

Nadine Perrault
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Comprehensive and Holistic Legislative Reform on Behalf of Children's Rights

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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)¹ 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 CRC² 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'³ 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

¹ The CRC was adopted by the UN General Assembly on 20 November 1989.

² CRC, Article 4.

³ 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).

guaranteed by the CRC. This holistic approach to policy planning and 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.⁴

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.⁵

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.

⁴ 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).

⁵ 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 principles⁶ 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.⁷ 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.⁸ Thus, it calls for the abolishment of “any distinction, exclusion, restriction or preference”⁹ 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

⁶ UN Common Understanding on HRBA (Stanford Consensus, 2003).

⁷ *Core principles of a rights-based approach to programming* (from Core Course: Human Rights Principles for Programming).

⁸ For more details see: Duncan, Beatrice. Chapter III of the Handbook, *Constitutional reforms in favour of children*, UNICEF, DPP (2007).

⁹ 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.¹⁰

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 equality¹¹ (i.e. the rule's results or effects).¹² 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.¹³ 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,

¹⁰ Goonesekere, Savitri, "A gender perspective in legislative reform", paper presented at the Expert meeting on legislative reform, UNICEF, New York (2004).

¹¹ Schuler, Margaret and Flowers, Nancy. *Women's human rights, Facilitator's guide*, Women, Law and Development International (2003).

¹² "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.

¹³ 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.¹⁴ The Committee on the Elimination of Discrimination against Women also addresses this indirect discrimination,¹⁵ 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 Inclusion¹⁶

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.¹⁷

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

¹⁴ Ibid. General Comment no. 16, para. 8.

¹⁵ "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).

¹⁶ 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).

¹⁷ 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.¹⁸

¹⁸ 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.¹⁹ 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

¹⁹ 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.

rights principles and norms

- Ensures special protection for vulnerable and marginalized children
- Combats social practices negatively affecting children and women and 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.²⁰

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

²⁰ 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).

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.

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.²¹

2.1.1 Harmonising National Legislation with International Human Rights Norms²²

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 CRC²³ implies, among other things:

²¹ Please note that a separate chapter is dedicated to each one of the other critical characteristics of an HRBA to legislative reform.

²² 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).

²³ See: Ibid. Chapter II of the Handbook.

- 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 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.”²⁴

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

²⁴ Ibid. Gooneskere, Savitri. *A gender perspective in legislative reform*, UNICEF, New York, 2004.

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, 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).

2.1.3 Implementation and Enforcement of Legislative Measures²⁵

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."²⁶

1. Institutional Reform and Development

²⁵ UNICEF, Programming guidance on legislative reform, p.36.

²⁶ Goonesekere, Savitri. *A gender perspective in legislative reform*, paper presented at the Expert meeting on legislative reform, UNICEF New York (2004).

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.

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 rights²⁷

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.

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*²⁸ and FGM, both religious/culture-based practices, are very difficult to eliminate merely through legislation. The same reason explains the obvious lack of

²⁷ For more information on monitoring mechanisms see also: Lansdown, Gerison.

Independent institutions protecting children's rights, Innocenti Digest, 8, Innocenti Research Centre (2001).

²⁸ 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.

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).

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.²⁹ 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.”³⁰ 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).³¹

²⁹ ‘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).

³⁰ Summary Report of the Study on the Impact of the Implementation of the Convention on the Rights of the Child, Innocenti Research Centre (2004).

³¹ For example, women who practice female excision/cutting as a job.

Box 11: Costing legislative measures

*Costing the South African Child Justice Bill*³²- 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.³³ 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).

³² 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).

³³ 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.³⁴

2.2 Value-added of a Human Rights-based Approach to Legislative Reform

2.2.1 Sustainable Social Policies for Children³⁵

Legislative reform is neither an isolated activity nor an optional activity, but rather an essential tool to develop sustainable policies in a

³⁴ UNICEF Programming Guidance Paper Series, UNICEF, DPP (2007), p.76.

³⁵ 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).

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.

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).³⁶

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.

³⁶ For instance, minorities, indigenous peoples, persons with disabilities etc.

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.

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.³⁷

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.

³⁷ 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 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.

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.³⁸

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.³⁹ (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.⁴⁰

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

³⁸ See Chapter 2 for more details.

³⁹ See Chapter 2 for more details.

⁴⁰ See Chapter 3 for more details.

force of law by common adoption or acquiescence; customary law is sometimes administered by traditional chiefs and their councils, often dealing with matters relating to children and family.⁴¹

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.⁴²

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

⁴¹ Heritage Community Foundation, "Nature's Laws: Customary Law", at Albertasource.ca, viewed 10 June 2008. See Chapter 2 for more details.

⁴² Thies, Joachim, "Introduction to Rights-based Programming", *Part 1: Rights Based Programming – An Evolving Approach*, Save the Children, Sweden, 2004, p.3.

or victim) and/or 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.⁴³

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

⁴³ 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.

in terms of both the legal areas involved and the measures needed to ensure effective application and enforcement of the law.⁴⁴

Homogeneous system – A legal system based on a single legal tradition, either civil law or common law.⁴⁵

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.⁴⁶

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.

⁴⁴ See Chapter 1 for more details.

⁴⁵ See Chapter 2 for more details.

⁴⁶ 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.⁴⁷

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.⁴⁸

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

⁴⁷ See Chapter 2 for more details.

⁴⁸ 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.⁴⁹ (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, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” (CRC, Article 2.1).

⁴⁹ See Chapter 2 for more details.

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*.⁵⁰

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.

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.

⁵⁰ 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*.

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.