising during television programs targeting children.<sup>346</sup> Eighty-five per cent of 73 countries surveyed by WHO were found to regulate television advertising to children with respect to timing and content. Two countries had banned advertising to kids.<sup>347</sup> The food industry markets and promotes its products through many media, both directly and indirectly. Tactics include advertisements, product placements in toys, games, educational materials, songs, movies, character licensing, celebrity endorsements, internet and mobile phone text messaging, displays at retail outlets (including product displays), and stocking or slotting policies that make junk foods accessible to children, to name just a few.<sup>348,349</sup> All forms of direct and indirect advertising and promotion will need to be addressed in a comprehensive way. Marketing and promotion in schools is a growing trend and, as discussed above, should be prohibited.

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<sup>344</sup> *Global Strategy on Diet, Physical Activity and Health*, WHA 57.17 WHO, Geneva (2004); available at [http://www.who.int/child-adolescent-health/New\\_Publications/NUTRITION/gi\\_ycf.pdf](http://www.who.int/child-adolescent-health/New_Publications/NUTRITION/gi_ycf.pdf). Accessed August 23, 2006.

<sup>345</sup> *Ibid.*

<sup>346</sup> Hawkes, C., *Marketing food to children: The global regulatory environment*, WHO, Geneva (2004); available at <http://whqlibdoc.who.int/publications/2004/9241591579.pdf>.

<sup>347</sup> *Ibid.*

<sup>348</sup> Nestle, M., "Food Marketing and Childhood Obesity - A Matter of Policy", *New England Journal of Medicine*; 354:2527-2529 (June 15, 2006). Available at <http://content.nejm.org/cgi/content/full/354/24/2527?query=TOC>.

<sup>349</sup> "Obesity: How is the food industry responding?" *Investor Responsibility*. Accessed June 29, 2006.

## 5. Labeling

Food labelling should provide consumers with accurate, standardised and understandable information on content to enable them to make healthy choices.<sup>350</sup> Labelling requirements also can mandate an indication of the nutritional disadvantages of a product (a warning). In addition, misleading claims will need to be addressed. For example, foods labelled as '90 per cent fat free' are misleading because 10 per cent fat content is still fairly high.<sup>351</sup> Under the proposed European Union Regulation on Nutrition and Health Claims Made on Foods, claims like 'high fibre' will have minimum amount of fibre per unit defined. To make health claims, companies will have to provide scientific evidence and get pre-marketing approval. A positive list of well-established health claims will be developed.<sup>352</sup>

## 6. Fiscal Policies

Pricing influences food consumption choices.<sup>353</sup> Influencing pricing of healthy foods relative to unhealthy foods can be accomplished through measures like taxes (higher on junk foods, lower on healthy foods like fresh fruits and vegetables), subsidies (lower for products that are, for example, high in fat and higher for healthy foods), and reduced tariffs on fruits and vegetables.

## 7. School Policies

Creating a healthy eating environment in schools has meant, in some jurisdictions, banning sales of junk foods and sugary sodas (e.g., England, sodas and high sugar snacks; France, sodas; and New South Wales, sodas) and establishing nutritional requirements for school-provided meals (England). Nutrition education, as discussed above, also is an important component of school policies, as are requirements for physical education in the curriculum.

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<sup>350</sup> *Global Strategy on Diet, Physical Activity and Health*, WHA 57.17 WHO, Geneva (2004); available at [http://www.who.int/child-adolescent-health/New\\_Publications/NUTRITION/gs\\_iycf.pdf](http://www.who.int/child-adolescent-health/New_Publications/NUTRITION/gs_iycf.pdf). Accessed August 23, 2006.

<sup>351</sup> "Obesity: How is the food industry responding?" *Investor Responsibility*. Accessed June 29, 2006.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

## **8. Physical activity promotion**

Many initiatives for promoting physical activity, such as providing paths for cycling and walking, and public transportation policies are to be undertaken at the local level. National government can establish policy guidance and provide funding to lower levels of governments for new initiatives in this area.

### **1.6 Participatory processes**

An important component of a rights-based approach to nutrition is a participatory process involving all stakeholders, with special outreach to population groups most affected by inadequate nutrition. In the micronutrient realm, national alliances involving governments, food producers, health and nutrition professionals, academics and researchers, civil society and international agencies have been key to the successes achieved.<sup>354</sup> These alliances have been involved in policy development, programme implementation, monitoring and evaluation. Similar alliances would be well equipped to address obesity prevention and physical activity promotion. The conflict of interest with involving the food industry in addressing obesity must be borne in mind, however.

With regard to breastfeeding, the Innocenti Declaration calls for a breastfeeding coordinator and a multisectoral national breastfeeding committee. Participatory processes for maternity protection will need to include the involvement of employers, trade unions, workers, especially from informal and rural economies, and health and nutrition NGOs. It also will be essential to include NGOs involved with breastfeeding promotion, health promotion, and women's rights in maternity protection efforts. Of course, the role of children of sufficient age in the process should be assured, as appropriate, in accordance with the CRC framework. A participatory approach should be taken in all phases of legislation reform for nutrition, from analysing the need

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<sup>354</sup> Andersen P., *Vitamin and mineral deficiency: A global progress report*, Micronutrient Initiative, Ottawa, undated; available at <http://www.unicef.org/media/files/vmd.pdf>. Accessed August 23, 2006.

for reform, to planning legislative and programme interventions, to implementing and monitoring their effectiveness.

## **1.7 Creating Justiciable Rights**

Creating a justiciable right of redress empowers individuals and members of civil society with a means for claiming their rights. In this regard, the law can provide for a private right of action by any individual harmed as a result of non-compliance by any duty-bearer, governmental and non-governmental alike. An individual, therefore, would not be required to rely on the government for protecting his or her rights. Rather, an individual would be able to bring action against the government for failing to fulfill any of its direct obligations of implementation and enforcement. An individual also would be able to bring legal action directly against a private duty bearer (e.g., food company, employer) for any failure to comply with any duty imposed on it by law.

A right to bring public litigation by civil society organisations should be established in the law, where appropriate. In the case where a duty bearer fails to fulfill its duty, representative organisations can be empowered to bring an action on behalf of any intended beneficiary to seek a court order for fulfillment of that duty and the award of an established civil penalty, along with recovery of costs and waiver of filing fees.

## **1.8 Mechanisms for Monitoring and Accountability**

For all of the programmes discussed in this sub-chapter, the law should charge the government with a clear duty to establish and implement processes for periodically monitoring the effectiveness of its nutrition interventions, including the effectiveness of legal provisions and their implementation and enforcement. This way, programmatic adjustments and legislative amendments can be undertaken as appropriate. Different models for doing this include, among others, monitoring by the state, special rapporteurs, ombudspersons or civil society.

In China, for example, the government undertakes a five-year review

process designed to monitor progress, budgets, training and best practices to renew high-level political commitment to its universal salt iodization program.<sup>355</sup> As mentioned in the section on the Code, above, Botswana's implementing regulations authorise the designation of specially trained monitors to investigate, observe and report on marketing practices and present evidence in court. The Brazilian Department of Justice, in collaboration with NGOs, established the position of a national rapporteur for monitoring the right to food, water and rural land. This endeavour was initiated by a national network of civil society organisations.<sup>356</sup>

## 1.9 Issues checklist

- Establish or reinvigorate multi-sectoral coordinating committees (or similar bodies) composed of broad-based governmental and civil society representatives, especially those responsible for child well-being, on:
  - micronutrient malnutrition;
  - breastfeeding promotion and accompanying social policies; and
  - childhood overweight and obesity.

Coordination among these committees will be important because micronutrient malnutrition, breastfeeding and obesity are all interconnected. Lessons learned, for example, from the Code's marketing restrictions can be applied, with some adaptation, to measures regulating the marketing of junk foods.

- Conduct a legislative review of nutrition policies, laws and regulations, specifically related to micronutrient malnutrition, breastfeeding protection, promotion and support, and childhood overweight and obesity, with special inquiry into:
  - whether existing measures meet or exceed the international standards of the Codex, the Code and the Maternity Protection Convention and Recommendations and whether

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<sup>355</sup> Ibid.

<sup>356</sup> *Report of the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, FAO, Rome (2004); available at <http://www.fao.org/docrep/meeting/008/j1877e.htm>.

- they implement the frameworks of the Innocenti Declaration and the Global Strategy on Infant and Young Child feeding;
- whether groups most affected or at risk of nutritional deficiencies, especially children and adolescent girls and women of childbearing age, are fully protected by existing measures; if not, what gaps exist and what strategic plans are necessary to fill them;
  - whether existing measures protect and promote the best interest of the child, including giving priority to children's best interests over competing interests (for example, mandatory fortification to address deficiencies that are widespread and that especially affect children and adolescent girls and women of child bearing age, banning marketing of junk foods to children);
  - whether existing measures adequately protect children from intentional or unintentional discrimination (for example, high rates of iron deficiency in girls and women);
  - whether existing measures adequately protect children's right of life, survival, development and protection (for example, where there are low rates of breastfeeding and high rates of child malnutrition and/or sickness and death);
  - whether existing laws have taken into account the views of children (for example, with regard to fortification, marketing of junk foods); and
  - whether duty bearers are clearly identified and justiciable rights and remedies are created for each breach of duty.
- Conduct a situation analyses, including:
    - rates in the entire population and in subpopulations of micronutrient malnutrition, breastfeeding, childhood overweight and obesity, physical activity, infant and child malnutrition, morbidity, and mortality, and the factors influencing these rates
    - identification of the groups affected by inadequate nutrition and the groups most vulnerable, barriers to their access to adequate and appropriate foods and, as applicable, adequate protection of breastfeeding; and
    - identification of additional nutrition and other public health interventions that may be necessary to reach children and



adolescent girls, women of childbearing age, and any other underserved populations.

- Develop strategic plans with measurable, time-bound objectives and clear roles with respect to:
  - eliminating deficiencies in iodine and Vitamin A and reducing iron deficiency;
  - increasing the rates of exclusive and continuing breastfeeding; and
  - reducing or at least containing the rate of childhood obesity; using a child impact analysis in developing the plan and monitoring indicators.
- Ensure an adequate budget for nutrition and breastfeeding protection and promotion interventions, including for their monitoring and enforcement.
- Assess institutional capacity in regard to:
  - implementing, monitoring and evaluating interventions and the effectiveness of legislative measures; and
  - inspecting and enforcing legal requirements.
- Develop programmes for capacity-building where gaps are identified.
- Conduct an analysis to identify potential unintended consequences, including those on other rights guaranteed by the CRC and other human rights instruments, of planned legislative reform.
- Develop mechanisms for monitoring and periodic reporting on legislative measures and nutrition programme interventions, with civil society involvement.

## Chapter 5: Annex 1

### Summary of the Code's Provisions

**Scope (Art.2):** The Code applies to products marketed or otherwise represented to be suitable for use as a partial or total replacement of breastmilk, feeding bottles, and teats.

**Information and Education (Art. 4):** The government is responsible for planning, providing, and disseminating information on infant and young child feeding, or controlling it to ensure objective and consistent information, which includes:

- the benefits and superiority of breastfeeding
- maternal nutrition and preparation for and maintenance of breastfeeding
- negative effect of introducing partial bottle feeding on breastfeeding
- difficulty of reversing a decision not to breastfeed
- proper use of infant formula where needed, social and financial implications, hazards of inappropriate use of breastmilk substitutes, and no text or pictures that idealise breastmilk substitutes

Distribution of informational or educational equipment or materials is allowed through the health care system if made at the request of the government and it does not refer to a proprietary product.

**The general public and mothers (Art. 5):** There should be no:

- advertising or other promotion of covered products to the general public
- direct or indirect provision of samples
- point of sale advertising, samples, other promotional devices at retail, such as special displays, discount coupons, premiums, special sales, loss-leaders, or tie-in sales
- distribution of articles or utensils which may promote the use of breastmilk substitutes
- direct or indirect contact with pregnant women or mothers by marketing personnel

**Health care systems (Art. 6; WHA 47.5):** No facility of a health care system should be used for promoting covered products, including:

- displaying products, placards or posters, or distribution of material from a manufacturer or distributor other than scientific and factual information provided by companies to health professionals
- using ‘professional service representatives’, ‘mothercraft nurses’, or similar personnel provided or paid for by manufacturers or distributors
- allowing, if necessary, demonstration of infant formula by anyone other than health workers or community workers
- donations or low price sales of supplies of breastmilk substitutes in any part of the health system
- donated equipment or materials that refer to any proprietary product covered by the Code

**Health workers (Art. 7; WHA 58.32):** Health workers should encourage and protect breastfeeding and should not:

- accept financial or material inducements to promote covered products from manufacturers or distributors
- give samples of infant formula or other covered products to pregnant women, mothers, or members of their families
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Health workers should disclose any contributions made by a manufacturer or distributor of any fellowship, study tour, research grant, attendance at a professional conference, and the like.

Member states should ensure that financial support and other incentives for programmes and health professionals working in infant and child health do not create conflicts of interest.

**Employees of manufacturers and distributors (Art. 8):** Sales incentives for marketing personnel should not be based on volume of sales and sales quotas should not be set. Marketing personnel should not perform educational functions in relation to pregnant women or mothers of infants and young children. They should have written approval of the appropriate governmental authority to perform other functions.

**Labelling (Art. 9; WHA 58.32):** Labels should be designed to provide necessary information about appropriate use and should not discourage breastfeeding. Labels on infant formula containers should have a clear, conspicuous, easily readable and understandable message printed in the appropriate language that includes the following words or statements:

- ‘Important Notice’ or the equivalent
- the superiority of breastfeeding
- should be used only on the advice of a health worker as to the need for its use and the proper method of use
- instructions for appropriate preparation and warning of the health hazards of inappropriate preparation
- information that powdered formula may contain pathogenic micro organisms and must be prepared and used appropriately
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There should be no pictures of infants or pictures or text which may idealise formula use or which contains the terms ‘humanised’ or ‘maternalised’ or similar terms.

Nutrition and health claims should not be permitted unless specifically provided for in national legislation.

**Quality (Art. 10):** Covered products should meet Codex-recommended standards.

**Implementation and monitoring (Art. 11):** Governments should implement the Code through appropriate legal, policy, or other measures. Governments have an obligation to monitor, in collaboration with UN agencies, NGOs, and civil society. Manufacturers and distributors should abide by the Code irrespective of whether the national government has taken steps to implement the Code through national measures.

## Chapter 5: Annex 2

# Summary of the ILO Maternity Convention and Recommendations

**Scope (Articles 1 and 2):** The Convention applies to all employed women, but ratifying members may exclude limited categories of workers when covering them would “raise special problems of a substantial nature.”

**Maternity leave (Article 4):** Women covered under the Convention are entitled to maternity leave of not less than 14 weeks. **Maternity Recommendation (R) 191:** members should endeavour to extend the leave period to at least 18 weeks.

**Benefits (Articles 6 and 7; R 191):** Cash benefits shall be provided for maternity leave and leave due to illness or complications. Benefit levels shall be at a level that ensures the woman can maintain herself and child in proper conditions of health and with a suitable standard of living:

- Cash benefits based on previous earnings shall be no less than two thirds of previous earnings or comparable amount. Where practicable, cash benefits should be raised to the full amount of previous earnings.
- A large majority of covered women must be able to satisfy the conditions for qualifying for cash benefits.
- Where a woman does not meet the conditions to qualify for cash benefits, she shall be entitled to adequate benefits out of social assistance or public funds upon meeting any required means test.
- To protect against discrimination, cash benefits shall be provided through compulsory social insurance or public funds.
- In countries where the economy and social security system are not sufficiently developed, benefits may be paid at least at the level provided for sickness or temporary disability.

**Employment protection and non-discrimination (Articles 8 and 9; R 191):**

- An employer may not terminate a woman during pregnancy or leave or following her return to work for a prescribed period,

except on grounds unrelated to the pregnancy, birth, or nursing. The burden of proof rests with the employer.

- A woman is guaranteed the right to return to work to the same or equivalent position paid at the same rate. The period of leave should be considered as a period of service for the determination of rights.
- Ratifying members must adopt measures to prevent discrimination based on maternity, including not requiring a pregnancy test or certification of non-pregnancy upon application for employment, unless national law prohibits or restricts employment of pregnant or nursing women or where there is a recognised or significant risk to the health of the woman or child.

**Breastfeeding mothers (Article 10; R 191):** Women should have one or more daily breaks or a daily reduction of hours for breastfeeding, adapted to particular needs. These are to be counted and paid as working time. Where practicable, clean and safe facilities for nursing at or near the workplace should be established.

**Periodic Review (Article 11):** Each member must examine periodically, in consultation with the prescribed organisations, the appropriateness of extending the period of leave or increasing the rate of cash benefits.









# HANDBOOK ON LEGISLATIVE REFORM: REALISING CHILDREN'S RIGHTS

## VOLUME 1

The *Handbook on Legislative Reform: Realising Children's Rights* aims to support the effective implementation of the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This process has great potential to advance gender equality through influencing the adoption of legislative measures, social policies and institutional changes that promote gender equality and results for children.

The Handbook advocates for a human rights-based approach to legislative reform with gender equality at its core. It is inspired by the need for innovative processes and approaches to the establishment of a legal framework that effectively protects children (both girls and boys) and ensures the full realisation of their rights. It is also motivated by the need to disseminate more widely practical experiences of rights-based approaches to legislative reform initiatives in favour of children.