

WORKING PAPER

# THE GLOBAL STATUS OF LEGISLATIVE REFORM RELATED TO THE CONVENTION ON THE RIGHTS OF THE CHILD

LEGISLATIVE REFORM INITIATIVE – PAPER SERIES

KARUNA NUNDY

DIVISION OF  
POLICY AND PLANNING  
AUGUST 2004

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**Global Policy Section**

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## Introduction

Every country in the world – except for the USA and Somalia- has ratified the Convention on the Rights of the Child<sup>1</sup>. On ratification, each country acquired an international legal obligation to ensure that the rights the Convention vests in children are fully enforceable under their national laws.<sup>2</sup> This paper provides an overview of domestic legislative reform initiatives since the Convention came into force in 1990: why reform is initiated, how State Parties have dealt with the reform process, the establishment of national institutions to safeguard rights, the role of the courts and the impact of children's rights on policy and budgets.

Legal systems are not equally receptive to the incorporation of international treaties. This is true even if the underlying social values are similarly sympathetic to the rights in question. The peculiar characteristics of the world's three major legal systems- Civil law, Common law, Sharia and plural systems which derive from these systems and other sources such as custom<sup>3</sup> - shape a country's implementation of the Convention rights. Trends in reform initiatives by State Parties with similar legal systems have therefore been analysed together.

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<sup>1</sup> The United Nations Convention on the Rights of the Child is an international treaty approved by the General Assembly on 20 November 1989 and entered into force on 21 September 1990.

<sup>2</sup> Arts. 26, 27 of the Vienna Convention on the Law of Treaties 1969 which is considered to reflect customary law binding on all States.

<sup>3</sup> A particularly useful world map of countries coded by legal system has been devised by the University of Ottawa at <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.html>. Accessed on April 1, 2004.

# 1 GLOBAL TRENDS IN REFORM

## 1.1 Sharia

“Sharia or Islamic law represents the religious and ethical standards that govern Muslims, and includes some legal rules and topics. Sharia is derived from the Qu’ran and Qu’ranic legislation interpreted through the centuries. It is contained in the Qu’ran and Hadiths (traditions) which are considered evidence of Sunna, or the practices and customary law of Arabian society prior to Islam.”

The interpretation and practice of Sharia has been affected by local cultures; it varies according to region, particularly since its spread away from the Arab world. In many countries, while Sharia is the main source of legislation, the traditions and customs of local societies are also considered.<sup>4</sup>

Twenty two State Parties<sup>5</sup> have legal systems that are predominantly Sharia. Thirty six percent of these countries have declared that Islamic law<sup>6</sup> will prevail if there is any conflict with the Convention. Iran for instance, has reserved the right not to apply any article of the Convention that may be in contravention with Islamic laws. Saudi Arabia has entered a similarly broad and imprecise reservation.<sup>7</sup> It is clear that such reservations are not allowed by established international law. Article 19 of the Vienna Convention, does not allow States to make reservations that are “incompatible with the object and purpose of the treaty.” Article 51 of the Convention on the Rights of the Child itself says, “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.”

However, it would seem *prima facie*, that provisions of non-discrimination on the basis of religion and the right to freedom of religion are the only provisions of the Convention that could potentially conflict with Sharia.<sup>8</sup> Article 14 (1) grants every child the freedom to choose their religion, but Sharia prohibits abandoning Islam.<sup>9</sup>

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<sup>4</sup>State Parties where traditions and customs influence legislation significantly have been primarily dealt with under the category of plural legal systems below.

<sup>5</sup> Afghanistan, Bahrain, Bangladesh, Brunei, Jordan, Libya, Maldives, Mauritania, Pakistan, Qatar, Saudi Arabia, Sudan, UAE, Kuwait, Syria, Morocco, Yemen, Iran, Iraq, Tunisia, Oman, Djibouti

<sup>6</sup>Scholars have argued that Islam is only one source of Sharia, however the phrase Islamic law in the context of this study has been used repeatedly in declarations and reservations and State Parties reports to the Committee on the Rights of the Child.

<sup>7</sup>For all declarations and reservations to the Convention go to: <http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm>

<sup>8</sup>Evinced by the fact that blanket reservations on signing are restricted on ratification to one or more of the articles mentioned. For example Kuwait’s reservation on signature to “all provisions that are incompatible with the laws of Islamic Sharia and the local statutes in effect.” On ratification, however, it restricted its reservation to Article 14 and also to Article 7- which is on nationality and related to a non-Sharia specific domestic law of the country.

<sup>8</sup>The objection to Article 14 seems specifically to the “freedom of religion” aspect of the provision. Syria’s reservation to Article 14 is restricted “only to its provisions relating to religion and do not concern those relating to thought or conscience. They concern: the extent to which the right in question might conflict with the right of parents and guardians to ensure the religious education of their children, as recognized by the United Nations and set forth in article 18, paragraph 4, of the International Covenant on Civil and Political Rights; the extent to which it might conflict with the right, established by the laws in force, of a child to choose a religion at an appointed time or in accordance with designated procedures or at a particular age in the case where he clearly has the mental and legal capacity to do so; and the extent to which it might conflict with public order and principles of the Islamic Shariah on this matter that are in effect in the Syrian Arab Republic with respect to each case.” At <http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm#N14>

<sup>9</sup>The objection to Article 14 seems specifically to the “freedom of religion” aspect of the provision. Syria’s reservation to Article 14 is restricted “only to its provisions relating to religion and do not concern those relating to thought or conscience. They concern: the extent to which the right in question might conflict with the right of parents and guardians to ensure the religious education of their children, as recognized by the United Nations and set forth in article 18, paragraph 4, of the International Covenant on Civil and Political Rights; the extent to which it might conflict with the right, established by the laws in force, of a child to choose a religion at an appointed time or in accordance with designated procedures or at a particular age in the case where he clearly has the mental and legal capacity to do so; and the extent to which it might conflict with public order and principles of the

The provisions on adoption are sometimes wrongly perceived to conflict with Sharia specific reservations to article 21 have been entered by 40% of State Parties with Sharia. Articles 20 and 21 concern the care of a child outside the family environment and adoption. Kuwait volunteered one reason for its reservation to article 21: the state does not approve adoption because “abandoning the Islamic religion is strictly banned”. Also, Islamic law provides the institution of the *kafalah*, which provides substitute care to children who cannot be cared for by their own parents, without a change in kinship status.

However, the Committee on the Rights of the Child has observed<sup>10</sup> in the context of its concluding observations to Egypt’s<sup>11</sup> that reservations to articles 20 and 21 on the grounds that they are against Sharia, are unnecessary. It points out that article 20 (3) of the Convention expressly recognizes *kafalah* as a form of alternative care. Article 21 specifically excludes countries like Egypt that do not recognise adoption, and therefore is not in conflict with Sharia. In addition, article 41 of the Convention specifies that domestic laws which are more conducive to the realisation of the rights of children will prevail over the Convention. *Kafalah* is recognised to provide more protection to children’s status than adoption.

In 27% of countries governed by Sharia, including Tunisia, Libya and Kuwait, the Convention prevails over domestic law in the event of any conflict.

The government of Sudan asserted to the Committee on the Rights of the Child that the Convention can be invoked in domestic courts and is on par with domestic law. But this needs closer examination: whether courts will only acknowledge its authority to fill gaps in domestic law or whether it will prevail over domestic law when it is more conducive to the realisation of children’s rights. Incorporation should mean that the provisions of the Convention can be directly invoked before the courts. And that in event of a conflict, the standard more favourable to children - as determined within the core principles and framework of the Convention- will prevail.

Comprehensive children’s codes that reflect the provisions of the Convention and conform to its general principles are rare in countries with predominantly Sharia legal systems, if they exist at all. In a few, such as Libya and Tunisia, codes with special protection laws have been enacted/ amended; Syria is drafting a new labour code. None of these even approaches the idealised consolidated children’s code recommended by the Committee. Reform has generally been piecemeal and ad-hoc.

Some countries –Sudan, Bangladesh and Morocco among others- have set up ministerial committees to engage in a comprehensive review of the jurisdiction’s laws to assess compatibility with the Convention. But systematic harmonising of laws with the Convention has not followed. In Sudan for instance, the Ministerial Committee reported that the laws of the country already had guarantees to protect child rights – the Committee on the Rights of the Child did not agree. As a result of the Ministerial Committee’s recommendations, there have been no major changes in Sudanese legislation but for a few. In fact since a number of countries have made declarations/reservations that the Convention will be interpreted in accordance with Islamic law- the ‘harmonisation’ process has

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Islamic Shariah on this matter that are in effect in the Syrian Arab Republic with respect to each case.” At <http://www.unhcr.ch/html/menu2/6/crc/treaties/declare-crc.htm#N14>

<sup>10</sup> CRC/C/15/Add.145, 21 February 2001

<sup>11</sup> Egypt has a mixed civilist and Sharia legal system, but the reservations mentioned were entered explicitly in deference to its Islamic legal roots.

in some cases taken place in reverse. The Convention standards seem to have been bent to the Sharia standards- which can be lower.

A second concern is that the core principles of the CRC: non-discrimination in article 2 and primacy of the best interests of the child in article 3 are not fully reflected in laws and policies.

Regarding article 2, Sharia fosters strong acceptance of the principle of racial non-discrimination, but dominant interpretations of Sharia have been resistant to some of women's human rights.<sup>12</sup> Women' activists within Sharia countries seek to elicit non-discriminatory interpretations and challenge interpretations of Islam that deny women's right to equality.

The Committee on the Rights of the Child has often expressed concern at discriminatory attitudes towards girls and women in a number of Sharia countries including the practice of early marriage and nationality of the mother not being passed on to her child. The Committee for Elimination of Discrimination Against Women (CEDAW) noted discrimination in laws for punishment of adultery and laws governing marriage, divorce and child custody.

The Committee on the Rights of the Child said in response to Egypt's report, "Noting the universal values of equality and tolerance inherent in Islam, the Committee observes that narrow interpretations of Islamic texts by authorities, particularly in areas relating to family law, are impeding the enjoyment of some human rights protected under the Convention." The CEDAW Committee encouraged Morocco to continue using *ijtihad*, or the evolving interpretation of Islamic religious texts to change attitudes.<sup>13</sup>

State Parties' reports however, provide the sense that many states- Sharia and non-Sharia- are unclear about the meaning of the "child's best interests".<sup>14</sup> Even if a State Party's laws recognise the principle, a child's best interests is often interpreted as what the child's parents think those best interests are. Also, a family's interests would always impact the child's well-being and the two are often conflated.

Laws are sometimes enacted to fulfil what are perceived to be "the child's best interests" but are within the discriminatory limits of the local culture.<sup>15</sup> It is the law in Libya and other State Parties in West Africa as well as in 12 Latin American State Parties, that a rapist will be exonerated if he marries his victim. If a child is raped, then she is seen to have no future. So if the rapist marries her, the law excuses his crime. Of course under the standards of the Convention this would be unacceptable as it violates most fundamental Convention rights. The best interests of a child cannot be determined in the context of additional violations of her rights, but in relation to all the all the rights of survival, development, protection and participation under the Convention.

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<sup>12</sup> Donna E. Arzt, "The Application of International Human Rights Law in Islamic States" Human Rights Quarterly 12 (2), 1990, p 202-230

<sup>13</sup> A/52/38/Rev.1, paras 45-80

<sup>14</sup> Division of Evaluation, Policy and Planning, UNICEF, New York, "Trends and Gaps in steps taken to implement the Convention on the Rights of the Child: Based on a review of government reports to and Concluding Observations of the Committee on the Rights of the Child", p 5

<sup>15</sup> Philip Alston and Bridget Gilmour-Walsh in "The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values", Oxford University Press, August 1994, investigate the dilemmas that arise in applying the 'best interests' principle—particularly as the term is used in Article 3(1) of the Convention on the Rights of the Child—to concrete situations involving the treatment of children.

The core right to child participation in society includes inter-alia respect for the views of the child in article 12 as well as the civil rights to freedom of thought and conscience, the right to freedom of expression and the right to freedom of association, in Article 14 of the Convention. Sharia recognizes the concept of “age of puberty” where the child acquires legal capacity. This concept links to the concept of child participation quite naturally, but has not been used to internalise child participation rights. Thirty three percent of Sharia countries have entered reservations to Article 14. But even in those countries that have not entered reservations to them, the right of children to be heard and to participate in decision-making according to their age and maturity have low priority. In Jordan, the constitution protects freedom of opinion. But in violation of Article 12 of the Convention as well as the Jordanian constitution, respect for children’s views is limited by traditional societal attitudes to children in schools, judicial interpretation and especially within the family.<sup>16</sup>

## 1.2 Common law

Countries of the Common law have been scrupulously dualist; adhering to the view that international law cannot automatically become domestic law. Traditionally international treaties have required legislative transformation in Common law countries. Very few if any of the Common law countries, which have submitted reports to the Committee on the Rights of the Child,<sup>17</sup> have enacted a law implementing the Convention in its totality. In contrast to most Civil law and some Sharia countries, the Convention does not prevail over domestic law in any of the Common law countries surveyed. In fact although the UK has ratified the Convention, to date the Convention does not even extend to all its Overseas Territories, nor to all its Crown Dependencies.

However a new recognition has come about among Common law judges –since they are another source of law making, they may use international human rights principles in domestic decisions. A number of important judicial decisions in the Common law countries therefore implement the provisions and principles of the Convention.<sup>18</sup> This is a reflection of the growing body of international human rights law and in recognition of the importance of its content.

An example of networking and judicial awareness raising on human rights based interpretations of law is the series of Judicial Colloquia for Commonwealth Judges on Incorporating International law in Domestic Legal Systems, arranged by the Commonwealth Secretariat. In the colloquia of February 1988 a group of judges and lawyers mainly from Commonwealth countries agreed on the Bangalore Principles. Chief Justices and Judges of the apex courts of Australia, India, the United States, England, Mauritius and Zimbabwe chaired the meeting. At that time the recognition of the importance of international law was extended thus far: “if an issue of uncertainty arises (as by a lacuna in the Common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations.”<sup>19</sup> The principles have been implemented in subsequent judicial decisions.

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<sup>16</sup> CRC/C/15/Add. 125, 2000

<sup>17</sup> Canada, Australia, United Kingdom, New Zealand, Barbados, Belize, Fiji, Grenada, Ireland, Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines, Trinidad and Tobago, Palau, Marshall Islands, UK Overseas Territories (which include Anguilla, Bermuda, the Falkland Islands, Gibraltar, the British Virgin Islands, the Pitcairn Islands), the Isle of Man (a UK Crown Dependency).

<sup>18</sup> See section below on ‘Use of the Convention’ by lawyers and judges.

*Teoh v Minister of Immigration and Ethnic Affairs* is a landmark decision from Australia, which sets a precedent for placing even greater reliance on the Convention.<sup>20</sup> Mr. Teoh relied on the Convention in deportation proceedings. He argued that Australia had an obligation under the Convention to consider the best interests of his child (Article 3) and that the children should not be separated from their father (Article 9), particularly since the mother was a drug addict. The High Court ruled that Mr. Teoh had a legitimate expectation that the best interests of the child would be considered in deportation proceedings because Australia had ratified the Convention on the Rights of the Child.

Although *Teoh* is a controversial decision and has been subsequently disavowed by the Government of Australia, the case has encouraged greater reliance on the Convention in Australia<sup>21</sup> and has been cited in other jurisdictions: in judicial decisions in English courts and in arguments in the Indian and Canadian courts.

The national constitutions of a few Common law countries contain provisions dealing explicitly with the rights of children. Ghana's<sup>22</sup> new constitution of 1992 includes specific provisions relating to children's rights. Zimbabwe has amended its constitution to prohibit gender discrimination. The Canadian Charter of Rights and Freedoms includes some reference to children's rights. To some extent the level of detail of the provisions reflect the age of the constitution. The more recently enacted the document, the more likely it is to contain more comprehensive provisions. But Constitutions themselves do not always provide a procedure for enforcement.

None of the Common law countries examined have a comprehensive Children's Code which implements the provisions and incorporates the general principles of the Convention. State Parties' reports of New Zealand, Fiji, Trinidad and Tobago, Ghana, Palau and the United Kingdom's Overseas Territories said they had reviewed or were currently reviewing their laws comprehensively. Despite action taken on the review process reform has been slow and harmonisation with the Convention, piecemeal. Some State Parties, like those belonging to the Organisation of Eastern Caribbean States embarked on their harmonisation process without a comprehensive legislative review, making ad hoc reform inevitable.

Even in Canada, where political will to enforce child rights is high and there have been wide reforms, the reform effort has not been systematised. The State Party reported that the Convention has "affected judicial decisions concerning the Canadian Charter of Rights and Freedoms, relevant legislation and the Common law. The Convention has been specifically considered in legislative developments in the areas of child prostitution, child sex tourism, criminal harassment and female genital mutilation, as well as in the ongoing renewal of youth justice."<sup>23</sup>

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<sup>19</sup> From "The Impact of International Human Rights Norms: A Law Undergoing Evolution" (1995) 25 Western Australian L Rev 1.

<sup>20</sup> UNICEF Staff Working Papers, Evaluation, Policy and Planning Series, Number EPP-00-004, "Translating law into Reality", 2000, p 14.

<sup>21</sup> In *Tevita Musie Vaitaki v Minister for Immigration and Ethnic Affairs*, where Article 3 of the Convention was cited in an appeal in deportation proceedings. The Federal Court held that the best interests of the children involved should have been the primary consideration.

<sup>22</sup> Ghana has a mixed Common law and customary law system, Zimbabwe has a mixed Common law/customary /Civilist system, but Common law dominates in both.

<sup>23</sup> CRC/C/83/Add.6, 2003

Similarly, the core principles of the Convention have not been incorporated into legislation in any comprehensive way either. Indeed some new laws continue to be based on the welfare approach – that children are beneficiaries of protection and charity rather than holders of rights. The draft Children and Young Person’s Bill in the Isle of Man is a good example of this.

A hierarchy within the Convention’s core principles seems to emerge. Non-discrimination is taken most seriously and is often enshrined in constitutions. Primacy to children’s best interests is implemented in some domestic laws, most prominently in custody and juvenile justice. The right of children to be given due weight for their views in other areas are taken least seriously.

Constitutions and other laws of State Parties contained a non-discrimination provision frequently, reflecting article 2 of the Convention- though enforcement was sporadic. Most of these are broadly framed and pre-date the Convention. They are not therefore, tailored specifically for children. Common law countries usually have gender equality laws and their courts are increasingly turning to the CEDAW (in addition to the Convention on the Rights of the Child) as an aid to interpretation in many diverse areas of law.<sup>24</sup> Canada, Australia and New Zealand now recognise government-tolerated gender violence as a legitimate basis for asylum. They have opened their borders to those who have suffered honour crimes, sex trafficking, female genital mutilation, domestic violence and other human rights abuses perpetrated against women.<sup>25</sup>

Ratification of CEDAW has also stimulated some programme and policy initiatives. For example, following ratification by St. Kitts and Nevis, the Department of Gender Affairs has begun gender-based violence awareness courses in police training schools.<sup>26</sup>

There is a trend towards giving the child’s best interests primacy in adoption, domestic violence, divorce and other proceedings concerning custody, but not significantly in other legislation and administrative decisions. The concept of the child’s best interests in the Convention reflects Common law jurisprudence on child law in relation to custody and juvenile justice. As such, it continues to be reflected in Common law countries but has rarely seen new interpretations of the concept in the rights-based context of the Convention. The interpretation of “best interests” in a culturally relativist manner (noted in the Sharia section) is seen also in Common law countries in Africa.

Common law accommodates the concept of the “child’s age of discretion” at which parental authority becomes a diminishing right, as the child grows towards legal majority. However despite this, Common law countries have laws that emphasise child welfare and child protection in a paternalistic sense, rather than the Convention’s range of participation rights.

Children and Young Persons laws (which reflect this approach and are often located in a travelling colonial jurisprudence) continue on the statute books of African and Asian countries with a heritage of Common law.

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<sup>24</sup> UNICEF Staff Working Papers, Evaluation, Policy and Planning Series, Number EPP-00-004, “Translating law into Reality”, 2000, p 1

<sup>25</sup> The Working Group on Ratification of CEDAW, “CEDAW: Rights that Benefit the Entire Community”, 2004 at [http://www.womenstreaty.org/CEDAW\\_Book.htm](http://www.womenstreaty.org/CEDAW_Book.htm). Accessed on 5 August, 2004

<sup>26</sup> *Ibid.*

There have been some efforts to foster child participation in the Convention sense, including New Zealand's Youth Parliament which tries to actively involve young people in the parliamentary process and give them the opportunity to have their views heard by key decision makers and the general public. The Youth Parliament duplicates as realistically as possible the actual workings of Parliament. This includes the active involvement of Members of Parliament in the process. However it is only held over two days in the House of Parliament in Wellington every three years.

Countries that do not appreciate the importance of children's right to participation according to their evolving capacities in decisions that affect their lives, tend to see child rights as a state's commitment to protect children from exploitation and to ensure their survival and development in a traditional sense.<sup>27</sup>

### 1.3 Civil law

Countries with Civil law have drawn mainly on their Roman legal heritage in addition to other sources. While giving precedence to written law, they have resolutely opted for a systematic codification of their ordinary law. Also included in this category are countries, generally of the mixed law variety, that do not systematically codify law but have retained enough elements of Roman law concepts and jurisprudence to be considered affiliates of the civil tradition.

Civil law systems facilitate reception of international human rights law. In many Civil law countries, international treaties, once ratified, automatically become part of the legal system of that country – enabling lawyers and judges to invoke them directly in cases brought before the courts. This is a welcome indication for global national incorporation of Convention rights, since 75 State Parties are governed by Civil law<sup>28</sup> and in another 26 Civil law is supplemented by customary law<sup>29</sup>.

In more than 22 Civil law countries the Convention has been integrated into the constitution or prevails over national law - a very strong line of incorporation as Constitutions provide the framework and basis for other laws. In Belarus for example, the constitutional Court in 1998 struck down article 116 of the Marriage and Family Code which allowed adoption of children by an extrajudicial procedure without the parents' or guardians' consent. The article was struck down on the grounds that it was inconsistent with the Convention and the domestic constitution.

A further 11 national constitutions – at the very least- contain provisions dealing explicitly with the rights of children. These range from the comprehensive and detailed provisions of the Brazilian constitution of 1988, to brief and narrowly focussed provisions as in Japan's constitution which provides that “children shall not be exploited”.

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<sup>27</sup> Savitri Goonasekere, “Children, Law and Justice: A South Asian Perspective”, p 311

<sup>28</sup> Azores, Albania, Angola, Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Cape Verde, Central African Republic, Chile, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Dominican Republic, El Salvador, Ecuador, Estonia, Finland, France, Georgia Germany, Greece, Guatemala, Haiti, Honduras, Holy See, Hungary, Iceland, Italy, Kazakstan, Kirgystan, Laos, Latvia, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav republic of Macedonia, Mexico, Moldova, Monaco, Nicaragua, Netherlands, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, San Marino, Serbia and Montenegro, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, Uruguay, Uzbekistan, Venezuela, Viet Nam.

<sup>29</sup> Burundi, Burkina Faso, Chad, China, Democratic republic of the Congo, Congo, Côte D'ivoire, Equatorial Guinea, Ethiopia, Gabon, Guinea, Guinea Bissau, Japan, North Korea, South Korea, Mali, Madagascar, Mongolia, Mozambique, Niger, Rwanda, Sao-Tome and Principe, Senegal, Swaziland, Taiwan, Togo.

But an all-embracing children's code which reflects the principles and provisions of the Convention - i.e. the ideal legislation - has only been adopted in a tiny minority of countries. Ecuador adopted a Children's Code compatible with the letter and spirit of the Convention in 1992. The Honduras adopted a Code on Children and Adolescents in 1996. It consolidates relevant legislation and reflects the core principles of the Convention. The Honduras Code outlines, among other things, a system of social policies and the principles that a special justice system for children is based on.

In contrast, several other countries in Latin America enacted a limited children's code before the Convention was adopted. These codes applied only to children in need of special protection, following the "doctrine of irregular situation." The doctrine promotes the view of children as objects of judicial protection rather than individuals with rights. In the juvenile justice systems of most Latin American countries, judicial procedures and treatment did not make a clear difference between children in need of care and protection and those in conflict with the law. Deprivation of liberty tends not to be in accordance with the recommendations of the Committee on the Rights of the Child- i.e. an exceptional sentence granted as punishment for serious crimes, limited in time and for the shortest possible duration. Judges also tended to have too much discretion – to institutionalise child victims or those in danger; and to institutionalise children in conflict with the law without safeguards of due process that adults can claim as of right.

Reform of those codes has been initiated in many countries. For instance in Argentina - where the Minor's Code of 1919 was said to be outdated and applied only where children were the object of judicial protection – a reform process has taken place to replace the Code and include all children. But even legislative reform has been more in areas of special protection than in other areas and many reform measures have not conformed to the Convention standards.<sup>30</sup>

However even constitutional status, incorporation and a consolidated Code does not remove the need for a State Party to review all laws that affect children, and amend them into conformity with the Convention. Almost every Civil law country has pursued a degree of positive law reform in the relevant areas since ratifying the Convention, some extensively, including Georgia, Sweden and Viet Nam.

Article 2 and the principle of non-discrimination is a standard established in a number of constitutions and domestic laws. Ratification of CEDAW and reporting to the CEDAW Committee has furthered the enforcement of non-discrimination. For example the Brazilian Constitution of 1988, revoked the leadership (or *chefia*) of the man within the family and established that the "rights and duties relating to the conjugal unit are exercised equally between the man and the woman" in accordance with CEDAW article 16. After ratification, many countries have also increased their efforts to educate girls. With a new emphasis on education, Colombia was able to increase primary school enrolment and literacy rates among girls. Burkina Faso enabled many girls in rural areas to go to school for the first time by creating satellite schools.<sup>31</sup>

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<sup>30</sup> DPP, UNICEF Notes on "Technical contribution to the expert consultation on the CRC implementation."

<sup>31</sup> The Working Group on Ratification of CEDAW, "CEDAW: Rights that Benefit the Entire Community", 2004 at [http://www.womenstreaty.org/CEDAW\\_Book.htm](http://www.womenstreaty.org/CEDAW_Book.htm). Accessed on 5 August, 2004

Acting towards the best interests of the child and seeking a child's views is sometimes envisaged in legal procedures involving children- most explicitly in parental divorce proceedings, adoption and crimes. The right of children to participate in society according to their age and maturity is surrounded by a lack of awareness or ambivalence- as it is in countries globally regardless of legal system.

Many States that are trying to implement the core right are still grappling with its contours. In family law proceedings there is often an emphasis on finding out the wishes of the child, but children's voices tend to be mediated through adults- through professionals called upon to determine post-separation custody or articulated by lawyers whose duty it is to advocate for the child's best interests. While there is some evidence of listening to children –mostly in cases of adoption or parental divorce- there is little evidence of giving due weight to the views of the child.

#### **1.4 Plural Legal Systems**

In a number of countries in Asia, Africa and parts of Oceania, uniform legal norms derived from Civil or Common law apply alongside customary law that is indigenous to the country<sup>32</sup>. Customary law arises from the customs and practice of religious and ethnic groups. It may be written or unwritten.

In post-colonial jurisdictions, colonialism has reinforced legal pluralism by creating a dominant system of Western State law and an often separate system of 'personal law' based on local religions and customs. Colonialism also often *transformed* customary law, creating an environment for positive advocacy to remove limitations of colonial law and harmonise the legal systems with the Convention. Plural legal systems also carry a heritage of received norms based on gender discrimination, child protection and child welfare approaches and ideologies of the 19<sup>th</sup> century in Western Europe. Such laws have been extensively reformed in the former colonist countries, for example England and France, but in the country that was colonised these have not been reformed after Convention ratification. Examples of colonial laws frozen in time are common in countries of Africa and Asia which have, for instance, antiquated juvenile justice laws located in English / French law.

In South Africa after the fall of apartheid, attempts to bring customary law front and centre to the administration of justice has begun. The process of harmonising customary law and the common law system that has been dominant so far, also entails reforming it at the same time- to ensure that it is gender neutral and recognises child rights. Traditional marriages, inheritance rights and the status of traditional courts have been identified as the areas in greatest need of reform. In 1998, The Recognition of Customary Marriages Act was passed. The South Africa Law Commission and the women's movement were consulted and collaborated in passing the legislation.<sup>33</sup>

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<sup>32</sup> Bhutan, Guinea, Hong Kong, Liberia, Malawi, Myanmar, Nepal, Papua New Guinea, Sierra Leone, Solomon Islands, Tanzania, Uganda, Western Samoa, Zambia, Brunei, Gambia, Kenya, India, Malaysia, Nigeria, Israel, Algeria, Comoros, Egypt, Lebanon, Eritrea, Indonesia, Timor-Leste, Cameroun, Lesotho, Sri Lanka, Vanuatu, Zimbabwe.

<sup>33</sup> According to Ferial Haffajee, senior Editor, Johannesburg *Financial Times*, 'South Africa: blending tradition and change', " Under apartheid, traditional or customary law marriages were not legally recognized and only regarded as "unions". If a couple couldn't afford a common law marriage,

The example of South Africa has met with some success. But the coexistence of more than one legal system can often become a barrier to recognising the Convention's standards. The range of laws and different judicial - and other- authorities can make law reform and enforcement very complex. In Lebanon for example, around fifteen justice systems have been formulated by the confessional groups. Their positions overlap on some issues and are contradictory on others. The task, therefore, of discussing the status of children under the personal status laws and making comparisons with the Convention is especially difficult. Personal status laws create conflicts in standards applicable *between* children of different ethnicity and religion, in addition to conflict between personal laws and State laws (the Convention therefore provides an opportunity to create general norms, even though introduction of legal reform is a complex task.)

Further, it tends to be more difficult to amend laws entrenched in ethnicity and religion as they derive their legitimacy from sources that are deeply personal to the communities they govern. Although the norms of these systems may be unwelcome to many women and children of the community, powerful stakeholders that represent the communities and participate most in the democratic process can be resistant to change. That human rights norms are seen as 'western' can pose another barrier to harmonisation in post-colonial societies.

Since constitutional amendment and reform is difficult – judicial interpretations of Constitutions with a rights approach is important. Courts in Asia and Africa have given 'child rights' friendly interpretations in mixed jurisdiction and this has been a catalyst for reform of the law.

The Convention has been adopted to give rights to all children. Where customary law that preserves existing traditions or Sharia coexists with Common law and/or Civil law, reconciliation of *all* laws with human rights standards is required of the State Party.

The Committee on the Rights of the Child has expressed deep concern over the legal status of children in Nigeria, particularly under customary law and laws passed at the local and regional levels. It has urged the government to hasten adoption of the draft Children's Decree of 1993, which would apply to all children regardless of their religion or ethnic origin. Moreover legislative review to ensure eradication of harmful practices like female genital mutilation, early marriage and abuse of children in the family has been encouraged.<sup>34</sup>

Reform initiatives under the Civil law-Sharia mixed jurisdiction of Egypt have met with greater success. Under the current Egyptian Constitution, Sharia has been added to the sources of law, and the Court of Cassation has been called upon to judge Sharia cases and determine the interplay between Sharia and Civil law. Adoption of the 1996 Children's Code incorporates the Convention's principles and provisions and brings national laws in line with the Convention. The Egyptian delegation mentioned to the Committee on the Rights of the Child, that it had consulted UNICEF

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the woman was considered a "minor" who wasn't even allowed to open a credit account with a local grocer. Most rural women raise their children alone, as their husbands are migrant workers in mines and industrial centres. 'The women couldn't buy anything. They had to wait for their husbands to return from the city in order to sell property,' says Likhapa Mbatha of the Centre for Applied Legal Studies (CALs), a legal think-tank." At [http://www.unesco.org/courier/1999\\_11/uk/dossier/txt23.htm](http://www.unesco.org/courier/1999_11/uk/dossier/txt23.htm), Accessed on 6 August, 2004.

<sup>34</sup> CRC/C/15/Add.61, 1996

and various countries including Sweden on the best ways to implement the idea of an Ombudsman's office, but that it was doing so slowly so as not to provoke popular resistance.

Guinea – which has a Civil law system supplemented by customary law established a new Constitution in 1990. Title II of the Constitution is essentially based on the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights.<sup>35</sup> The following articles in Title II refer specifically to child rights<sup>36</sup>:

#### Article 16

Marriage and the family, which constitute the natural base of society, are protected and promoted by the State.

The parents have the right and the duty to ensure the education and physical and moral health of their children. Children have a duty to take care of their parents.

#### Article 17

Young people must be particularly protected from exploitation and moral abandonment

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#### Article 21

The State must promote the well being of the citizens.....It must ensure the education of the youth, which is compulsory...

Article 16 prima facie imposes no direct obligation on the State and is phrased in terms of the parents' rights and duties rather than the child's rights. The positive obligation on the State in article 21 to provide education to its citizens is a part of the emerging trend to make economic and social rights justiciable.

Countries where the systems coexisting are Common law and Civil law<sup>37</sup> face far fewer problems. Although the Philippines has not enacted a comprehensive children's code which reflects the Convention and its principles, its approach to legislative reform has been systematic. Before ratifying the Convention, its National Economic and Development Authority conducted a review of existing laws and policy statements that deal with children and identified gaps in light of the Convention. Soon after ratification, the Council for the Welfare of Children created a consolidated legislative agenda for children's rights, based on idealised laws based on the Convention. Five laws were specifically enacted to fulfil obligations under the Convention. Gaps still exist, but the State Party has devised a roadmap for reform.

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<sup>35</sup> DEPP, UNICEF, New York, "Status of the CRC in the domestic legal order", p 4

<sup>36</sup> Translated from the 'Loi Fondamentale du République de Guinée'.

<sup>37</sup> Botswana, Cyprus, Guyana, Malta, Namibia, Philippines, Quebec (Canada), St. Lucia, Seychelles, South Africa, Thailand.

South Africa also has a legal system that is part Common law and part Civil law. A highly commendable action of the South African government has been its adoption of article 28 on the rights of children in its constitution. Article 28 one of the best examples of specific Constitutional protection of child rights, which are in addition to the rights of citizens enumerated elsewhere under the Bill of Rights. Indeed article 28 seeks to set standards even higher than the Convention's when it specifies that a child's best interests be of "paramount" importance rather than "primary" as in the Convention.<sup>38</sup> South Africa's Constitution also requires the judiciary to use treaty law in interpretations.

Uganda's national Constitution of 1995 also incorporates a number of important child rights. Customary law supplements the Common law system in the country. Uganda also passed a Children's Act the following year, in 1996. In the drafting of this legislation the Convention on the Rights of the Child was used as one of the core documents so as to ensure full compatibility between the Constitution, the Children's Statute and the Convention.

## **2 IMPETUS FOR REFORM**

Although human rights have become a part of the calculus of political legitimacy, the process of review and reform is unlikely to proceed in a systematic and logical way in most States. The role of individual initiative in legislative reform has tended to be greater than that of institutions. The individual judge, government functionary or bureaucrat would thus play a vital role in advancing Convention rights – a reason for focussed advocacy and lobbying efforts. What motivates the individual actor however, is not always predictable. Below are a few broad instigators of law reform.

### **2.1 Ratification of the Convention and ongoing monitoring by the Committee on the Rights of the Child**

The process of ratification of the CRC has undoubtedly - directly or indirectly- provoked a huge volume of law reform in many States and spotlighted political attention on this area. State Parties' periodic reporting to the Committee on progress achieved in its implementation has nudged them onwards along the reform process. For instance, although Denmark initially claimed that Danish legislation was to be regarded as being compatible with the Convention, it introduced laws on child protection, specifically an amendment to the 1994 Criminal Code banning photographs and film depicting child pornography immediately after ratifying the Convention. The United Kingdom, withdrew its reservations to Articles 32 and 37(d) following the Committee's Concluding Observation that urged it to do so.

At least ten State parties have responded to the Committee's repeated recommendation for withdrawal of reservations. International pressure on the State has been increased by objections from other State parties. For example, Denmark, Finland, Ireland, Netherlands, Norway, Portugal, and

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<sup>38</sup> Although this is subject to some debate. One argument proposes that a child's interests are woven with her family's best interests. To mandate that the child's interests must be "paramount" over the family's- might be detrimental to the family and as a result to the child. It is argued that the standard of best interests being "primary" might be better, as the focus can remain on the child's best interests while taking into account her context.

Sweden objected to Pakistan's reservation proclaiming that articles of the Convention inconsistent with Islamic law shall not apply. Bowing to the pressure in 1997, Pakistan withdrew its reservations.<sup>39</sup> Malaysia withdrew its reservation to articles 22, 28, 40, 44 and 45 that it had made upon accession, following compelling objections by Belgium and Denmark about the multiplicity of reservations and the importance of the articles to which they referred.

The close to universal ratification of the Convention also indirectly caused its provisions and principles to seep into domestic legal standards. The "best interests of the child" standard for instance is widely used, and the Convention is quoted even in the courts of the United States, one of two countries that have not yet ratified the Convention.<sup>40</sup>

## **2.2 Countries emerging from transition**

Sweeping legal changes become possible when countries emerge from a period of political transition and are in the midst of constitutional change. The trend of large-scale reform in transitional societies is apparent in parts of Africa and in Eastern Europe.

In South Africa, for example, revolutionary legislative reform has been one of the new administration's highest priorities, as the legal system under apartheid was one of the main enemies it was fighting. According to the post-apartheid government, "The Constitution of the Republic of South Africa...was the result of a remarkably long, detailed and inclusive negotiation, difficult but determined, carried out with an acute awareness of the injustices of the country's non-democratic past."<sup>41</sup>

The South African Law Commission has since conducted investigations into various areas of law reform. Between 1995 and 1997, the South African parliament approved over 12 laws that affect children, from the 1996 Films and Publications Act which introduced measures, inter-alia, to protect children from exploitation through child pornography and exposure to inappropriate material, to the 1996 Child Care Amendment Act which brings old legislation in line with the new Constitution as well as the Convention by enhancing measures to protect children and promote their rights. These include measures to recognise indigenous and religious marriages, adoption, provide street children with shelters and legal representation of children.

A similar trend is apparent in some countries of Eastern Europe. In Russia for instance, between 1993 and 1997 over 100 legislative measures were passed. In Belarus as many as 27 legislative acts targeting children had been adopted by 2002. The Rights of the Child Act was adopted in 1993, which required the amendment of several Codes.

## **2.3 Regional enforcement**

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<sup>39</sup> This is the only example of a State with Sharia withdrawing the blanket reservation that Convention rights inconsistent with Islamic law shall not apply.

<sup>40</sup> Innocenti Research Centre, UNICEF, "Law Reform to implement the Convention on the Rights of the Child: Background Paper", January 2004, p 7

<sup>41</sup> At the official South African Government website <http://www.southafrica.info>. Accessed on April 8, 2004.

The Convention has had a growing influence on other international and regional human rights standards, like the African Charter on the Rights and Welfare of the Child, the SAARC <sup>42</sup> Convention on Trafficking, the Inter- American Courts and Inter-American Commission on Human Rights and the judgments of the European Court of Human Rights.

Some of these regional agreements/cooperation mechanisms however, have demanded a stronger degree of compliance than the Convention on the Rights of the Child. Their influence has in turn brought State Parties' laws into better compliance with the Convention. For example, because of the supra-national, sui generis nature of the European Union, the European Convention on Human Rights has triggered concrete legislative reform in many of the 45 countries that are party to it. The United Kingdom for example, enacted the Human Rights Act, 1998<sup>43</sup> which incorporates the European Convention and mandates that no laws will be passed that are inconsistent with the European Convention. The Act and the monitoring of the European Court in Strasbourg, brings the United Kingdom into better compliance with the Convention on the Rights of the Child.

Further, even without regional enforcement mechanisms, countries do take normative cues from the choices that neighbouring countries make, particularly when other States in the region have similar cultures.

In areas like trafficking, where a rights violation begins in one country and continues into another country, which is often its neighbour- regional cooperation, becomes vital. This has been recognised by the seven countries in South Asia, and the SAARC Convention on Trafficking was adopted in 2002. The SAARC Convention on Trafficking seeks to promote co-operation between its State Parties: to prevent, interdict and suppress trafficking; repatriate and rehabilitate of victims of trafficking and crack down on international prostitution networks where the SAARC Member Countries are the countries of origin, transit or destination.

## **2.4 International developments <sup>44</sup>**

A number of international developments have raised awareness about children's rights and pressurised State Parties to take action. Attention on child rights issues is focussed within countries during the run-up to a global conference or the signing of a treaty. Advocacy efforts at the event also influence world leaders to implement change to varying degrees. The World Summit on Children (1990), the UN General Assembly Special Session on Children (2002), global summits and other conferences have strongly raised the profile of children's rights and highlighted the need for law reform.

Global movements have also created an environment for forging partnerships – between international agencies, international and national civil society groups and non-governmental

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<sup>42</sup> The South Asian Association for Regional Cooperation is the joint forum for seven South Asian governments: Bangladesh, India, Sri Lanka, Nepal, Pakistan, Maldives and Bhutan.

<sup>43</sup> Interestingly, Lord Lester who was the architect of the Human Rights Act 1998 was also a key member of the panel of judges that agreed on the *Bangalore Principles* in 1988. The *Bangalore Principles*- regarded as heretical in their time- decided that judges in Common law countries should refer to International treaties when there is a gap in domestic law.

<sup>44</sup> This section is based on the study of the Innocenti Research Centre, UNICEF, "Law Reform to implement the Convention on the Rights of the Child: Background Paper", January 2004, p 23-24. Text in italics are direct quotations.

organisations. The Conventions provisions giving NGOs access to the Committee and the legitimacy of Shadow Reports has also reinforced the concept of government, international agency NGO co-operation in carrying through the child rights agenda.

Some specific International developments leading to reform are:

1) *Graca Machel's comprehensive study on children in armed conflict (1996), the appointment of the Special Representative of the Secretary General on Children and Armed Conflict and the adoption of the Optional Protocol on Children and Armed Conflict.*

In article 38, the Convention on the Rights of the Child urges governments to take all feasible measures to ensure that children have no direct part in hostilities. On 25 May 2000, the United Nations General Assembly adopted by consensus an Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict which raises from 15 to 18 years the age at which direct participation in armed conflict will be permitted and establishes a ban on compulsory recruitment below 18 years.

A large number of State Parties have entered reservations to the Optional Protocol under the guise of a declaration, that run counter to the spirit of the document. The United Kingdom for instance declared that the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where "there is a genuine military need" to deploy their unit or ship to an area in which hostilities are taking place.

Over the past five years, the Special Representative of the Secretary General on Children and Armed Conflict has been working with governments, Security Council, UN agencies, regional organizations and NGOs. The activities of the Office concentrate on advocacy and strengthening norms. These endeavours have resulted in some tangible progress, for example, the Special Representative's visits to Sudan in 1998 and 1999 extracted from the Government of Sudan a renewed commitment, as a matter of policy and law, not to recruit and deploy children under the age of 18 years. In Sierra Leone, the Special Representative proposed the establishment of a National Commission for War-Affected Children (NACWAC), which became fully operational in July 2002.<sup>45</sup>

2) *The 'worst forms' of child labour have gained renewed interest with the entering into force of the International Labour Organisation Convention No. 182.*

Article 32 of the Convention on the Rights of the Child specifies that States should have "regard to the relevant provisions of other international instruments" in setting standards to end the hazardous or exploitative employment of children. The ILO Convention No. 182 is enjoying the fastest pace of ratifications in the ILO's history. ILO Convention No.138, setting forth the longer-term goal of the effective abolition of child labour, is also receiving a surge in ratifications.

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<sup>45</sup> <http://www.un.org/special-rep/children-armed-conflict>. Accessed on April 7,2004.

These treaties have contributed to State Parties taking “legislative, administrative, social and educational” measures to eliminate economic exploitation of children. The ILO has reported a number of successes of the International Programme on the Elimination of Child Labour:

“Many IPEC-participating countries have adopted national policies and programmes of action against child labour and introduced legislative reforms. Notable examples include a constitutional amendment raising the minimum age for admission to employment to 16 years in Brazil; a widening of the scope of the Child Labour act in India; a five-year "national plan against the sexual exploitation of children" in Cambodia; a new minors code in Costa Rica and Nicaragua expressly prohibiting child labour; the adoption in Senegal of a law for the protection of underage children against violence and sexual exploitation; and the passage of a law in Turkey extending the minimum time a child has to attend school from five to eight years. Three countries - Nepal, Tanzania and El Salvador - recently committed to time-bound national plans to eliminate child labour completely.”<sup>46</sup>

3) *Sexual exploitation of children has gained unique attention with the holding of the First World Congress against Commercial Sexual Exploitation of Children in Stockholm in 1996, and its follow-up World Congress in Yokohama in 2001.*

Article 34 provides that States take “appropriate national, bilateral and multilateral measures” to end the commercial sexual exploitation of children or CSEC. One hundred and fifty-nine countries have adopted the Stockholm Agenda for Action between the First and Second World Congress against Commercial Sexual Exploitation of Children (1996-2001). Only 23% of those nations that committed to the Agenda for Action have developed National Plans of Action against CSEC but it is the first tangible step to include various actors and serve as a framework for national actions against CSEC.<sup>47</sup>

In legislative reform two main concerns have been identified. First, it is important to criminalize all acts that constitute sexual exploitation of children. Second, it is important to decriminalise the acts of children exploited in prostitution and other activities; and to give them the benefit, as victims, of child sensitive procedures within the legal system.

An example of legislation resulting from increased awareness through these conferences may be found in Japan. In 1999 Japan adopted the Law on Punishing Acts relating to Child Prostitution and Child Pornography and on Protecting Children. This piece of legislation, in combination with the Child Abuse Prevention law adopted in 2000, reflects efforts to implement provisions of the Convention in the run-up to the Yokohama Congress.

4) *The appointment of a human rights rapporteur on the sale of children, child prostitution and child pornography, the adoption of the Optional Protocol to the CRC on sale of children, child prostitution and child pornography and the Palermo protocol to prevent, suppress and*

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<sup>46</sup> At the ILO website: <http://www.ilo.org/public/english/standards/ipec/governments/index.htm>, Accessed on April 7, 2004.

<sup>47</sup> “ECPAT Report on the Implementation of the Agenda for Action Against the Commercial Sexual Exploitation of Children, 2001-2002” p 39

*punish trafficking in persons, especially women and children, supplementing the UN Convention against Transnational Organised Crime.*

The optional protocol requires State parties to prohibit the sale of children, child prostitution and child pornography through criminal or penal legislation, to develop public awareness measures in this respect and to put in place measures for the protection of child victims. The protocol only came into force in early 2002, and it is too early to determine trends in its effect on legal reform.

The Palermo protocol to prevent, suppress and punish trafficking in persons, especially women and children, requires parties to criminalize trafficking in persons, defined for the first time in an international instrument. Together with the Convention against Transnational Organised Crime and the Migrant Smuggling Protocol, the main focus is on organised crime and law enforcement. They also require specific training programs for law enforcement officials, prosecutors, and judges who deal with the offences covered by the Convention and Protocols. Finally, the Convention and Protocols develop prevention methods to keep organized criminal groups out of lawful economic markets. These instruments have been useful in the battle against trafficking, as they strengthen law enforcement and build on those treaties, which merely establish the human right not to be trafficked.

The UN General Assembly called for a global study on violence against children in 2001 acting on the recommendation of the Committee on the Rights of the Child. The study is currently being carried out. The purpose of the study is to provide an in-depth picture of the prevalence, nature and causes of violence against children.<sup>48</sup> This study and other such developments are likely to instigate further legislative reform in State Parties.

## **2.5 Evolving interpretation of religion-based laws<sup>49</sup>**

In State Parties governed by Sharia, *ijtihad* or the evolving interpretations of religious texts could give the necessary impetus to improving the status of women and girls and leading to legislative reforms in line with the Convention. The modernist movement in Islam has opposed the traditional view of Sharia, which states that the law cannot be changed by human will. Modernists insist that it should be applied to the contemporary situations and that new interpretations are valid.

In any event, courts are increasingly interpreting Sharia in ways that are consistent with children's rights. In December 1997, a high court ruling in Egypt held that Islam does not require female genital mutilation<sup>50</sup>. It found:

“Circumcision of girls is not an individual right under Islamic law because there is nothing in the Koran which authorizes it and nothing in the Sunna...henceforth, it is illegal for anyone to carry out circumcision operations, even if the girl or her parents agree to it.”<sup>51</sup>

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<sup>48</sup> <http://www.unhchr.ch/html/menu2/6/crc/study.htm>

<sup>49</sup> The focus of this section is on the evolving interpretation of law based on Islamic traditions rather than other religious based traditions because countries with Sharia comprise the overwhelming majority of State Parties governed by religion based laws.

<sup>50</sup> Although FGM is primarily a cultural practice and not a religious one, followers of a number of religions in addition to Islam believe that their religion requires it. These include the Coptic Christians of Egypt, the Falasha Ethiopian Jews and followers of animist religions.

The Egyptian courts are seen as some of the region's foremost experts on Sharia. Their interpretations of the Koran are highly respected in the Arab world. With the appointment of Tahani-el-Gebali to the Egyptian apex court, in March 2003, the court's first woman judge will be participating in the court's resolution of Sharia issues. Her command of *fiqhi* or Islamic jurisprudence and her degree in the subject has effectively defeated a number of conservative religious opponents in her battles for civil liberties.

Within the human rights movements of countries with Sharia, there are those who believe that international human rights should apply universally. There are reformers however that see the International Bill of Rights- the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights – as rooted in Judaeo-Christian traditions and propagated by western secularists.

A few alternatives have been proposed. The Universal Islamic Declaration of Human Rights was proclaimed at UNESCO in 1981. It was followed by the Cairo Declaration on Human Rights in Islam, adopted in August 1990 by the Organisation of Islamic Conference countries. Both charters embody attempts to reconcile Sharia with the International Bill of Rights. Although neither document is binding, to the extent they conflict they represent differing views even within modernists in Islam, on the reconciliation of Sharia with the International Bill of Rights. On November 9-10, 1998 the United Nations High Commissioner for Human Rights hosted a seminar financed by the Organisation of Islamic Conference entitled "Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights." At the end of the seminar Mary Robinson, then the High Commissioner, cautiously welcomed the dialogue. She said:

“I have learned of the fundamental principles of Islam relating to the dignity of the human person, to the search for justice and the protection of the weak, solidarity, respect for other cultures and beliefs. In all these discussions, no one expressed doubts about the Universal Declaration of Human Rights nor denied the legitimacy or universality of international human rights standards. And we have heard of the relevance of international standards, including the Universal Declaration, to promoting and protecting human rights on the national level.”<sup>52</sup>

### **3 SOME IMPORTANT ISSUES IN REFORM**

#### **3.1 Access to justice**

Despite their special vulnerability to human rights violations children are unable to access adequate remedies- even when their most fundamental rights are breached. Children do not vote and have not been able to play a notable part in the political calculus of human rights. The Committee on the Rights of the Child has recognised<sup>53</sup> the special barriers children face in accessing justice.

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<sup>51</sup> <http://www.hrw.org/worldreport99/mideast/egypt.html>, Accessed on April 9, 2004

<sup>52</sup> [http://www.unhchr.ch/hurricane/hurricane.nsf/\(Symbol\)/OHCHR.981129.A.En?OpenDocument](http://www.unhchr.ch/hurricane/hurricane.nsf/(Symbol)/OHCHR.981129.A.En?OpenDocument) Accessed on April 9, 2004.

<sup>53</sup> The Second General Comment of the Committee on the Rights of the Child, “The Role of Independent National Human Rights Institutions in the protection and Promotion of the Rights of the Child”, 2002.

Rights without remedies are of no great value. Indeed the existence of such rights can undermine confidence in the institutions and documents that claim to provide them. State Parties need to therefore focus efforts on providing concrete remedies, both at the individual and collective level, through judicial, administrative or other appropriate means. Such remedies must include adequate reparation, which may take the form of restitution, compensation or satisfaction, and can also come in the form of a guarantee that the violation will not be repeated in the future.<sup>54</sup> Measures to promote physical and psychological recovery, rehabilitation and reintegration are required to be provided where needed by article 39 of the Convention.<sup>55</sup>

The Convention does not directly confer on individuals, the right to seek remedies for violations of its provisions. Effective mechanisms for remedies could be non-judicial, quasi-judicial or administrative, with ultimate access to the courts. In domestic courts, *locus standi* is available either if the country is monist and recognises its international treaties to be enforceable in the jurisdiction or if local laws incorporate the Convention and provide rights of challenge to individuals or groups.

State Parties have not faced squarely the question to which the Convention is truly exercisable within domestic jurisdictions i.e. the extent to which it provides remedies for breach of rights. This is reflected in the lack of information in their reporting to the Committee.

In order to make claims, children need access to effective mechanisms of redress. If such mechanisms do not exist, then claiming entitlements, even if they are constitutional or statutory, becomes a moot point. Constitutional remedies i.e. actions for violation of fundamental rights need to be available for claiming court orders for redress and compensation.

Indeed, even when a child's most fundamental rights are violated- criminal justice systems in most countries do not cater to the child complainant. The recent introduction of protective legislation for vulnerable child witnesses in Australia and Canada in cases of child abuse and other such traumatic and stigmatising violations has slowly gained momentum. So has the use of technology such as deposition through video screening. The Canadian case law was cited in the Indian case of *Sakshi v Union of India* and the Supreme Court has provided similar protections for victims of child abuse in trial. These protections have softened the impact on children of being involved in the system to some extent.

In view of limitations to children's access to effective remedies, the role of child rights and human rights institutions in intervening on behalf of children becomes magnified (*see section below on Institutions*). However, remedies represent the actual realisation of rights, and must be central to discussions of legislative reform.

### **3.2 Decentralisation**

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<sup>54</sup> The right to an effective remedy for violations of human rights is reflected in documents such as the Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2), General Comments 3 and 9 to the International Covenant on Economic, Social and Cultural Rights, and the Masstricht Guidelines on Violations of Economic, Social and Cultural Rights. The Masstricht Guidelines were issued in 1997 by a body of internationally recognized jurists and are regularly relied upon as authoritative by human rights tribunals.

<sup>55</sup> General Comment No. 5 para.24

Decentralisation of power does not reduce the States' direct responsibility to its children- regional and State compliance with the CRC must be ensured. Similarly where non-State actors provide services relevant to children, the State should monitor the indirect obligation on non-State providers to operate in accordance with the Convention.

Federal forms of government facilitate law reform in some countries, particularly if the structure of the federation and the hierarchies within it are clear. In others they are obstacles to implementing the Convention, particularly in enacting laws. Law reform has worked well in Sweden, where the Convention has been successively incorporated into Swedish law. In fact a large proportion of the Convention rights affect matters at a local government level. Decentralisation measures in recent years have given municipalities increased responsibility for the planning of child and youth policy.<sup>56</sup> By contrast in Micronesia, the nature of the country's federation acts as an obstacle to reform. There are disparities between different laws and practices of different states and insufficient coordination between the centre and four federations.<sup>57</sup>

Decentralisation can also aggravate economic disparities between regions. In France for example, the Committee on the Rights of the Child was concerned that decentralisation would lead to difference in standards of living. The Committee emphasised that close cooperation between central and local authorities would minimise disparities, especially to protect the rights of children in the most vulnerable groups.<sup>58</sup>

### **3.3 The Indivisibility of Child Rights**

The Convention on the Rights of the Child treats all rights as equally important: Article 4 of the Convention provides that "with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation." The distinction between enforceable civil and political rights and socio and economic policies has been undermined by the Convention and the jurisprudence of the Committee on the Rights of the Child which considers provision rights as important as protection and participation rights.

A majority of the Convention's State parties do recognise economic and social rights- in their constitutions, or through international treaties applied through domestic laws. Although these provisions are not always enforceable in court, their immutable status provides an ongoing guide to national policy. Over half of the world's constitutions have express provisions on social and economic rights or principles. More than 55 of the world's constitutions refer to a right or state duty with respect to social assistance, over 30 constitutions refer to the right to a minimum standard of living, and more than 30 constitutions enshrine a right or state duty with respect to housing.<sup>59</sup>

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<sup>56</sup> CRC/C/65/Add. 3

<sup>57</sup> CRC/C/28/Add. 5

<sup>58</sup> CRC/C/15/Add. 20. 1994

<sup>59</sup> Ontario Ministry of the Attorney General, Constitutional Law and Policy Division, "The Protection of Social and Economic Rights: A Comparative Study", 1991, p 6-7

However the Committee on the Rights of the Child has stated clearly that economic, social and cultural rights should also be justiciable.<sup>60</sup> It acknowledges resource constraints, but is emphatic that minimum core obligations must be fulfilled. In most countries economic and social rights are still perceived as discretionary social policies rather than enforceable rights. This undermines the capacity to realise protection and participation rights of children, leave alone the provision rights of health and education.

Traditionally, the focus of rights discourse has been on civil and political rights. Some sectors, like special protection of children and juvenile justice receive attention in the laws of most countries, while economic and social rights are left to the policy arena. In several Latin American countries for example, the “doctrine of irregular situation”<sup>61</sup> has meant that laws focussed primarily on children whose rights were especially at risk- of exploitation, abuse, neglect or in conflict with the law, and did not address the economic and social rights of children.<sup>62</sup> Other laws like administrative rules, codes on health, insurance, transport etc. were not included in legislative reforms for children. This is a grave omission. A number of laws and secondary legislation that do not target children- affect them in important ways and often disproportionately.

Repeated emphasis by human rights treaties and bodies that all human rights - civil, cultural, economic, political and social, including the right to development - are “universal, indivisible, and interdependent” is gaining currency now.

The exclusive emphasis on civil and political rights is changing and there is an upward trend of law creation and amendment of economic, social and cultural rights. India, for example, passed the 93<sup>rd</sup> Amendment to its Constitution in 2003 making education for children between 6 and 14 an enforceable fundamental right. The Indian Constitution’s new Art 21 A reflects the Supreme Court’s jurisprudence in cases such as *Unnikrishnan v State of Andhra Pradesh*.

However when economic and social rights are made enforceable, the judiciary of a third world country enters into somewhat unfamiliar territory. Staying with the example of India’s new fundamental right to education, the right imposes on the State an enforceable duty to ‘provide free and compulsory education to all children of the age 6 to 14 in such manner as the state may, by law, determine.’ But if the State is ever cornered on this, it might argue that education by correspondence is accessible to all. At this point the judiciary might have to intervene with a policy it determines is required for the State to fulfil its core obligations, a role that it is not especially well-equipped for.

Yet there is a growing trend around the world toward improved enforcement and adjudication procedures for social and economic rights. For example, the 40-member Council of Europe has recently adopted a revised European Social Charter, which came into force on July 1, 1999.<sup>63</sup> The revised European Social Charter provides protection for economic and social rights, for example, through the right to decent housing and protection against poverty and social exclusion. The rights are subject to a complaint procedure that allows employer organizations and NGOs to file complaints against governments, which are then considered by a Committee of Independent Experts. Under the earlier version of the Social Charter, economic and social rights assumed the character of

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<sup>60</sup> In the Committee’s General Comment No. 5.

<sup>61</sup> The concern was articulated by the Committee to the delegations of Chile, Guatemala, Argentina and Venezuela among others.

<sup>62</sup> For other problems with the application of the ‘doctrine of irregular situation’ see the section on Civil law countries.

<sup>63</sup> European Social Charter (Revised), 3 May 1996, ETS No. 163 (entered into force 1 July 1999).

'policy objectives' rather than fully justiciable, substantive rights. This is in stark contrast to the civil and political rights, which are outlined in the European Convention on Human Rights and are fully justiciable - whose protection is carried out in part by the European Court of Human Rights.<sup>64</sup>

#### **4 IMPACT OF LAWS ON POLICIES AFFECTING CHILDREN**

Laws enforcing child rights have had an impact on the normative dimensions of policy – though more in the implementation of social and economic rights. Although legislative reform has often concentrated on the civil and political rights of children- mainly children in need of special protection - policy follow-up to effectively implement legislation has not been consistent. In contrast, policy and programmes in the social and economic sector are more widespread.

State Parties have accorded priority to reforming their educational systems and there is some relevant legislation. A number of governments appear committed to making education compulsory and free in primary school and to a lesser extent in secondary school. A worldwide trend to reform health care and to improve the quality and quantity of services has emerged. Special attention is often paid to immunisation and nutrition. In juvenile justice, drug abuse by children and discrimination against children of minority religions or ethnic groups, rhetoric flourishes. There are minimal accounts of concrete action.<sup>65</sup>

An example of the trend in divergence between law and policy implementation of its provisions comes from the United Kingdom. The United Kingdom claimed it did not require any amendment to legislation when it ratified the Convention<sup>66</sup>. The State Party accepted, even more than a decade later however, that translating legislation into everyday policy and practise throughout the country was required. This is sharp contrast to the impact of the European Convention on Human Rights.

The United Kingdom's Human Rights Act, 1998 which seeks to implement the European Convention on Human Rights in the UK's domestic legal system, requires the government to make human rights a part of policy formulation. When those policies are implemented- public authorities must have human rights principles in mind. It is unlawful for public authorities to act incompatibly with the rights in the European Convention.

The rights approach in legislation is however pushing policies away from the welfare approach. In Ireland, the Child Care Act 1991, showed movement 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 a 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

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<sup>64</sup> From the Ontario Human Rights Commission's, "Human Rights Commissions and Economic and Social Rights", a research paper of the policy and education branch. The paper is reproduced at <http://www.ohrc.on.ca/english/consultations/economic-social-rights-paper.html>

<sup>65</sup> DEPP, UNICEF, "Trends and Gaps" p 8-11

<sup>66</sup> CRC/C/11/Add.1, 1994

for children and coordinating in particular the activities of three departments in relation to child protection.

The absence of automatic policy-making to ensure that concrete action follows law reform is a considerable gap in reform processes. This step is vital to ensure that the often long and arduous process of law reform does not result in laws that remain on paper – not enforced and not achieving the often worthy goals they seek.

## **5 ADEQUACY OF RESOURCES TO FUND IMPLEMENTATION OF NEW LAWS**

Following a legislative change, resources need to be allocated to, inter-alia, enforcement mechanisms, monitoring institutions and delivering services. Compulsory education and health services need money. Resource allocation for a social policy agenda is also crucial if children's survival and development rights (the socio-economic rights above) are to be implemented. In fact Article 4 of the Convention requires State Parties to deliver services to realise children's economic, social and cultural rights to the maximum extent they are able.

Trends in State Parties' performance in allocating resources to fund the realisation of children's rights are difficult to ascertain. Assessments are inhibited by the lack of disaggregated data on public expenditure on children; the area is only now emerging as a focus of monitoring and analysis. Inadequate data, political agendas, and the limited capacity of government to calculate costs and benefits constrain accurate costing of policies. For example, providing social services has a large number of unintended but valuable spillover effects. Rights are indivisible and inter-dependent. As such, providing social services and fulfilling some economic and social rights accrue unintended but important benefits to a society. These benefits can help strengthen civil and political rights to its children. If these are not accounted for in the cost-benefit analysis is skewed.

An illustration of this idea is a policy to provide safe drinking water. Women and children in parts of Asia and Africa travel long distances everyday to fetch safe drinking water. The chore often occupies several hours of the day. Many implications stem from this. School-age girls spend hours each day carrying water for their families instead of pursuing an education. In addition this often consigns girls to poverty and dependence later in life. Increased vulnerability to sexual assault and abduction is another serious consequence, particularly in areas of armed conflict. Providing local access to a safe water point not only brings water closer to the community but also allows girls to go to school, allows women to engage in the formal economy and reduces their vulnerability to sexual violence and to AIDS.

So if the spillover benefits of a policy are not accounted for, the costing of a policy that follows legislative reform can be misleading. Incorrect costing can skew decisions in programme and policy follow-up of the legislative reform. Further, in political negotiations over budgets, social policy objectives often get overtaken by competing priorities like defence expenditure, food subsidies,

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<sup>67</sup> This section has been written in collaboration with Radhika Gore, it is based on excerpts of her report for the Division of Policy and Planning, UNICEF, "Budget Implications of Legislative Reform".

administration etc. But social sector policy objectives need to be a focus of budgets rather than a residual category, they also need to take into account the effect on children's rights. This implies, inter alia, a focus on poverty reduction.

One impetus for governments to ensure adequate budgeting and follow-up for legislative and policy reform is the active participation of civil society. For example policy costing exercises, can affect the content of new policy. Being able to illustrate the economic costs and benefits of a new potential policy can be a factor in determining its scope. For example the civil society costing of the Child Justice Bill in South Africa caused important adjustments to be made.

### South Africa

#### *Costing the implementation of the Child Justice Bill*

Two costing exercises<sup>68</sup> were conducted for the implementation of the Child Justice Bill. The initial exercise, which estimated the cost of implementing the Draft Bill of 1998, involved establishing an estimate of expenditure of the prevailing juvenile justice system. This entailed modelling and costing programmes spanning five different sectors - police, welfare, justice, correctional services and education. This was done across both national and provincial spheres of government. The expected impact of the changes proposed by the Draft Bill was then estimated.

The exercise highlighted the real cost of components of the Bill and contributed to it being revised. A few years later in 2001, the revised Bill was costed - and the original cost estimates were updated, taking into account changes made to the Bill.

Also notable as impetus for ensuring budgets sensitive to child rights are national advocacy movements that highlight the consequences of economic policies. Such movements – led by NGOs, academics, and others - present alternative methods in managing public funds to achieve greater social equity.

### Experience in Brazil

*The Child Budget:* This is a national-level effort that aims to promote 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 highlights the importance of monitoring public policy financing that affects children.

*Participatory Budget:* This is a government-led methodology emerging in certain parts of Brazil for increasing popular participation in financial decision-making. It aims to involve ordinary citizens in defining local-level spending priorities. UNICEF has supported local administrations in certain towns to implement the initiative.

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<sup>68</sup> The first is "Costing the Implementation of the Child Justice Bill: A Scenario Analysis (1999), and the second is Re-Costing the Child Justice Bill. Updating the original costing taking into consideration changes made to the bill" (2001), by Conrad Barberton with John Stuart.

*The Municipal Kit*: The Kit, a series of five booklets, was developed by a local NGO to familiarize citizens, especially teachers and students, with the municipal budgetary process, and to assist them to play an active role.

Another impetus is the trend in ‘legislative budgeting’<sup>69</sup>. In a substantial number of developing and transitional countries, legislatures are moving towards greater budgetary activism. Parliamentarians have begun to actively challenge and scrutinise national budgets. The primary reason for this trend is that democratization and constitutional change have opened up possibilities for legislative participation in many previously closed systems, notably in parts of Latin America, Africa and central Europe.

Interaction between legislatures and civil society organizations is increasing in many countries. Many legislatures now open their proceedings to the media and the public, and it is becoming more frequent for them to call for submissions & outside experts to testify.

## **6 ACTORS IN LEGISLATIVE REFORM**

The two main actors in lawmaking are legislatures and the executive. They have the discretion to consult civil society but there is rarely any obligation to do so. Children are almost never consulted on laws that will affect them.

Citizens’ and (where relevant) children’s participation throughout the legislative process, through transparent and open discussion and public debate is an essential dimension of creative law reform. Citizen’s and children’s participation is also mandated by Convention: Article 17 requires specific actions on State Parties to ensure that a child has access to information aimed at promotion of his or her social, spiritual and moral well-being. Article 12 gives children the right to their views being given “due weight” and article 14 requires State Parties to respect a child’s thought, conscience and choice of religion.

State Parties differ dramatically in the degree to which they grant the public access to the legislative process. Zimbabwe until recently had rules that forbade public access to committee deliberations, while Uganda’s committees are, with few exceptions, open to and covered by the press. Some legislative bodies require that that legislative meetings and agendas be published in advance so that interested parties may attend.

Legislatures play three overlapping roles; they legislate, they represent, and exercise oversight of the executive. Their legislative function refers to introducing, considering and enacting laws. As representatives, legislators act as intermediaries between their constituents and government agencies, and represent constituent interests in the policy-making process. In their oversight function, legislators hold the executive accountable for its actions and spending. They also work together with the executive to monitor the operation of laws.

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<sup>69</sup> Taken from International Budget Project: <http://www.internationalbudget.org/themes/LEG/index.htm>

Legislation proceeds to the floor of the legislature through a number of steps. The process is designed to ensure that the proposed legislation is sufficiently deliberated upon. The government drafts the bill. Non-governmental organizations, interest groups or experts may be consulted during the drafting stage. In most legislatures, bills are first introduced formally to the floor of the legislature (parliament or Congress). The bill is then referred to a specialized committee for more thorough consideration. In some legislatures, committees have the power to prevent unwanted legislation from being further considered. Proposed bills are then sent back to the floor for further debate and voting before they are enacted.<sup>70</sup>

When draftsmen are inadequate and civil society and/or experts in the area are not consulted, the resulting laws can have a lasting and wide negative impact. The initial version of the Indian Juvenile Justice Act 2000, was drafted in 15 days, a consultation was then arranged with two days notice and in rare unanimity all the law academics and children's rights activists at the meet revolted against the draft. Although an official committee was subsequently set up to provide legitimacy to the bill – a grossly inadequate version that was condemned by civil society was presented to and passed by Parliament, with lasting repercussions for children in conflict with the law.

A large number of countries have embarked on reviews of their laws. Not a single has reviewed the entire legal landscape including constitutional provisions, legislation, religion based and customary law through the lens of child rights and then set up mechanisms to continually measure its laws against the changing situation in which its children live. Piecemeal reform has not prioritised or harmonised interventions.

Some States have set up permanent bodies to examine national legislation on an ongoing basis to determine conformity with the Convention. There are other State Parties that have acted contrary to the general trend of ad-hocism. Georgia widely disseminated a document on harmonising legislation in 2000, following a recommendation by the Committee on the Rights of the Child.<sup>71</sup> The study was conducted by an independent council of experts and sent to parliamentary bodies- including the subcommittee on the Protection of the Mother and Child- government agencies and civil society organisations. Currently the Parliamentary Committee on Human Rights, Petitions and development of Civil Society, assisted by experts in foreign laws, is drafting a law on the rights of the child. It will include the Convention, other international human rights Conventions, Georgian laws and implementing mechanisms.

Parliamentary Committees, composed of members from the government and the opposition, are a valuable mechanism for advocacy within and outside parliament, and to initiate a procedure for child and family impact assessment when a bill comes before Parliament. The role of such committees is particularly useful in the absence of a coordinated approach to policy formulation and the enactment of laws.<sup>72</sup>

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<sup>70</sup> The above two paragraphs are from Radhika Gore's report, Division of Policy and Planning, UNICEF, "Budget Implications of Legislative Reform", p 9-11

<sup>71</sup> CRC/C/Add.124, 2000

<sup>72</sup> S. Goonasekere, "Children, Law and Justice" p 364

## 7 DISSEMINATION OF LAWS AND LEGAL LITERACY

The Convention on the Rights of the Child is the only convention that includes the concept of people's participation in the enforcement and assertion of rights. It is the only convention that says that the State has an obligation to disseminate information about its laws. It is also the only convention that specifically gives NGOs the right to participate in hearings. Its guidelines have influenced other conventions as well.

Effective strategies to disseminate information as part of a systematic policy post-reform can greatly enhance the claiming of rights. Several State Parties are making efforts to disseminate information and provide human rights training<sup>73</sup>. These efforts are mostly ad-hoc however and not institutionalised in law or policy.

Sri Lanka is one of the State Parties doing human rights training in a big way. The Human Rights Committee expressed its appreciation “at the efforts undertaken to include human rights education within the curricula of secondary schools and higher educational establishments, and that human rights training programmes are been organised for the security forces.”<sup>74</sup> NGOs, especially those working directly with children and families at community level, have been mobilized for support using a training manual as the basis of their interventions.

UNICEF has conducted training programmes for members of the Liberation Tigers of Tamil Eelam and to the Heads of District in their areas of control. The training aims to help the organization to eliminate child conscription, and reintegrate child soldiers, and other children affected by war in the North and East. Training programmes also seek to help the LTTE educate and support those in child labour.<sup>75</sup>

The Convention has not been translated widely into local or indigenous languages. In Ethiopia however, the Convention has been translated into twelve languages. Sensitisation workshops on the Convention have been conducted for judicial personnel, law enforcement officials, child-care personnel, social workers, medical personnel and the university community. Awareness raising programs promoting the participation of children is also regularly promoted through the mass media.

A government project in Burkina Faso has played a big role in disseminating information on the content of the new family code to both adults and young people. The code, its contents and routes to remedies are explained through campaigns at the national and community level. These campaigns have helped civil society, women's groups in particular, to claim their rights.

Civil society organisations have become a powerful force for the realisation of children's rights in many countries. NGOs have a formal role in the Convention's reporting process as well as in monitoring and advocacy at the national level. In many countries, NGOs have formed coalitions that focus on children's rights; in some NGOs meet regularly with the government and collaborate on

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<sup>73</sup> General human rights training was found to be a lot more frequent than specific training in child rights.

<sup>74</sup> The Human Rights Committee monitors the implementation of the International Covenant of Civil and Political Rights. The Committee's Concluding Observations in Sri Lanka were recorded in CCPR/C/79/Add.56, 1995.

<sup>75</sup> A joint LTTE and UNICEF press release at [www.unicef.org/media/media\\_7304.html](http://www.unicef.org/media/media_7304.html), Accessed on April 1, 2004.

implementation initiatives. For example, in South Asia, lawyers groups and civil society organisations provide legal aid and programmes for legal literacy. Courts have sometimes intervened to provide legal aid to disadvantaged groups. An effort to integrate legal literacy with community education programs has been made by training community workers. Law schools and universities in the region have included legal aid and community legal literacy work. There are also efforts to integrate child rights in Law School curricula, for example the National Law School at Bangalore and Colombo University have courses on child rights or teach it as part of other courses.

Courts and governments now recognise their role in law enforcement and monitoring. In India, for example, a judicial decision and subsequent legislative enactment gave legal status to non-governmental organisations to monitor violations of the Equal Remuneration Act.<sup>76</sup> However at the national level there is much more civil society participation in providing services than in monitoring enforcement of rights. Even in countries like Italy that comply to “a great extent with the Convention’s practice and principles”<sup>77</sup>, the Committee on the Rights of the Child has expressed concern over the lack of official participation by civil society.<sup>78</sup> Participation by those directly or indirectly affected by a law is required. An anti-trafficking law for instance, should involve the police, border security, the tourism industry, communications and advertising agencies among others.

State Parties need to give particular attention to ensuring that there are effective child-sensitive procedures available to children and their representatives. These should include the provision on child friendly information, advice, advocacy- including support for self-advocacy- and access to independent complaints procedures and to the courts with necessary legal and other assistance.

## **8 USE OF LAW BY LAWYERS AND JUDGES**

One of the most significant developments has been the higher judiciaries’ championing rights under the Convention, and providing effective remedies, as a result of a number of rights becoming actionable.

Lawyers have a crucial role in ensuring that the Convention rights and other laws in favour of children are respected and applied by the courts. Training lawyers and raising awareness about Convention rights therefore, is a strategic intervention. In Civil law systems for instance, judges cannot decide issues that are not raised before the courts and suo moto jurisdiction is more limited.

In countries of the dualist tradition- i.e. those that hold that international law is not domestic law - a change is coming about. A growing belief that domestic courts may use international human rights principles and their exposition by the international courts, tribunals and other bodies established to give them content and effect. This has happened as a reflection of the growing body of international human rights law and in recognition of the importance of its content.<sup>79</sup>

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<sup>76</sup> Ibid.

<sup>77</sup> CRC/C/8/Add.18, 1995

<sup>78</sup> CRC/C/15/Add.41, 1995

<sup>79</sup> For a discussion on court’s enforcing the CRC in countries with a dualist tradition, please see the Section on Common law above.

Courts have the power to interpret domestic laws so as to stimulate legislative efforts that reflect and enforce rights under the Convention. There also exist a number of judicial decisions that use the Convention standard to interpret a constitutional standard in domestic law. So forging a link to international standards through judicial activism that incorporates these norms into national law can compensate for legislative apathy in harmonising domestic laws with the Convention.<sup>80</sup>

A few State Parties' apex courts have widened their locus standi provisions considerably. The Costa Rica, the Supreme Court will accept any action brought by a citizen regardless of age, an immediate response to CRC ratification.<sup>81</sup> This is the greatest degree of access modern children have ever had to courts.

In Egypt, the Supreme Constitutional Court has prohibited any bill from being passed without due consideration of the Convention's provisions. If a bill is inconsistent with the constitution or with a treaty Egypt is party to, it is declared null and void. For instance, a bill calling for the age of majority to be reduced to 15 years was rejected because it would have been inconsistent with the provisions of the Convention. The Committee has observed that the role of the court is far-reaching and important.<sup>82</sup>

The legal authority courts possess can also make them better monitoring bodies than agencies of the executive. Across South Asia, the fusion of judicial and administrative roles is accepted jurisprudence.<sup>83</sup> In India, to ensure effective monitoring backed by the power of judicial sanction, the Bonded Labour Legislation has conferred a monitoring and administrative role on magistrates. The Supreme Court has also given the National Human Rights Commission, a monitoring role. The close connection of the Supreme Court and the Human Rights Commission has been partly a result of the Commission's head being a former Chief Justice of India, a requirement prescribed by statute.

Another way courts can enforce children's rights is by expanding the jurisprudence of rights to link principles of social policy with fundamental rights. The bifurcation of rights and directive principles of social policy is a concept in all South Asian constitutions - in India, Pakistan, Sri Lanka, Bangladesh and Nepal. This reflects the early narrow European definition of human rights.

The Indian Supreme Court's judgments in public interest litigation have given a new dynamism to the traditional ideology of human rights, particularly by integrating social and economic rights and moving towards a recognition of basic needs as legally enforceable basic rights. For instance, the interpretation of the right to life in the traditional human rights sense of civil and political rights is the right not to be deprived of liberty - without due process of law. The Supreme Court has stated that the right to life is the right to live with human dignity. Under this jurisprudence, it declared children's right to primary education a fundamental right, also the right to live in a clean and healthy environment. So in addition to the traditional negative responsibility on the state not to infringe fundamental rights, there is now a positive, justiciable obligation to realise rights.

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<sup>80</sup>S. Goonasekere, "Children, Law and Justice"

<sup>81</sup> CRC/C/Add.65/7, 1998

<sup>82</sup> Kolosov (CM), at the 66<sup>th</sup> meeting, Summary Record: CRC/C/SR.66, para.21 cited in Innocenti Research Centre, UNICEF, "Law Reform to implement the Convention on the Rights of the Child: Background Paper", January 2004, p 17

<sup>83</sup> S. Goonasekere, "Children, Law and Justice", p 363

## 9 CHILDREN'S RIGHTS AND HUMAN RIGHTS INSTITUTIONS

Children's developmental state makes them particularly vulnerable to human rights violations. Children cannot play a meaningful role in the political process that determines governments' response to human rights.

After the ratification of the Convention a large number of governments prioritised children's rights enough to establish government departments that served as focal points for children as well as specialist task forces to work on urgent issues. These ranged from child protection units within ministries of welfare, as in Eritrea ; to ministries dealing exclusively with children's issues ; and in the case of Denmark, to a ministerial committee on children with a parallel committee of civil servants, the Inter-Ministerial Committee on Children as well as the Trans-Ministerial Youth Committee which handles the government's youth policies.

Children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights. For these reasons, the Committee has consistently encouraged State Parties to establish specialist children's rights institution – or to develop children's rights within human rights institutions where resources are limited - to promote and monitor Convention rights. There has been a proliferation of national human rights institutions and children's ombudspersons since the Convention came into force.

Where such institutions exist the Committee has recommended that States review their independence and efficacy. The Committee consolidated its recommendations in its second General Comment, "The Role of Independent National Human Rights Institutions in the protection and promotion of the Rights of the Child", 2002.<sup>84</sup>

The Committee promotes establishment of such institutions in compliance with the 'Paris Principles'<sup>85</sup> which provide minimum standards for the establishment, competence, responsibilities, composition, including pluralism, independence, methods of operation, and quasi-judicial activities of such national bodies.

The Committee recommends the institution should be constitutionally entrenched – but it must at least be legislatively mandated. Quasi-judicial powers would be required for the institution to effectively carry its activities, set out in an 'indicative but not exhaustive' list of activities.

This includes the ability to:

Undertake investigations into any situation of violation of children's rights, on complaint – including by children- or on their own initiative, within the scope of their mandate.

Keep under review the adequacy and effectiveness of law and practice relating to the protection of children's rights;

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<sup>84</sup> This can be found at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2002.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2002.2.En?OpenDocument). Accessed on April 1, 2004.

<sup>85</sup> Principles relating to the status of national institutions for the promotion and protection of human rights (The "Paris Principles"), General Assembly resolution 48/134 of 20 December 1993. Adopted by the General Assembly in 1993 transmitted by the Commission on Human Rights in 1992.

Promote harmonization of national legislation, regulations and practices with the Convention on the Rights of the Child, its Optional Protocols and other international human rights instruments relevant to children's rights and promote their effective implementation, including through the provision of advice to public and private bodies in construing and applying the Convention.

Ensure that the "best interests of a child" are primary, and laws and policies on children are carefully considered from development to implementation and beyond;

In light of article 12, ensure that the views of children are expressed and heard on matters concerning their human rights and in defining issues relating to their rights;

Advocate for and facilitate meaningful participation by children's rights NGOs, including organizations comprised of children themselves, in the development of domestic legislation and international instruments on issues affecting children;

Take legal proceedings to vindicate children's rights in the State or provide legal assistance to children.

The Committee also addressed the issue of access to the institution by children, which many existing institutions in State Parties provide inadequately. The Institutions, it says, should be geographically and physically accessible to all children, in particular the most vulnerable and disadvantaged including children in care or detention and children with disability.

The Nordic model of the ombudsman influences most existing independent child rights institutions.<sup>86</sup> Over 40 State Parties have specialist 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, is a similar post with the name of 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. The courts usually play that role.

Costa Rica's Children's Ombudsman was established prior to its ratification of the Convention. The State Party has found the office to have a "significant effect" on child rights. The role of the Ombudsman is to "monitor and require observance of the law". The Ombudsman, however seems to have been most active in disseminating information about child rights and protecting children in the public education system. The issues dealt with most frequently have been "assaults by teachers on pupils; the refusal of information concerning progress with the handling of complaints lodged by pupils or their representatives; the problems raised by curricular reform and the failure to solve the problems of adolescents with disabilities who are completing their primary studies and are unable to enter pre-vocational or specialized education."<sup>87</sup>

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<sup>86</sup> DPP, UNICEF Notes on "Technical contribution to the expert consultation on the CRC implementation."

<sup>87</sup> CRC/C/65/Add.7, 1998

An interesting experiment has been that of Sri Lanka. The Child Protection Authority has been quite effective- its advantages are that it is a national, inter-departmental authority and hence has the authority to implement recommendations more directly. Its activities are the adoption of measures to prevent child abuse, to protect and rehabilitate child victims; create prevention awareness; recommend legal reform; monitor progress of investigations; maintain a database for planning child protection interventions. Its major gap has been, however, the weak participation of NGOs. This model has worked well in Singapore as well.

Andorra provides a recent example of an ombudsperson for human rights. The Andorran Parliament has created the post of *Raonador del Ciutada*, based on the Swedish and French ombudsmen. The *Raonador* is an extrajudicial guarantee, to ensure protection of rights- including children's rights- in the Andorran Constitution. He or she acts as a representative of the Counsel General. The *Raonador* can receive and investigate complaints on the working of public authorities, and can also act on his or her own initiative.

There are more than 23 ombudspersons for children in Europe. The European Network of Ombudspersons was formed in 1997 with 12 members.<sup>88</sup> Its aims are to “encourage the fullest possible implementation of the Convention on the Rights of the child, to support collective lobbying for children's rights, to share information, approaches and strategies, and to promote the development of effective independent offices for children.”<sup>89</sup> On the international level, ombudspersons from more than 30 states held the first international meeting of such institutions in 2002, at the United Nations General Assembly Special Session for Children. UNICEF has committed to help in promoting a global network.<sup>90</sup>

## 10 RECOMMENDATIONS FOR LEGISLATIVE REFORM AND BEST PRACTICES

- **International and regional agreements** to promote children's and women's rights should be ratified and implemented as complementary to the Convention, including the Optional Protocols to the Convention on the Rights of the Child . The **Concluding Observations** of the Committee on the Rights of the Child should be implemented and followed-up on, in particular those related to legislative reform. **Reservations** to international human rights treaties should be withdrawn, particularly those that are incompatible with the object and purpose of the treaty. Also, inconsistency of national laws with such treaties cannot allow State Parties to reserve the right not to perform treaty obligations.
- **Review of policy and legislation** to ensure compatibility with the Convention should be ongoing. Law and policy that don't directly target children, can have a significant, even disproportionate impact on them. All new legislation and amendments to existing legislation

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<sup>88</sup> See for more detail, Innocenti Research Centre, UNICEF, “Law Reform to implement the Convention on the Rights of the Child: Background Paper”, January 2004, p 38

<sup>89</sup> For more information see European network of Ombudspersons for Children website at [www.ombudnet.org](http://www.ombudnet.org).

<sup>90</sup> See for more detail, Innocenti Research Centre, UNICEF, “Law Reform to implement the Convention on the Rights of the Child: Background Paper”, January 2004, p 38

should be assessed for their impact on all those under 18, as well as specific groups of children. Also, new technology and changed context may require new legislation to maintain compatibility with the Convention. Laws and policy planning need to address discrimination against girls and women on the basis that the two are aspects of the same issue

- Systematic collection of disaggregated qualitative and quantitative **data** creates a better basis for law reform. It helps to evolve targeted laws and policies, to evaluate progress achieved and assess the impact of policies.
- **Consolidated Children's Codes** which reflect the principles and provisions of the Convention should be enacted to set common standards for all children within a State Party. A single Children's Code would remove difficulties of ascertaining the existence and content of various laws that concern children.<sup>91</sup> In the absence of a consolidated Code, all legislation concerning children should be placed in a single volume of national legislative enactments and disseminated together
- Efforts should be increased to ensure that the **core principles** of the Convention are implemented in laws, policies and programmes.

The principle of **non-discrimination**, particularly as it relates to the vulnerable group should be absorbed. All appropriate measures should be taken, including those of a legal nature, to ensure that all children are afforded equal and adequate access to health, education, social and legal services

All appropriate measures to ensure that the principle of the **best interests of the child** is appropriately integrated in all legal provisions and under customary law, as well as in judicial and administrative decisions and in projects, programmes and services which have an impact on children.

A systematic approach should be taken to increase awareness, including among traditional leaders, of the **participatory rights** of children according to their evolving capacities; and to further encourage respect for the views of the child in the family, communities, schools, and administrative and judicial systems. Children's parliaments have been one successful participation mechanism.

- The State Party should develop systematic and ongoing **training programmes** on human rights, including children's rights for State officials and parliamentarians. In addition to such training programmes, specific modules on child rights should be included in the curricula of professionals working with and for children, such as judges, lawyers, law enforcement personnel, teachers, school administrators and health personnel, including psychologists and social workers, as well as traditional community leaders and helpers.

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<sup>91</sup> Uniform application of law is a particular priority in jurisdictions with plural legal systems, where a plenitude of personal law provide different standards for children depending on which system they are governed by. This can be determined by the ethnic and/or religious identity of their parents.

- **Advocacy** of the Convention with **lawyers and judges** will help incorporate Convention rights into case law. Training on the Convention, national legislation and prior case law dealing with children's rights in the jurisdiction could be provided as continuing education for professionals
- The State Party should **disseminate information on the Convention** and its implementation among children and parents, civil society and all sectors and levels of government, including creative initiatives to reach vulnerable groups. Further, the State party should seek to ensure that the Convention is fully integrated into the curricula at all levels of the educational system. The State Party should also continue to promote the Convention through, inter alia, the use of local languages and traditional methods of communication.
- Independent children's rights **institutions** should be established. Where resources are limited human rights institutions with an institutionalised provision for a child rights section should be established. The institution should be at a constitutional level, or at the very least statutory, with a broad mandate and appropriate powers and resources all across the State party and at the national level.

The institution should be in accordance with the Paris Principles and the Second General Comment on the Committee on the Rights of the Child and able to monitor, protect and promote all the rights of the Convention for all children.

Such institutions should have links with the judicial system, be empowered to hold independent enquiries, and have the ability to initiate proceedings against public authorities. The institution should be easily accessible to children, able to determine its own agenda, empowered to investigate violations of children's rights in a child-sensitive manner and ensure that children have an effective remedy for violations of their rights;

(b) Ensure that all the human rights institutions have formal advisory functions with the respective legislative bodies and that they establish formal links, including of cooperation, with each other;

(c) Provide national human rights institutions with adequate resources and appropriate staff;

(d) Ensure that children and children's organizations are effectively involved in their establishment and activities.