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Constitutional Reforms in Favor of Children

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CONSTITUTIONAL REFORMS IN FAVOUR OF CHILDREN

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

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

the handbook by supporting the view that legal reforms, of which constitutional reforms form an essential part, must be geared towards the fulfilment of the rights of the child.

Part 1 CONSTITUTIONS AS TOOLS OF LEGISLATIVE AND POLICY REFORMS

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

1.1 The Role of Constitutions in State Affairs

In the broadest sense, a constitution refers to a country's supreme law, which contains the guiding principles according to which that country is governed. More specifically, it is a text which outlines the powers of parliament, the executive, judiciary and other national institutions. It is characteristic of written constitutions, especially those guaranteeing fundamental rights, that they also impose constraints on the powers of the legislature and the government (Barendt, 1998).¹

A useful example of how a constitution can be defined comes from the case of Botswana. In the case of *Unity Dow vs. the Court of Appeal*² (1991), the Court of Appeal (the highest court in that country), defined a written constitution in the following way:

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

¹ Barendt, E, *An Introduction to Constitutional Law*, Oxford University Press (1998).

² Appeals Court, 1994 (6) BCLR 1.

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

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

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

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

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

further serve as opportunities for defining the relationship between the domestic law of a State and its treaty obligations.³

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

Box 15: Supremacy clauses:

Examples from Iraq, Nigeria, East Timor and Ukraine

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

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

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

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

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

³ See sub-section below on the interface between international law and constitutional reforms for more details.

“A person who alleges that-

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

1.2 Constitutions as Frameworks for Legislative Reform

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

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

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

Box 16: Constitutional mandates for legislative reform:

Case studies from South Africa, Ethiopia⁴ and Ghana

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

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

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

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

1.3 Constitutions as Frameworks for Policy Reform

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

Box 17: Principles of State Policy:

Case Examples from the Republic of Ireland, India, Pakistan, The Gambia, Ghana, Nigeria and Uganda

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

⁴ All provisions have been summarised.

more or less bind together and elaborate segments of the International Bill of Rights for purposes of social cohesion, resource allocation and development. These principles have the potential to serve as broad frameworks for implementation of the Millennium Development Goals.

Under the Social Objectives of its Directive Principles of State Policy, The Gambia has made a constitutional commitment to pursue policies to protect the rights of *children* and other vulnerable groups and in doing so, is to be guided by “international human rights instruments..., which recognize and apply particular categories of basic human rights to development processes. Under the same section, the State is to work towards the provision of clean and safe water, adequate health, shelter and sufficient food and security to all persons” (Article 216).

The Principles in practice: A case study from Ghana

Directive Principles of State Policy of 1992 guided the Multisectoral Child Law Reform Committee in the formulation of the first Children’s Act of 1998 (Act 560). This ensured the inclusion of civil and political rights in addition to economic, social and cultural rights in the text of the instrument. In the area of social policy they have also served as a framework for the design and implementation of national policy instruments, notably, all post-1992 Poverty Reduction Strategies and the draft National Social Protection Strategy currently undergoing finalisation by the Ministry of Manpower, Youth and Employment. Significantly, article 34(2) of the Constitution requires of the President to *report to Parliament at least once a year*, all steps taken to ensure the realisation of the policy objectives contained under the Directive Principles of State Policy; in particular, the realisation of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education. The Presidential presentation is open to all sectors of the public including civil society, children and the UN.

1.4 Constitutions Should Reinforce the Status of Children as Subjects of Human Rights

The status of constitutions as frameworks for legitimising laws and policies in favour of children, presents them with the opportunity to reinforce the status of children as *subjects of rights* as opposed to being *objects of charity*. By incorporating general provisions (for example, the International Bill of Rights) and specific provisions (with respect to the CRC and CEDAW), States are thereby admitting that the citizenry (including children) are rights holders with the capacity to make claims against duty bearers.

This is an essential component of the rights-based approach and falls in line with State obligations under international human rights law. The Constitution of Venezuela provides deep insight into how

countries can craft provisions that reinforce children as subjects of rights.

“Children are *full subjects of rights* and shall be protected by the law and by specialised organs and courts, which shall respect, guarantee and develop the provisions of this Constitution, the Convention on the Rights of the Child and other international treaties on this subject, signed and ratified by the Republic. The State, families and society shall give absolute priority to ensuring holistic protection and in so doing, shall take the best interests of the child into account in all decisions and actions that concern them. The State shall promote their progressive assumption of an active role in society and a national orientation system shall direct policies for the holistic protection of children. The Convention on the Rights of the Child is thus incorporated into the national law at the highest level, as part of the Constitution” (article 78).

In an article on the rights of the child in relation to the final Constitution of South Africa, Mosikatsana (1998) draws out how Constitutions influence holistic implementation of the CRC, using the lens of a rights-based approach.

Box 18: How Constitutions can positively influence CRC implementation:

1. Constitutional provisions specific to children provide a trigger and springboard for legislative reform.
2. As a minimum, constitutionalization legitimises political discourse on children’s rights and provides political justification for *government expenditure* on social programmes for children.
3. With the location of the rights of the child in the supreme law of the land, children can be legally and properly viewed as *subjects* of rights.
4. It enables the rights claimants, who are children, to make substantial claims against the State, using the law as a *sword*.
5. It enables children to use the law as a *shield* to protect themselves from erosion of social benefits by the State.
6. It can create *justiciable rights* that children may enforce against the State.
7. It offers the government political justification for providing social welfare benefits to children as they compete for *scarce resources*.
8. It provides government with useful moral and legal justifications for its social welfare expenditures when conservative and liberals demand *fiscal restraint* through reduced expenditures on social programmes.

Source: Mosikatsana T.L (1998); Children’s Rights and Family Autonomy in the South African

1.5 Key Considerations in the Formulation of the Substance and Process of Constitutions in Favour of Children

When considering the formulation of a new constitution or the review of an existing one, States are generally influenced by their specific political, economic, social and cultural circumstances. Historically, political perspectives have, however, far outweighed other considerations in the development of constitutional law. Emancipation from colonial rule in countries such as India (1950), Ghana (1957) and Nigeria (1963) provides such examples. The establishment of principles of a new system of government subsequent to a revolution, as in the case of the French constitution of 1791, provides another political basis. From a rights-based perspective however, issues of substance and process may also be considered and integrated into constitutional law formulation and reviews.

1.5.1 *The Substance*

Box 19: Three H's to Consider in the Formulation of the Substance of Constitutions

Historical circumstances should provide moral justification for an improvement in the status and conditions of children. History will aid a State in ascertaining which groups have been traditionally excluded from participation and access to social services. Historically excluded groups such as women, children, the disabled and minorities should be protected under the umbrella of constitutional law.

Human Rights treaty obligations should be addressed by express constitutional provisions. Article 31 of the Constitution of Cambodia, for example, states that "the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the UN Charter, the Universal Declaration of Human Rights, the Covenants and Conventions related to human rights, women's and children's rights."

Human Development priorities, as set out by global standards, espouse a broad array of development concerns. Examples include the Millennium Development Goals and the Declaration on the Right to Development.⁵

⁵ The emphasis here should be on the general content of these global standards and not on their time-bound specific provisions.

1.5.2 *The Process*

Legal reform within the context of constitutional law could be initiated through two broad processes: (a) the formulation of the very first constitution of a State and/or (b) the revision or amendment of an existing constitution. The binding and universal character of constitutions calls for broad-based participation of all sectors of the State: Political (including traditional authorities), economic (such as Trade Unions), religious (especially faith-based organizations) and the social services sub-sectors (which often intersect with children's interests) and civil society. Such a cross-sectoral approach would ensure inclusion of ethnic and geographic sub-groups, constitutional sustainability and stability across time. While specific interest groups such as faith-based organizations and trade unions have traditionally been visible during such processes, some groups, such as child-related institutions, children and young people, have had less of a role. Their visibility throughout the process is a means of ensuring that their concerns receive due attention.

Procedures for constitutional reviews will differ, based upon the political system in question. In general, they involve more complex procedures and consultations as compared to legislative reviews.⁶ A recent example of a constitutional review initiative is found in Kenya, where The Constitution of Kenya Review Commission spearheaded a nationwide consultative process for obtaining constitutional proposals on a wide range of human rights and policy issues.

The Kenyan reform began with the struggle to change the political system from one party to a multi-party democracy. This movement gathered great momentum in the 1990s, bringing together individuals and organizations from many sectors of society and many parts of the country. At the forefront of the movement were religious, gender and human rights organizations, and the Constitutional Commission charged with spearheading the process facilitated a broad participatory process. It encouraged numerous civil society organizations to provide civic education and entered into formal

⁶ The United Kingdom presents an exception to this general observation. There is no difference between the review of the Constitution and an ordinary piece of legislation as both can be carried out with the same level of flexibility. See Barendt (1998).

arrangements with other groups to assist in providing civic education by providing financial and other resources. The Commission prepared a national curriculum and teaching materials for civic education, including *Reviewing the Constitution*, all of which were widely distributed. It also distributed a booklet, entitled *The Constitutional Review Process in Kenya: Issues and Questions for Public Hearing*, to stimulate reflections on reform and to elicit recommendations. The process made it possible for the Commission to gather information for crafting specific provisions on the rights of children.⁷

Broadly speaking, two types of constitutional reviews may be envisaged: a) a holistic review, involving the constitution in its entirety or b) a review of specific provisions. The Kenyan example cited above fits into the former category, whereas India and the United States may be cited as examples of the latter. Some constitutions set out the circumstances and legal procedures to be followed in any given constitutional review and have even defined some areas as “entrenched,” requiring a national referendum to approve valid amendments. In all cases, however, the Legislature plays a key role in the constitutional reform process.

Box 20: Amendments to entrenched provisions:

Case studies from the United States, Canada and Ghana

United States: Article V of the Constitution of the United States sets out a complex procedure for amendments to take effect. It spells out two broad methods: The first is for a Bill to pass both houses of the legislature by a two-thirds majority in each. Once the Bill has passed both houses it is then referred to the states. The second method is for a constitutional convention to be called by two-thirds of the legislatures of the states and for that convention to propose one or more amendments. These amendments are then sent to the states to be approved by three-fourths of the legislatures. This route has never been taken and there have been discussions in political science circles about how such a convention would be convened and what kind of changes it would bring about. Regardless of which of the two methods are chosen the amendment as passed must be approved by three-fourths of states. The amendment as passed may specify whether the Bill must be passed by the state legislature or by a state convention.⁸

⁷ Summarized from *The People's Choice. The Report of the Constitution of Kenya Review Commission. Short Version* (2002).

⁸ See <http://www.uscontitution.net/constam.html> for more details.

Canada: Sections 38-49 of the Constitution Act of 1982 outline procedures for amending the Constitution. Amendments can only be passed by the Canadian House of Commons the Senate and a two-thirds majority of the provincial legislatures

representing at least 50 per cent of the national population. Though not constitutionally mandated a popular referendum in every province is also considered to be necessary by many especially following the precedent established by the Charlottetown Accord.⁹ If a constitutional amendment affects only one province, however, only the assent of the legislature of that province is required. Nonetheless, there are some parts of the Constitution that can only be modified by a unanimous vote of all the provinces. This may include changes to the composition of the Supreme Court changes to the process for amending the Constitution itself or abolition of the Monarchy in Canada.

Ghana: The general responsibility for initiating constitutional reform lies with Parliament. By article 289 Parliament is mandated to amend any provision of the Constitution provided it receives approval of two thirds of all members at the second and third readings. However specific clauses in the Constitution (for example those pertaining to fundamental human rights including article 28 in relation to children's rights) cannot be amended by a mere Act of Parliament. Article 290 (4) requires such proposals be submitted to a referendum at which there is at least a 40 per cent turnout of those entitled to vote and at least 75 per cent of those voting cast their votes in favour of passage of the Bill.

1.6 The Relationship between Constitutions, Customary Law and Islamic Law

In the design of constitutions, countries are to take into account the values of their respective societies in determining potential factors that are likely to influence the direction of constitutional debates and the substance of provisions. While there are many factors that have the potential to affect constitutional reforms, this section is limited to customary law and Islamic law as important keys to the determination of constitutional rights in many countries. In this regard it is critical to start from the understanding that both customary law and Islamic Law offer potential opportunities in favour of children and that stakeholders should therefore explore the positive potential of each. On the other hand, where certain aspects of culture and religion are likely to negate the principles of human rights law and even the constitution itself, the latter should provide guidance on how to

⁹ The Charlottetown Accord was a package of constitutional amendments proposed by the Canadian Federal and Provincial government in 1992. It was submitted to a public referendum on October 26 of that year and was defeated.

handle conflicts which, in all cases, should be resolved in favour of children.

1.6.1 Country Case studies on Constitutions and Customary Law

It is to be noted that, due to historical, political and cultural differences, the treatment of customary law in relation to country constitutions will vary. The importance of customary law within a constitution would depend upon whether it has matured to the level of *law*. As noted above, the integration of customary law within the legal definition of “law,” is unique to common law countries. What is needed, in the process of integrating such provisions, is the inclusion of specific clauses to resolve possible conflicts between modern law (including the constitution) and customary law.

The constitutions of Ghana, Iraq, Nigeria, South Africa, Timor-Leste and Uganda provide for the right of the individual to enjoy, practice and profess any culture of his or her choice, provided this does not conflict with the provisions of the constitution, particularly those which pertain to Fundamental Human Rights and Freedoms.

Box 21: The supremacy of the constitution over custom:

Case studies from Ghana, Timor-Leste and Uganda

Ghana: “Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution. All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited” (Article 26).

Timor-Leste: “The State shall recognize customary laws of East Timor, subject to the Constitution and at any legislation dealing with specifically with customary law” (Section 2 (4)).

Uganda: “If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall to the extent of the inconsistency be void” (Article (2) (2)).

The approach taken by these countries strengthens the fundamental position of the constitution as supreme to all law, including customary law. Indeed, the ratification of international instruments provides further basis for a State to situate local customs and traditions within the authoritative framework of the constitution.

Article 5 (a) of CEDAW specifically mentions that “States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for and men and women.”

Many customs and traditions are based on patriarchal principles, placing males in a superior position to females. In Botswana, for instance, customary law treats women as minors subject to the guardianship of the male head of family. In Ghana, patrilineal principles of succession in selected parts of the country (for example in Ewe communities) subjugate the inheritance rights of females to that of males even where the latter are younger than the former.

Box 22: How judges have treated conflicts between customary law and the constitution: From the Botswana case of *Unity Dow vs. Attorney General*¹⁰

“A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is custom not the Constitution which must go.

-extracted from the decision of Justice Amisshah, the presiding judge.

“Customs, traditions and culture of a society must be borne in mind and afforded due respect, but they cannot prevail when they conflict with the express provisions of the Constitution. In relation to the protection of personal and political rights the primary instrument to determine the heartbeat of Botswana is its Constitution.”

-extracted from the concurring decision of Judge Bizos.

Systems which fail to provide equal opportunities for men and women are discriminatory in content, purpose and effect, and must be eliminated. The following provisions from CEDAW provide ample legal justification for incorporating provisions against discrimination occasioned by custom.

Box 23: Definition of discrimination by CEDAW

“For purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (Article 1).

¹⁰ Cited in Court Documents, Judgements Cases and Materials, edited by Unity Dow (1995), p20.

Express prohibition of discrimination through constitutional reform by CEDAW

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) to embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle” (Article 2 (a)).

The Constitution of The Gambia makes express provisions for equality before the law and non-discrimination. However, the Constitution appears to give with one hand and take with the other: In one section provisions are made to proscribe discrimination and at the same time exceptions are created in relation to personal law which negate the essence of the same section.

Box 24: The effect of ambiguities in constitutional provisions:

The case of The Gambia

Article 33 (2) and (3) of the 1997 Constitution states as follows:

“Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect.”

“Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.”

Subsection 5 states as follows:

“Subsection (2) shall not apply to any law in so far as that law makes provision- (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.”

These provisions clearly suggest that customary law and religion (as the case may be) will trump the Constitution when they are in conflict. This is bound to have a negative impact on women and girls, whose lives are often compromised by matters of adoption, marriage, divorce, burial and devolution of property, due to the inherent tendency on the part of customary law to discriminate against them.¹¹ Hawa Sisay-Sabally notes in connection with article 33 of the Constitution of The Gambia that “this constitutional provision, which is contained in the entrenched fundamental human rights chapter, implies that a person’s

¹¹ The UN system and counterparts operating in the country arrived at a general consensus to reform this aspect of the Constitution at a workshop on mainstreaming gender into the CCA in October 2005.

personal or customary law may discriminate against him or her and such person shall have no recourse under the Constitution or any other law.”¹²

For the purposes of implementation of customary law, the Constitution of Nigeria makes provision for Customary Courts of Appeal of a State with appellate and supervisory jurisdiction in civil proceedings involving questions of customary law. A judge of such a court is required to possess considerable knowledge of, and experience in, the practice of customary law (articles 265-269). State Councils of Chiefs are also provided for under the third schedule of the Constitution to advise the Governor on matters relating to customary law, cultural affairs and other related matters. Similar provision has been made under article 272 of the Constitution of Ghana, which provides for the continued existence of the National House of Chiefs with the mandate to *inter alia* undertake the “progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law and an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful.” Although these provisions call for representation of female traditional rulers in the National House of Chiefs for effective review of customary law, female participation has remained an illusion.

The existence of such institutions, however, calls for effective training of personnel and panel members in matters of human rights and constitutional law to ensure that activities and decisions result in improvements in both the status of women and children, given the fact that these two groups are the hardest hit by harmful traditional practices.

1.6.2 Country Case Studies on Constitutions and Islam

A distinction is to be made between States that profess Islam as a State religion and those that provide for the practice of other religions but make special provisions for Islam on account of its dominance among

¹² Sisay-Sabally, Hawa, *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women*, ed. Akua Kuenyehia (1998), P. 123 at p. 128.

the general populace. Iraq represents an example of an Islamic State, with specific constitutional provisions on Islam. By article 2 of the Constitution of Iraq, "Islam is the official religion of the State and is a basic source of legislation." By virtue of 2 (a) and 2 (c), no law can be passed "that contradicts the undisputed rules of Islam and the rights and basic freedoms outlined in the Constitution."

In The Gambia, *Shari'a* forms part of the main body of law in "matters of marriage, divorce and inheritance among members of the Communities to which it applies" (article 7 (f)). To facilitate the implementation of Islamic principles, Islamic States, in addition to those that recognise the practice of Islam, have made provision for Islamic Courts with the mandate to apply Islamic law in all matters brought before them. In The Gambia and Nigeria, justice administration includes Islamic or *Cadi* Courts. In the specific case of The Gambia, the independence of all courts is guaranteed and, in the exercise of their functions, they are subject to the Constitution, which includes article 33 (5) cited above. Specifically, a *Cadi* Court has jurisdiction to apply the *Shari'a* "in matters of marriage, divorce and inheritance where the parties or other persons interested are Muslims." It also has the power to review its own decisions where an application is made by a grieving party (article 137 (4) and (5)).

"Another set back is that Section 6 of Cap 6:04 (Mohammedan Recognition Act) permits a *Cadi* to sit alone to preside over issues of marriage, divorce and inheritance. It is therefore possible for his decision to be subjective. The Constitution of the second Republic, which is now in force, requires a *Cadi* to sit with two scholars of the *Shari'a* or *Ulamas* for hearing at first instance. In order for section 137 to effectively amend or repeal section 6 of the Mohammedan Law Recognition Act, the Constitution requires that the President may by Order published in the Gazette and made with the approval of the National Assembly, at any time within twelve months of the coming into force of this Constitution make such provision as may appear necessary for repealing, modifying, adding to or adapting any existing law for purposes of bringing it in accord with the provisions of this Constitution. Since this action has not yet been taken, the *Cadi* continues to sit alone though the panel came into existence on 4th November 1997.

In the case of *Harding v Harding*, in which one Mohammed H. Harding (deceased), a Muslim and citizen of The Gambia died intestate, leaving two sets of issues from his widow and former wife. A *Cadi* Court sitting alone at the Kanifing Muslim Court, administered the deceased intestate estate. Although all sets of children were catered for, the former wife, believing that her children were short changed applied for an order of certiorari. She wanted the proceedings to be transferred to the High Court so that they might there be quashed. The judge ruled that there was no error of law on the face of the record to suggest that the *Cadi* sitting alone exceeded or lacked jurisdiction for which certiorari can be applied.”¹³

Islamic law is subject to varied interpretations. Inasmuch as it has been recognised under constitutions of States which profess Islam, an opportunity exists for ensuring consistency of interpretation with the constitution in its general form rather than the treatment of Islamic law as a separate text.

1.7 The Interface between International Law and Constitutional Reforms

As stated in the introduction, the ultimate goal of a constitution should be the fulfilment of human rights. For this to occur, constitutions must find ethical and substantive expression in the principles and provisions of international human rights law. While constitutions are political documents, the fact that they possess a legal character also provides considerable opportunity for the incorporation of child rights considerations. In other words, it is possible for constitutions to be pro-children by reflecting the principles of the CRC and CEDAW. In the design of constitutions, States should observe that children are subjects of both general international law and of specific treaties affecting them.

¹³ Gaye et al. *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women*, ed. Akua Kuenyehia. P. 2 at p.7-8.

A rights-based approach to constitutional formulation takes into account both general and specific international norms in favour of children, as children are subjects of both sets of standards. Because it would not be possible to adopt a wholesale incorporation of international human rights law, States should be guided more by the general and specific principles associated with these standards.

The following provides an overview of the general and specific human rights treaties affecting children and the principles that guide them. Countries are to note that the list is not exhaustive and that many other guidelines, declarations and conventions may be used as tools during constitutional review processes.

Box 25(a): General treaty obligations affecting children

- The International Bill of Rights (encompassing the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights)
- The Convention on the Elimination of all Forms of Racial Discrimination
- The Convention on the Elimination of All forms of Discrimination Against Women
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Box 25(b): Specific treaty obligations affecting children

- The Convention on the Rights of the Child
- The Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography
- The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- ILO Convention on Minimum Age (no. 138)
- ILO Convention on the Worst Forms of Child Labour (no. 182)
- The Hague Convention on the Protection of Children and Cooperation in respect of inter-country adoption
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The following principles apply to the overall body of general and human rights law:

- Universality
- Indivisibility
- Accountability
- Participation

Whereas the following principles apply in specific relation to child-specific treaty standards:

- Non-discrimination
- The Right to life, survival and development
- The best interests of the child
- Respect for the views of the child.

In keeping with the underlying fact that children's rights are human rights, States are enabled by these broad principles to design two broad sets of constitutional provisions: One derived from the principles of general human rights law and the other from the principles of specific human rights law affecting children. This approach will ultimately result in the formulation of constitutions that reflect the general corpus of human rights treaties in favour of children. The aforementioned general and specific principles will therefore constitute the foundation for the consideration of proposals under Parts II and III.

Part 2 GENERAL CONSTITUTIONAL PROVISIONS IN FAVOUR OF CHILDREN

2.1 Principle 1: Universality

Provisions that capture the principle of universality of rights should be aimed at ensuring inclusiveness, especially in favour of traditionally excluded groups. In keeping with human rights instruments such as the UDHR, the Convention on the Elimination of all Forms of Racial Discrimination and CEDAW, provisions could be created to capture non-discrimination (including the meaning of discrimination), affirmative action (for purposes of creating a level playing field for the excluded) and equal protection (to reinforce equality before the law and equal opportunities for all). In addition to provisions on discrimination with respect to CEDAW already discussed above, States are also to take account of those contained in the Convention on the Elimination of All Forms of Racial Discrimination. Below is the full text of the definition contained in the latter.

“The term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (Article 1).

A definition of discrimination leads the way towards identifying specific grounds or basis for discrimination to prevent the denial of rights of any group. Examples of grounds for discrimination are expressed in the definition of racial discrimination cited above. However, in declaring that “everyone is entitled to all the rights and freedoms set forth in this declaration” the UDHR sets more grounds for discrimination by citing the following categories under article 2:

- Race
- Sex
- Language
- Religion
- Political or other opinion
- National or social origin
- Birth
- Or other status

By providing for *or other status*, the declaration makes it possible for States to derive additional categories or classifications based on local circumstances. These provisions have indeed made it possible for states to craft comprehensive provisions on non-discrimination based on their specific needs and priorities. Below are case examples from Ghana, followed by South Africa:

“For purposes of this article, ‘discriminate’ means give different treatment to different persons attributable only mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not

made subject or are granted privileges or advantages which are not granted to persons of another description” (article 17 (3)).

South Africa has model provisions which take holistic advantage of the *or other status* clause of the UDHR. Article 9 (3) on non-discrimination takes critical account of children, women and other potentially excluded groups:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

The inclusion of both sex and gender within the South African Constitution connotes the desire of the State to eliminate discrimination against women and girls on the basis of both their biological and perceived status within society. This means that the existence of pervasive forms of gender stereotyping and traditional roles for the sexes cannot be an excuse for depriving women and girls of equal protection before the law. Additionally, the inclusion of pregnancy, age and birth as grounds for non-discrimination further reflects an attempt on the part of the State to ensure respect for the reproductive status of women and girls, whereas those on age and birth seek to protect all categories of children and youth.

In line with the need to support traditionally excluded groups, constitutions could also have express clauses that permit positive discrimination or affirmative action under special circumstances. In India, for example, the State is constitutionally empowered to make special provisions for women and children and for the advancement of any socially and educationally disadvantaged classes of citizens or for the Scheduled Castes and Tribes¹⁴ within its non-discrimination clause.¹⁵ In Ghana, a similar clause is being used as the constitutional justification for the attainment of gender parity in education. The government is enabled by article 17 (4) “to implement policies and

¹⁴ Similar provisions are contained in article 22 (4) of the Constitution of Pakistan.

¹⁵ Part III, article 15 (3) and 10 (4).

programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society.”

Equal Protection clauses lend complementary support to provisions on non-discrimination. Equal protection can cover equal access to social services and equal opportunities for participation. Some states also express this in relation to the law. The provisions of the Constitution of Iraq state, for instance, that “Iraqis are equal before the law without discrimination because of sex, ethnicity, nationality, origin, colour, religion, sect, belief, opinion or social or economic status.”¹⁶

2.2 Principle 2: Inalienability, Indivisibility and Interdependency

The principles of inalienability, indivisibility and interdependency afford States the opportunity to create a “basket of rights” that incorporates those enshrined in human rights conventions, declarations and commitments. This basket should include the broad range of civil and political rights, and economic, social and cultural rights afforded by these treaties and required for the proper and harmonious development of the individual. As such these rights immensely impact the rights of the child. This is manifest in the following two ways:

1. *As a collective*, human rights treaties while unique in their purpose and direction, are also interrelated to and interdependent on each other. For example, the CRC and CEDAW are separate instruments, but are nonetheless linked by virtue of the impact they both have on specific groups, such as the girl child, pregnant women and nursing mothers. For purposes of this handbook, the process of using the broad spectrum of human rights instruments for the formulation of constitutional provisions may be referred to as the *inter-convention approach*.
2. *As separate instruments in themselves*, the provisions contained within them are also deeply connected to each other, to the extent that recognising and fulfilling one and neglecting

¹⁶ Article 14.

another would result in a distortion of implementation of that particular treaty. For instance, denying the child the right to birth registration as contained in article 7 of the CRC could affect the child's right to education as set out under articles 28 and 29. For purposes of this handbook, the process of using the broad spectrum of provisions within a particular human rights instrument for the formulation of constitutional provisions may be referred to as the *intra-convention approach*.

The combined effect of both approaches would result in the identification of the following four key areas around which constitutional provisions may be formulated:¹⁷

- Civil and political rights
- Economic, Social and Cultural Rights
- The Rights of Women
- The Rights of Children

The ensuing will focus on the first three, as “children’s rights” are covered separately under part 3 of this chapter.

2.2.1 Civil and Political Rights

The Covenant on Civil and Political Rights makes provision for the right to life, protection from torture or from cruel, inhuman or degrading treatment or punishment, protection from slavery and the slave trade, protection of personal liberty, the right to fair trial, respect for human dignity, and respect for general fundamental freedoms (freedoms of speech, thought, conscience, belief, assembly, association, information and movement). The Covenant allows for derogation of rights during periods of public emergency, but only under very restricted circumstances (see article 4). It also makes special reference to children in specific situations. For example, under article 6 (5), the death penalty cannot be imposed on children and pregnant women and under article 10(2)(b), “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” All these provisions are critical for ensuring the well-being of children and

¹⁷ These thematic areas have been chosen to meet the desired objectives of this Handbook. However, countries should expand or reduce based on local circumstances.

should therefore be incorporated into country constitutions to the greatest extent possible.

- Ireland, on the right to life: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right” (Article 40 (3) (iii)).
- Sweden, on the death penalty: “There shall be no capital punishment” (Article 4).
- South Africa, on the right to human dignity: “Everyone has the right to bodily and psychological integrity, which includes (a) the right to make decisions concerning reproduction” (Article 12 (2) (a)).
- Pakistan, on the abolition of slavery: “Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into Pakistan in any form” (Article 11 (1)).
- Ghana, on the protection of juveniles: “A juvenile offender who is kept in lawful custody or detention, shall be kept separately from an adult offender” (Article 15 (4)).

In some cases, children have to be protected from the civil and political activities of adults. The decision of the court in the Nigerian case of *Cherananci v Cherananci* presented below suggests that children can be protected from engagement in political activity where it is established that they will be vulnerable to abuse.

Box 26: A Nigerian judicial case study on the interface between constitutional derogation and child-related legislation

In the Nigerian case of *Cherananci v Cherananci*, [1960], NRNLR 24, Dahiru Cherananci had been prosecuted for inciting a child to participate in politics contrary to the provisions of the Northern Region, Children and Young Persons Law, 1958 (Part VIII), which prohibited children aged 15 and below from participating in political activity. The accused applied to the High Court Northern Region, by way of motion to have the provisions in question declared void, on grounds of being in derogation of the freedoms of expression, peaceful assembly, association and conscience guaranteed by the Constitution.

The Court held that a restriction upon a fundamental human right must, before it may be considered justifiable, (a) be necessary in the interest of public defense, public order, etc. and (b) must not be excessive or out of proportion to the object which it sought to achieve. It held this law to have passed the test. If juveniles are

allowed to take part in politics, their receptive and uncritical minds make them easy victims of thoughtless or unscrupulous people who wish to take advantage of their youth in order to indoctrinate them with a particular ideology before they are old enough to form their own opinions on the matter. Juveniles may be attracted to ideas that are presented in an interesting form; They have neither the experience nor the standards of comparison to enable them to fully discriminate. Their enthusiasms are easily aroused and their natural high spirits lead them to thoughtless excesses.

1. The Right to Identity

The right to identity through birth registration and citizenship is an important component of civil and political rights and very pertinent to children because it ensures access to basic social services and minimises social exclusion.

Birth Registration

Box 27:

Article 24 of the Covenant on Civil and Political Rights notes that:

“(1) Every child shall have, without any distinction as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State; (2) Every child shall be registered immediately after birth and shall have a name; (3) Every child has the right to acquire a nationality.”

Article 7 of the CRC states that:

“[T]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.”

Constitutional provisions on birth registration would positively impact a State’s provision of registration services by compelling relevant agencies to accelerate attainment of universal registration. General constitutional provisions with respect to discrimination as already discussed, would facilitate the review of legislation with clauses which discriminate against women and girls in the registration process. Brazil and Uganda are among very few countries with constitutional provisions on birth registration. Each of them places an obligation on the State to fulfill this right and in the case of Brazil, to provide this free of charge where necessary. The Constitution of Uganda states that “[t]he State shall register every birth, marriage and death occurring in Uganda” (Article 18). Similarly, the Constitution of Brazil contains the

following provision: “The State provides free birth registration to those who are acknowledged to be poor” (Section LXXVI).

Citizenship

Based on global experience, the following section presents the possible ways by which citizenship or nationality may be acquired:

Citizenship by birth: Children born within or outside the country may become a citizen where either parents or grandparents *is* or *was* a citizen.¹⁸

Citizenship by registration: The Registration of different categories of persons as citizens: (i) a married partner of a citizen may register as a citizen upon fulfillment of specific legal requirements, (ii) persons born within the State, neither of whose parents or grandparents is a citizen and (iii) a migrant, who has spent a specified number of years within the State.

Presumption of citizenship: A child found within the jurisdiction of unknown parentage can be presumed to be a citizen.

Citizenship by adoption: A child,¹⁹ neither of whose parents is a citizen of the State, but is adopted by a citizen of the State can, by virtue of that adoption, become a citizen.

Citizenship by naturalization: A non-citizen may apply to be a citizen through naturalization upon meeting specific requirements (for example, residence over a period of time and good behaviour).

Foreigners and stateless persons: Foreigners and stateless persons who are in the country on legal grounds can enjoy the same rights and freedoms and also bear the same duties as citizens.

The presumption of citizenship is a unique child protection provision, which serves to support children affected by conflicts. States are,

¹⁸ In Brazil, citizenship by birth to foreign parents is also possible, provided they are not in the service of their country of origin.

¹⁹ Limited to children below 16 years of age in the case of Ghana (article 6 (4)) and below 18 years of age in Uganda (article 11 (2)).

however, encouraged to integrate the full range of options provided to minimise opportunities for exclusion of marginalized children. The Botswana case of Unity Dow vs. Attorney General, already cited, demonstrates the reality pertaining in some countries, of overlooking constitutional provisions in the formulation of legislation on citizenship. It presents a classic test case on the interface between constitutions, gender, children's rights and citizenship legislation.

Box 28: In this case, Unity Dow challenged the Citizenship (Amendment) Act of 1984 which provided among other things that:²⁰

"4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth:

a. his father was a citizen of Botswana; or

b. in the case of a person born out of wedlock, his mother was a citizen of Botswana

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

a) his father was a citizen of Botswana;

b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

5. (1) A person born outside Botswana shall be a citizen of Botswana by descent, if at the time of his birth;

his father was a citizen of Botswana

in the case of a person born outside wedlock, this mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement."

Among other things, Unity Dow questioned the constitutionality of the above provisions by advancing the following arguments, among others:

- That section 4 (1) of the Citizenship Act precluded her from passing citizenship to her two children on grounds of sex.
- That she was prejudiced by the discriminatory effect of the law given that her children were aliens though born in her native country (Botswana) and thus enjoyed limited rights and legal protections.
- The discriminatory effect of Sections 4 and 5 is in conflict with Section 3 (a) of the Constitution of the Republic of Botswana.
- Section 13 of the Citizenship Act only makes special provision for application for naturalization by a woman married to Botswana citizen men and no such special provision exists for foreign husbands of Botswana citizen women.
- That she was desirous of being afforded the same protection of law as a male Botswana citizen and in this regard, desirous that her children be accorded Botswana citizenship and that her spouse be in a position to

²⁰ Summarised from *Unity Dow v. Attorney General of the Republic of Botswana*; found in *Court Documents, Judgements Cases and Materials*, edited by Unity Dow (1995).

make application for Botswana citizenship, should he so wish as provided for under Section 13 of the Citizenship Act.

- Furthermore Sections 4 and 5 [and 13] relegated her, by reason of being female to the status of a child or an idiot and that the cited sections are in contradiction of section 7 of the Constitution of the Republic of Botswana insofar as they subject her to degrading treatment.”

By referring to both local statutes and international treaties (for example, CEDAW, the CRC, the UNDHR and the African Charter on Human and Peoples Rights), both the High Court and Court of Appeal (the highest court) found among other things that the Act discriminated against women and therefore was inconsistent with the Constitution.

2.2.2 Economic, Social and Cultural Rights

Closely linked to civil and political rights are economic, social and cultural rights, which are critical for the survival and development of the child. The Covenant on Economic, Social and Cultural Rights provides general guidance to States on material issues to consider in the formulation of provisions on economic, social and cultural rights.

Box 29: Critical areas of concern expressed in the CESCR include:

- Protection and assistance to the family as the basic unit of society and responsibility for the care and education of the child (Article 10 (1)).
- Social protection measures for mothers during, before and after pregnancy (Article 10 (2)).
- Protection of children and young persons from economic and social exploitation (Article 10 (3)).
- Provision of social protection in the areas of adequate standard of living (including food, housing and clothing) (Article 11(1)), the right to the highest attainable standard of physical and mental health (Article 12), and the right to education (Article 13).

Brazil’s constitutional provisions on economic, social and cultural rights have been formulated within the context of social protection. Within the public sector, social protection is a policy framework that fosters support for vulnerable and excluded groups such as ethnic minorities, the disabled and rural communities. This ensures inclusion, and makes exclusion of special groups of children a constitutional violation, thereby strengthening the principle of universality and non-discrimination. Social protection is increasingly becoming the most

effective way of protecting vulnerable groups from shocks and risks (for example, illness and natural disasters).

Brazil serves as an example of a country with an elaborate social protection programme founded on the Constitution. From its chapter on Social Rights (chapter II), “education, health, work, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth by this Constitution.” Some of the social protection clauses include maternity and paternity leave, free assistance for children and dependants from birth to six years of age, day care centres and pre-school facilities, prohibition of night, dangerous or unhealthy work for minors under 18 years of age and of any work for minors under 14 years of age except as an apprentice. Under a special chapter on the Family, Adolescents and the Elderly, the Brazilian Constitution also places an obligation on the family, society and the State to ensure children and adolescents are given priority: “the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression” (article 227).

The Covenant also sets out provisions on cultural rights within the broad context of cultural life and scientific progress (article 15). Countries beset by problems of harmful traditional practices should not feel restricted from providing appropriate constitutional provisions to deter such practices under this umbrella.

2.2.3 Women’s Rights

Specific provisions on non-discrimination on the basis of gender as already discussed, would pave the way for specific legislative and policy reforms in line with CEDAW. In accord with the principle of interdependency of human rights treaties, the linkages between women and children can be underscored through relevant provisions such as those pertaining to the right to health. However, while upholding the principle of interdependency will be necessary, ensuring that specific provisions are included to advance the political, economic, social and cultural rights of women as a distinct group will be imperative. This approach would result in a holistic expression of

women's rights as the letter and spirit of CEDAW demand. In its preamble, CEDAW gives expression to the important role of women in "the welfare of the family" and in particular, the "the social significance of maternity." In so doing, however, it acknowledges that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women." This suggests that constitutional provisions reinforcing the maternal roles of women alone will not suffice and that States, must move towards a more holistic approach to addressing women's rights within their respective Constitutions.

Box 30(a): Examples of provisions which demonstrate the complementarity between CEDAW and the CRC

- Ghana: "Special care shall be accorded to mothers during a reasonable period before and after childbirth; and during those periods, working mothers shall be accorded paid leave."
- Ghana: "Facilities shall be provided for the care of children below school-going age to enable women, who have the traditional care of children, realise their full potential" (Article 27 (1) and (2)).²¹

Box 30(b): Examples of Specific Provisions on Women's Rights without Reference to Children

- Uganda: "Women shall have the right to equal treatment with men in all aspects of political, economic and social life" (Article 33 (4)).
- Ghana: "[T]he State shall take steps so as to ensure the full integration of women into the mainstream of economic development" (Article 36(6)).
- Kenya has also taken advantage of its recent constitutional review to accord more economic (for example, access to land) and political rights to women.²²

Clauses that may result in the perpetuation of discrimination or uncertainty in interpretation, as the case may be, should be removed or excluded. In Pakistan, for instance, sex discrimination in appointments in the service of the country is not permissible. However, "specified posts or services may be reserved for a member of either sex if such

²¹ Duncan has criticized the inclusion of the phrase "women, who have the traditional care of children," in a study on Women and Agriculture (2004, sponsored by Freidrich Erbert and Stiftung and the Federation of International Women Lawyers), suggesting that the provision perpetuates the perception that childcare is a role strictly reserved for women. This is contrary to commitments made at the 1994 Cairo conference on population and development, during which childcare was categorized as a joint responsibility between men and women.

²² For instance, the draft constitution introduced a Mixed Member Proportional system, requiring that 50% of "top-up" members be women and also ensures fair representation of women in the second legislative chamber and in district and local councils. See the Report of the Constitution of Kenya Review Commission (short version, p. 16, 2002).

posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex” (Article 27 (1)). Such a provision may result in acts of direct or indirect discrimination against women.

2.2.4 Constitutional Redress in Cases of Violations of Fundamental Human Rights

1. Redress in matters of a civil and political nature

The case of *Unity Dow*, cited above, demonstrates that it is possible to address constitutional violations of rights through due process. Remedies can be made available to victims of such violations and additional provisions made for expeditious execution of due process to prevent further violations. The following constitute examples of remedies appropriate in constitutional cases:

1. *Habeas corpus*: to produce the body of a victim
2. *Certiorari*: to overturn the decisions of a person or body
3. *Mandamus*: to compel a person or body to perform its functions
4. *Prohibition*: to prevent a person or body from breaking the law
5. *Quo warranto*: to maintain the status quo
6. *Declaration*: an explicit formal pronouncement by the court on the issue in question

Ghana, India, Ireland, Nigeria, South Africa, Timor-Leste, Uganda and Ukraine are examples of States with specific constitutional provisions that allow individuals or group of persons (for example, interest groups) to seek redress in a court of competent jurisdiction on the ground of actual or potential violation of a fundamental human right. In South Africa, for instance, it is possible under article 38 for:

1. anyone acting in their own interest;
2. anyone acting on behalf of another person who cannot act in their own name;
3. anyone acting as a member of, or in the interest of, a group or class of persons;
4. anyone acting in the public interest; and
5. an association acting in the interest of its members.

Fundamental Human Rights are to be interpreted in accordance with the Universal Declaration of Human Rights (Timor-Leste, section 23). In seeking judicial redress, insufficient economic means cannot be used as an excuse or the denial of justice (See Constitution of Timor-Leste, section 26 (2)).

These provisions make it possible for individuals or groups of persons to initiate action within an appropriate legal forum for the purposes of correcting an abuse of the constitution. It must be noted, however, that constitutional cases in relation to the rights of children have generally not been common. South Africa appears to be an example of a country with progressive constitutional judicial reforms in favour of children. It is hoped that this Handbook and other materials on human rights law would contribute to changing this state of affairs.

2. Redress in matters of a social, economic and cultural nature

Although many States have incorporated social, economic and cultural rights in their constitutions' Bills of Rights or separate sections on Fundamental Human Rights, issues of justiciability and enforcement have been less clear. This may have been the reasoning behind article 2 (1) of the International Covenant on Economic, Social and Cultural Rights which states that "[e]ach State Party...undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant."²³

However, after 40 years of global operation of this Covenant and an almost equal period of international assistance and cooperation, an evolution of the application of this principle appears to be taking place under the auspices of the UN Committee on the Covenant of Economic, Social and Cultural Rights.²⁴ The Committee has considered the question of justiciability in connection with the role of legal

²³ See article 4 of the CRC for similar provisions.

²⁴ The beginning of this analysis, including the extract in Box 3, is to be credited to *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*, produced by the Office of the High Commissioner for Human rights in collaboration with the International Bar Association, Professional Training Series No. 9 (2003).

remedies in its General Comment No. 9. Although it considers that “the right to an effective remedy need not be interpreted as always requiring a judicial remedy” and that “administrative remedies will, in many cases, be adequate,” it is also of the view that “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”

In this General Comment, the Committee regrets that, in contrast to civil and political rights, the “assumption is too often made” that judicial remedies are not essential with regard to violations of economic, social and cultural rights, although “this discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.” The Committee notes that it has already made clear “that it considers many of the provisions in the Covenant to be capable of immediate implementation,” for instance, articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3). These provisions, which the Committee cites by way of example, contain rights in relation to children:

1. 1. The right of children and young people to special measure of protection and assistance, to be taken without discrimination (article 10 (3));
2. 2. The right to free compulsory primary education for all (article 13 (2) (a)) and;
3. 3. The right of parents or legal guardians to choose for their children, schools other than public schools to ensure religious and moral education in conformity with their convictions (article 13 (3)).

The Committee considers that “it is important to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by the courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right, which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the various branches of government must be respected, it is appropriate to

acknowledge that courts are generally already involved in a considerable range of matters, which have important resource applications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”²⁵

These important observations demonstrate that interpretation of the enforcement of social, economic and cultural rights is evolving and that countries need to take note of emerging international guidelines.²⁶ Kenya took advantage of its recent constitutional review to remove the perceived rift between civil and political rights and economic, social and cultural rights within its former constitutional provisions. By making extensive reference to the General Comment of the Committee, the Constitutional Commission expressed the view that there was no hierarchy of rights with some being more important than others.²⁷ Kenya also recognised the existence of new international procedures for enforcing human rights that would need to be reflected in the new Constitution as well as corresponding institutions to oversee their enforcement.²⁸

2.3 Principle 3: Accountability

During constitutional formulations and reviews it is important for stakeholders to agree on what mechanisms will be used to hold governments accountable to their constitutional obligations. In addition to other criteria, countries could consider the following:

- Commitment to international law
- Commitment to good governance
- Duties and responsibilities of the individual, family and society

²⁵ *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*, produced by the Office of the High Commissioner for Human rights in collaboration with the International Bar Association, Professional Training Series No. 9 (2003), p. 707-710.

²⁶ Mosikatsana (supra) asserts that judicial constitutional developments in South Africa may not rule out such a possibility in South Africa (see footnote 63).

²⁷ Report on the Constitution of Kenya Review Commission (short version), (2002), p. 30.

²⁸ Ibid. p. 29.

2.3.1 *Commitment to International Law*

Constitutions should indicate the relationship between international law and domestic law and at which stage of the legal process the former becomes integrated into the latter. The introduction to this Handbook has shown that the monist and dualist approaches are the principle means by which States with civil and common law traditions have expressed the interface between international law and domestic law. In addition to these broad distinctions, it is also important to recognise how constitutional monarchies incorporate international law into domestic law, when such an approach differs from the two that have already been outlined. Below is an overview of the constitutional provisions of some countries:

1. Examples of the monist approach

Ukraine: “International treaties that are in force, agreed to be binding by the *Vekhovna Rada* of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine” (Article 9).

Timor-Leste: “The legal system of Timor-Leste shall adopt the general or customary principles of international law. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of Timor-Leste following their approval, ratification or accession by the respective competent organs and after publication in the official gazette. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system shall be invalid. The state also recognizes the application of customary international law in matters of child protection” (Section 18 (2)).

Venezuela: “The Convention on the Rights of the Child is thus incorporated into the national law at the highest level, as part of the Constitution” (Article 78).²⁹

2. Examples of the dualist approach

²⁹ This is contained under its special provisions for children.

Ghana: “A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by (a) Act of Parliament; or (b) A resolution of Parliament supported by the votes of not more than one-half of the all the members of Parliament” (Article 75 (2)).

Ireland: “(1) Every International agreement to which the State becomes party shall be laid before Dail Eireann. (2) The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dail Eireann. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas” (Article 29 (5) and (6)) (Similarly, in the Russian Federation, before an international treaty is ratified by the State Duma, the constitutionality of the treaty must be determined by the Constitutional Court.)

For countries such as Timor-Leste, Ukraine and Venezuela the monist approach represents an opportunity to begin enforcement of international human rights law once ratified. Further parliamentary and legislative interventions would be important but not a *sine qua non* to CRC implementation. Venezuela’s explicit reference to the CRC is particularly unique and worthy of consideration during future constitutional reform initiatives.

3. Constitutional Monarchies

An analysis of the considerations that pertain to constitutional monarchical jurisdictions generally results in a blend of the dualist and monist approaches. The general practice is that a treaty obligation once ratified becomes part of the domestic law of the State, unless the treaty in question requires the passage of domestic law for purposes of giving effect to the treaty.

The general rule in most constitutional monarchies, such as the Canada, Monaco and the United Kingdom, is that treaty-making power is vested in the Crown. In Canada,³⁰ this is executed through

³⁰ An explanation of the Canadian example was extracted from Dupras, Daniel, Government of Canada, Law and Government Division, Depository Services Programme (2006) in an article entitled: “International Treaties Canadian Practice.”

the federal executive branch of government as the Crown's representative. Although the Governor in Council (Cabinet) retains final effective control over the ratification of treaties, it may appoint any person it wishes to negotiate and sign them. Apart from the Prime Minister, these persons are usually the ministers, deputy ministers, diplomatic representatives or negotiators of the Canadian government. A treaty entered into and signed for and on behalf of Canada by a representative of the Government of Canada and subsequently approved by the Governor in Council is binding on Canada. Approval usually takes the form of an order in council. Furthermore, the Governor in Council may approve the text of an international treaty that has not yet been signed and designate a representative of the Government of Canada to sign it on behalf of Canada. However, where amendments must be made to Canadian legislation in order for a treaty to be implemented, the ministers concerned give instructions for an implementation bill to be drafted. After receiving Cabinet approval, the bill is tabled in Parliament and goes through the parliamentary legislative process.

In the case of *Attorney General for Canada vs. Attorney General for Ontario* [1937] AC 326, the court made the following important observation about the linkage between international treaties and domestic law: "Within the British Empire, there is well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law requires legislative action. Ratification of a treaty alone does not give it the force of law."³¹

2.3.2 Commitment to Good Governance

The office of the UN High Commission for Human Rights has established an inseparable link between good governance and the enforcement of human rights. It defines governance as "the process by which public institutions conduct public affairs, manage public resources and guarantee the realization of human rights. Good governance accomplishes this in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of

³¹ For the full text, see the judgment of Lord Atkin. p. 347.

‘good’ governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.”³²

There ought to be commitment to good governance if constitutions are to be effective frameworks for the implementation of human rights, including the rights of children. This can be expressed through the effective and efficient running of the three arms of government, namely the executive, legislature and judiciary. The executive has the responsibility for all actions of government through Ministries, Departments and Agencies. It also has the function of drafting and proposing legislation and setting the budget and implementation of activities, once the budget has been approved. In addition to approving the budget, the main function of the Legislature is to consider legislation proposed by the executive branch and to pass it into law. The main function of the Judiciary is to administer the law. While each branch of government has its specific function, in most democracies these functions often overlap. For instance, as the Handbook has already shown, under common law jurisdictions, the judiciary plays a key role in the development of the law through interpretation. There are also overlaps between the executive and legislative branches in the Parliamentary system, because the chief Executive (the Prime Minister) is also part of the legislature.

In addition to the key organs of government, some countries have established specialised independent institutions under their respective constitutions that are responsible for monitoring the overall implementation of the constitution in favour of children. Such bodies are also needed to ensure implementation of human rights treaties and timely submission of country reports to relevant treaty committees. Country constitutional provisions demonstrate the existence of a broad array of such bodies.

- **Councils of State:** Available in Ghana, Ireland and Nigeria with the mandate to advise the President in the performance of his or her functions.
- **Commissions on Human Rights and Administrative Justice:**³³ Available in Ghana, South Africa, Timor-Leste and Uganda,

³² UNOHCHR (1996-2002) Human Rights in Development.

³³ Function summarized from article 52 of the Constitution of Uganda. The provisions of the South African Constitution permit its Human Rights Commission to require relevant organs

with the mandate to investigate, at its own initiative or in response to a complaint made by any person or group of persons a violation of any human right; visit jails, prisons and places of detention to assess conditions of inmates; recommend to Parliament effective measures to promote human rights; human rights education among the general populace and monitoring of overall Government compliance with international treaty obligations.

- **National Primary Education Commission:** Available in Nigeria, with the mandate to prescribe the minimum standards of primary education, advise Federal government on the financing of primary education and integrate master plans for a balanced and coordinated development of primary education in Nigeria (Article J (24)).
- **National Commission on Civic Education:** Peculiar to Ghana, with the mandate to create awareness on the provisions of the Constitution and rights and duties of the citizenry (article 233).³⁴
- **Commission for Gender Equality:** Peculiar to South Africa, with the mandate to promote respect for gender equality and the protection, development and attainment of gender equality (Article 187). This serves as an additional institutional framework for the monitoring and implementation of the MDGs.

2.3.3 Duties and Responsibilities of the Individual, Family and Society

Individuals, the family, society and the State should be made responsible for the full implementation of their constitutions in favour of children. Express provisions are therefore to be made which place an obligation on all duty bearers to perform their roles and responsibilities as outlined in the supreme law. The Constitution of Nigeria (Article 24) and the Constitution of India (Article 51) possess

of State “to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment” on an annual basis (Article 184 (3)).

³⁴ The Commission has created civic clubs in several second cycle institutions in Ghana, with a view to inculcating a sense of responsibility among children and awareness of their rights, including those enshrined in the CRC.

elaborate provisions on all aspects of national life. Broadly speaking, they can be classified under the categories of duties towards self, the environment, State and society. The eleventh fundamental duty of the Indian Constitution states that a parent or guardian is “to provide opportunities for the education of his child or, as the case may be, ward between the age of six and fourteen years” (added by the 86th constitutional amendment in 2002). The Constitutions of Ukraine and Cambodia contain further provisions on the duty of children towards society and their parents. Ukraine, however, limits this to adults towards children whereas no age limit is set in the case of Cambodia.³⁵

2.4 Principle 4: Participation

For purposes of this section, participation is defined as the process by which individuals and groups are provided with the necessary tools to take part in the political, economic, social and cultural affairs and activities of the State. All of the issues discussed under the principles of universality, indivisibility and accountability are essential to creating an enabling environment for effective participation to take place. The right to vote (essential for good governance, as discussed above) is key to participation. Mention could be made of the right of association (for example, the right to join a trade union) and the right to move freely. The Covenant on Civil and Political Rights contains essential provisions linked to the right to participation.

Box 31: Relevant provisions on the right to participation in the CCPR

Article 19: The right to hold opinions without interference, freedom of expression (including freedom to seek, receive and impart information)

Article 21: The right to peaceful assembly

Article 22: The right to freedom of association with others, including the right to form and join trade unions

Article 25: The right to take part in the conduct of public affairs, to vote and to be elected and to have access on general terms of equality, to public service

³⁵ Leaving such provisions open-ended could result in the perpetuation of exploitation within the domestic environment.

Part 3 SPECIFIC CONSTITUTIONAL PROVISIONS IN FAVOUR OF CHILDREN

According to UNICEF, well over 20 national constitutions possess the characteristic of “child rights” constitutions, with provisions dedicated to the protection of the rights of the child.³⁶ It would be reasonable to assume that the existence of a reference to the rights of the child is an indication that the CRC has had at least some impact, especially in constitutions adopted since 1989. However, the degree of penetration by the CRC in the text of each provision dealing with the rights of the child differs for each constitution. While some constitutions, such as that of Brazil, have elaborate provisions on the rights of the child, others, such as that of Thailand, have relatively brief provisions.³⁷

The incorporation of special provisions on the rights of the child will follow the evolution of human rights law, starting with the more general (the International Bill of Rights) and later considering the more specific (for example, CEDAW in relation to women and the CRC in relation to children). States should therefore be encouraged to consider special clauses or chapters on children during future constitutional reforms. For guidance, reference is to be made to the principles and key thematic areas of specific child-related international norms already cited.

3.1 The Relationship between Specific and General Provisions

The relationship between specific and general provisions should be governed by the principles of the interdependency and indivisibility of rights. The two broad provisions should be seen as complementary and mutually supportive of each other through an application and interpretation that would ensure that children receive the maximum

³⁶ UNICEF, ‘Laying the Foundation for Children’s Rights’, *Innocenti Insight* (2005), p. 25. The report cites Andorra, Azerbaijan, Belarus, Brazil, Bulgaria, China, Congo, Croatia, Ecuador, Eritrea, Estonia, Germany, Ghana, Hungary, Ireland, Italy, Kyrgyz Republic, Lithuania, Macedonia, Mexico, Moldova, Mongolia, Mozambique, Paraguay, Peru, Portugal, Romania, Russian Federation, Rwanda, Senegal, Slovenia, South Korea, Spain, Uganda and Ukraine as examples of jurisdictions with such constitutional provisions on children; See p. 26.

³⁷ *Ibid.* p. 25-6.

protection. Where a provision in one area affords greater protection, such provision should be used to correct the violation in question. Specific provisions on children should preferably be cited within the more general provisions on human rights. This approach would underscore the fact that children's rights are human rights, and can therefore draw on the remedies available for human rights violations. Where a country chooses to place its provisions regarding children's rights within another section or as a separate section, care must be taken to use words and phrases that would readily place them within the context of human rights and fully integrate them into the larger document. This would ensure that specific provisions are not perceived as mere appendages to the constitution.

The following checklist must be used when formulating a Children's Bill of Rights or Charter:

- Does it follow the key principles of the CRC?
- Can it serve as the basis for future legislative reform?
- Is it consistent with the general content of the constitution?
- Did children participate in its formulation?

3.2 Definition and Legal Status of the Child

The CRC provides States Parties with an opportunity to define "child" within their respective Constitutions. Article 1 states that "For the purposes of this present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier." In applying this provision, States should not peg the legal age at too low a level as this could expose children to situations of vulnerability or harm, such as early marriage and undue exposure to the criminal justice system. For this reason, the age of 18 is to be preferred in line with other international standards such as the Optional Protocol to the CRC on Children in Armed Conflict. This should not, however, prevent a country from stipulating lower ages with respect to employment and definition of a juvenile, in line with international treaty obligations. Below is a brief analysis of how some countries have treated definition of child within their respective constitutions.

- **South Africa** and **Ghana** define ‘child’ to mean “a person under the age of 18 years” (Article 28 (3) in the case of the Constitution of South Africa; and Article 28 (5) in the case of the Constitution of Ghana).
- For purposes of protection from child labour, **Uganda**, defines a ‘child’ to mean “persons under the age of sixteen years” (Article 34 (4) and (5)).
- The interpretation section of the Constitution of **Nigeria**, however, moves beyond age as a criterion for defining a child to categories of children. ‘Child,’ therefore, “includes a step-child, a lawfully adopted child, a child born out of wedlock and any child to whom any individual stands in place of a parent” (see Section 19 of the fifth Schedule). The Nigerian example is a reflection of values and traditions accorded to children of different categories and the all-inclusive nature of the African concept of childhood.

3.3 Application of the Principles of the CRC

This subsection deals with the application of the principles of the CRC already outlined above to the formulation of constitutional provisions.

3.3.1 *Principle 1: Non-discrimination*

As it is likely that a non-discrimination clause would have already been incorporated into the general provisions, specific provisions may focus on a limited range of situations or categories of exclusion. Stakeholders are to agree on the category of children to be provided for. Given the high potential for exclusion resulting from the impact of HIV/AIDS and war, countries may consider special protection for orphans. Additionally, the stigma accorded to children born out of wedlock leaves room for consideration of provision for such children. Children of minorities are another example. The Handbook provides case studies on provisions made with respect to orphans.

Box 32: Special provision on orphans: Case studies from Uganda, Ireland, Ukraine and Brazil

- Uganda: “The law shall accord special protection to orphans and other

vulnerable children” (Article 34 (7)).

- Ireland: “[The law shall] safeguard special care, the economic interests of the weaker sections of the community, and where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged.”

Brazil provides for a process by which families are encouraged to foster children through various forms of incentives such as tax rebates and subsidies. Its relevant provision states that “government fostering, by means of legal assistance, tax incentives and subsidies, as provided by law, of the protection, through guardianship, of orphaned or abandoned children or adolescents” (Article 227 (V)). These incentives as stipulated, serve as a disincentive to institutionalization of children in need of special care and protection and a promotion of family environment placements.

The following are case studies on the constitutional treatment of children born outside wedlock.

Express provisions in favour of children born outside wedlock exist in some texts. This has been inspired by article 25 (2) of the UDHR, which states that “all children, whether born in or out of wedlock, shall enjoy the same protection.” This provision seeks to remove discriminatory tendencies against children due to the circumstances of their birth or social origin.³⁸ Below is a summary of five country case studies on the treatment of children born outside wedlock within the context of constitutional law development in favour of children.

Ethiopia: “Children born out of wedlock shall have the same status and rights as children born in wedlock” (Section 36 (4)).

Timor-Leste: “Every child born in or outside wedlock shall enjoy the same rights and social protection” (Section 18 (3)).

Brazil: “Children born inside or outside wedlock or adopted shall have the same rights and qualifications, any discriminatory designation of their filiation being forbidden” (Section 227 (VII (6))).

³⁸ In the case of *Fraser v Children’s Court*, the Constitutional Court of South Africa had occasion to rule that the legislative command in section 8 establishing equality between children born in wedlock and those born extramaritally, was binding and required the lawmaker to comply (*Mosikatsana (supra)*, 60).

Ukraine: “Children are equal in their rights regardless of their origin and whether they are born in or out of wedlock” (52 (a)).

Ghana: “Every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents” (Article 28 (1) (b)).

3.3.2 Principle 2: The Best Interests of the Child

Article 3 of the CRC on the best interests of the child is key to all aspects of constitutional law development and interpretation in favour of the child. The existence of such a provision provides a yardstick for all stakeholders to measure the appropriateness of their actions in favour of children. Therefore embodying this as a constitutional right is indispensable. Countries with specific chapters or clauses on the rights of the child tend to incorporate provisions on the best interests of the child. Notable examples include South Africa and Ethiopia.

- **South Africa:** “A child’s best interests are of paramount importance in every matter concerning the child” (Article 28 (2)).
- **Ethiopia:** “In all actions concerning children undertaken by public or private institutions of social welfare, courts of law, and administrative bodies, the primary consideration shall be the best interests of the child” (Article 36 (2)).

3.3.3 Principle 3: The Right to Life, Survival, Development and Protection

This principle covers a broad range of rights, such as the right to education, health, adequate nutrition and protection from violence. Inherent in the principle is the important role of the family in the provision of basic services and the protection of children. The subsection is thereby structured as follows:

- Access to basic social services and social protection
- The role of the family
- Protection from violence, abuse, neglect and exploitation

1. Access to basic social services and social protection

To ensure the right of the child to survival and development, provisions are to be made to guarantee access to basic services. Given that detailed provisions would have been created under general provisions in relation to services such as education, health and nutrition, special provisions are to be brief, specific and focused on the special needs of children in the country.

For instance, under article 53 of its provisions on education, the Constitution of Ukraine provides for free pre-school education, although this is not provided for under the CRC. The implication of guaranteeing pre-school education as a constitutional right is to secure an early start in life for all children. In addition, where countries have low school enrolment, constitutionally guaranteeing pre-school would also assist in accelerating implementation of Education For All (EFA) goals as well as gender parity in education in favour of girls.

Box 33: The Constitution of South Africa

The Constitution of South Africa spells out its social services programme to include basic nutrition shelter basic health care services³⁹ and social services (Article 28 (1) (c)). Some Constitutions prohibit depriving any child of “medical treatment, education and other social economic benefit by reasons of religious of other beliefs”. This is stated in these terms by Uganda (Article 34 (3)). Similar provisions have been framed by Ghana (Article 28 (4)) and are in response to bottlenecks encountered by States in the delivery of primary health care and formal education among specific communities and groups.

2. The role of the family

In all countries, the family, as variously defined, serves as the front line for protection of the child. Yet in many countries, the breakdown of the family has either taken place or is imminent. Given its role in child protection, survival and development, the institution of the family must be safeguarded by specific provisions. Where possible, while emphasizing the role of the family, steps must also be taken to include provisions on the responsibility of parents and the community as building blocks for the creation of a protective environment. Below are country examples of constitutional provisions on the protection of the family.

³⁹ Kenya defines the right to health to include reproductive health care (Article 61(1) of the 2004 Draft Constitution).

- **Azerbaijan:** “The family as the foundation of society shall be under the special protection of the State. To take care of the children and their upbringing shall be the obligation of parents. The State shall see to it that this obligation is followed” (Article 17).
- **Ireland:** “The State recognises the Family as the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law (Article 41 (1)). The primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education for their children” (Article 42 (1)).
- **Uganda:** “Children possess a constitutional right to know, and be cared for by their natural parents or those entitled by law to bring them up” (Article 34 (1)).
- **Timor-Leste:** “recognises the special protection afforded to children by the family, community and State against all forms of abandonment, violence, oppression, sexual abuse and exploitation” (Section 18 (1)).
- **Ukraine:** “Parents are obliged to support their children until they attain the age of majority. The family, childhood, motherhood and fatherhood are under the protection of the State” (Article 51).

3. Protection from violence, abuse, neglect and exploitation

The CRC, its two optional protocols and the ILO conventions listed above constitute compelling normative grounds for the inclusion of clauses on violence, abuse, neglect and exploitation within child-specific provisions of constitutions. The growing incidence of the use of children in armed conflict also requires definitive constitutional prohibition across all jurisdictions.

Broadly speaking, specific clauses could cover the following:

- Sexual and economic exploitation
- Involvement of children in armed conflict

- Juvenile justice administration.

4. Sexual and economic exploitation: Case studies from South Africa, Ghana, Ethiopia, Ukraine and Iraq

Article 28 (1) (d)-(f) of the Constitution of **South Africa** provides that: “Every child has the right ...(d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that (i) are appropriate for a persons of the child’s age or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development.”

Ghana (Article 28 (2)) and Ethiopia (Article 36 (d)) also include references to work, which is hazardous or harmful to his or her education, health or well-being. In the case of Ukraine, however, provisions on child labour have been integrated into constitutional provisions related to employment. This provision is unique in the sense that it links child and maternal labour together: “The employment of women and minors for work that is hazardous to their health is prohibited” (Article 43 (e)). Under its special clause on children, however, Ukraine has a much broader sub article, which states that “any violence against a child, or his or her exploitation, shall be prosecuted by law” (Article 52 (b)).

The Iraqi Constitution broadens the scope of location of violence to include “the family, school and society” (Article 29 (4)) and possesses a more categorical provision which proscribes “forced labour, slavery, commerce in slaves, the trading in women or children of the sex trade” (Article 35 (c)).

5. Involvement of children in armed conflict: Case studies from South Africa, Kenya and Cambodia

Constitutional provisions on children in armed conflict are limited. South Africa currently serves as one of the best examples of a State with constitutional provisions on children involved in armed conflict. According to Article 28 (1) (i), “every child has the right not to be used directly in armed conflict, and to be protected in times of armed conflict.” Through its recent constitutional review, the Constitution of Kenya Review Commission took full advantage of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict by including a prohibition within its Draft Bill of Rights against “the participation of children in hostilities or their recruitment into armed conflicts and their protection in such situations” (Article 40 (on children) (6) (h)). Cambodia has also integrated a provision on this within its special clause on children, by stipulating their protection during wartime (Article 48). Other constitutional provisions, such as those that deal with abuse, exploitation, neglect, detention and the best interests of the child, may also be used as references for the protection and prevention of the use of children in armed conflict.

6. Juvenile justice administration: Case studies from Nigeria, Fiji, The Gambia, Uganda, Ethiopia, Ghana, South Africa and Brazil

Children are entitled to protection under general provisions dealing with persons deprived of their liberty. Specific provisions on juvenile justice administration must however conform to the broad provisions of article 37 of the CRC on the subject of the treatment of juveniles. More specific standards such as the United Nations Minimum Standard Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines") and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty can be provided for under specific legislation. Case studies of various levels of juvenile justice provisions are presented below:

- **Nigeria:** protects juveniles accused or convicted of offences by ensuring that they are “kept in remand homes or reformatory centres and their treatment, including rehabilitation shall be the underlying principle of their custody” (Article 34 (8)).

- **Fiji, The Gambia, Uganda, Ethiopia and Ghana:** have common constitutional provisions on the separation of detained children from detained adults (Section 26 (6), Article 29 (3)), Article 34 (6), Article 36 (3) and Article 15 (4) respectively).
- **South Africa:** provides direction on the significant role of diversion in the system of juvenile justice administration, by making express reference to detention as a “measure of last resort” (Article 28 (1) (g)).
- **Brazil:** also has in place the following for consideration:
 - provisions which ensure that female prisoners are assured of “adequate conditions to stay with their children during the nursing period” (Article 5 (L)).
 - provisions on the “prevention and specialised treatment programmes for children and adolescents addicted to narcotics” (Article 227 VII).
 - Stipulation on the minimum age of criminal responsibility, stating that “[m]inors under eight years of age may not be held criminally liable, subject to the rules of special legislation” (Article 228).

Ethiopia is among the few to have made express provisions against corporal punishment (Article 36 (1) (e)) within the context of the rights of the child and extends this to “schools and other institutions responsible for the care of children.” Other States (for example, Ghana, Article 28 (3)) focus on “torture, or other cruel, inhuman or degrading treatment or punishment.” In the South African case of *State v Williams*, the Constitutional Court of South Africa contributed to the effort of bringing juvenile penal laws into conformity with international jurisprudence by declaring corporal punishment unconstitutional on the grounds that it is cruel, inhuman and degrading (Mosikatsana, 363).

3.3.4 Principle 4: Respect for the Views of the Child

Allowing children to make their views known and heard in matters affecting them has yet to gain full acceptance across the globe. Given this general cultural and social limitation, constitutions could advance the cause of participation of children by including express provisions that require child participation. Children should be covered under the general provisions of civil and political rights, which expressly provide

for the rights to free expression, association and information. However, a provision on child participation in line with Article 12 of the CRC would provide States with the impetus to place this culturally sensitive issue in constitutional perspective. Article 12 (1) of the CRC states as follows: “States Parties shall assure to the child who is capable of forming his or own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

Expressions of the right to participation are rare within child specific provisions across countries. However, it would be worth mentioning how States have treated the issue under other provisions. Examples include case studies from Brazil and Uganda:

Brazil: under its provisions on “Political Rights,” has made an important inroad by including a constitutional provision which makes it possible for children aged between 16 and 18 years to exercise the constitutional option to vote (Article 14 II (c)).

Uganda: also makes special references to all-inclusive participation in national affairs by stipulating that “every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law” (Article 38 (1)). Minorities also have “a right to participate in decision-making processes and their views and interests shall be taken into account in the making of national plans and programmes” (Article 36).

Constitutional provisions in Nigeria (Article 55), which require that “the business of the National Assembly shall be conducted in English, Hausa, Igbo and Yoruba,” could be extended to the country’s Children’s Parliament to ensure effective and inclusive participation of the broad mass of children in national affairs.

Opportunities for child participation are also presented by constitutional reviews. Being the supreme law of the State, constitutions are generally perceived of as serious documents and the constitutional reviews preceding their promulgation as serious processes which cannot involve the participation of children. The 2002 Special Session on Children and other events have shown, however, that children have the capacity to make effective contributions towards

matters affecting their welfare, provided appropriate mechanisms are put in place. Another successful example of child participation comes from Timor-Leste. Children in that country made history when, in November 2001, over one hundred of them appeared before their country's Constituent Assembly with a request to pay attention to their rights. The children delivered a letter from the Working Group for Child Rights to the members of the Assembly, asking that the Constitution specifically refer to "the core rights of children," including the addition of guarantees of basic education and healthcare, and special assistance for vulnerable children. This resulted in the promulgation of a rights-based and child-centred Constitution.⁴⁰

To facilitate the effective participation of children in such reviews, States could make use of existing child participation-related structures such as Children's Parliaments (for example, Cameroon, Nigeria and The Gambia), in-school clubs (for example, Ghana) or alternatively, through the creation of all inclusive National Children's Constitutional Review Commissions.

Part 4 POST-CONSTITUTIONAL REFORMS: THE NEXT STEPS

The subsections above provide tools to consider the formulation of constitutions in a manner that reflects the concerns of children. Once constitutions have been formulated, the primary challenge becomes for States to ensure that these documents do not become symbolic gestures towards the citizenry but rather living tools towards the realisation of human rights.

Among post-constitutional reform measures to consider are 1) wide dissemination through appropriate means, 2) constitutional litigation and interpretation by the courts and 3) monitoring of implementation of constitutional provisions. These processes would involve a wide range of stakeholders with whom these milestones must be met.

⁴⁰ South Africa and the Philippines provide additional examples.

4.1 Who Are the Stakeholders and What Should They Do for Children?

- **Judges:** Judges develop and interpret the law in favour of children, mindful of international treaty obligations. In the case of the United States as with many other common-law jurisdictions, the courts are the central points for the interpretation of the constitution. In the case of *Marbury vs. Madison*,⁴¹ the US Supreme Court made the following fundamental observation: “It is emphatically the province and duty of the judicial department to say what the law is.”⁴²
- **Lawyers:** Lawyers can provide constitutional and public interest litigation in favour of children, including legal aid in constitutional cases.
- **Parliament:** Parliament ensures that resources are made available for the prevention of constitutional violations and protection and redresses when they do occur. The legislature is also to be proactive in the identification of laws needed to give effect to constitutional provisions. Parliamentary sub-committees and private members are encouraged to spearhead passage of legislation and regulations to correct social anomalies affecting implementation of the CRC and CEDAW.
- **Legislative drafters:** Drafters ensure that legislation is worded in a manner that is faithful to the intent of constitutional provisions.
- **Governmental agencies working for children:** Sectors working for children are to familiarize themselves with constitutional provisions and ensure that obligations outlined with respect to their functions are fully met.
- **Civil Society Organizations:** These groups have a role in initiating dialogue for constitutional reforms.
- **Children:** Children should appreciate the constitutional provisions affecting their rights and make their views heard in matters affecting them as part of the constitutional process.
- **Teachers:** Teachers can instruct on issues of civic education and ensure that pupils and students become familiar with constitutional provisions.

⁴¹ Cited supra.

⁴² Ibid. p. 175.

- **International Organisations:** Using national constitutions as frameworks for the provision of technical and financial support, international organisations can support the design and implementation of key national instruments (for example, UNDAF, PRSP's, Social Protection Strategies and legislation).

4.2 Wide Dissemination of the Constitution through Appropriate Means

Given the status of the constitution as the supreme law and the standard by which all actions of State and non-State actors are to be judged, it is critical to ensure that the document is disseminated by appropriate means. Widespread knowledge of the contents of constitutions and other legal frameworks increases their effectiveness. Uganda and Ukraine both have constitutional provisions that indicate that knowledge of the law is key to effective fulfillment of duties and responsibilities:

Uganda: "The State shall promote public awareness of this Constitution by:

- (a) translating it into Ugandan languages and disseminating it as widely as possible; and
- (b) providing for the teaching of the Constitution in all educational institutions and armed forces training institutions and regularly transmitting and publishing programmes through the media generally" (Article 4).

Ukraine: "Laws and other normative legal acts that determine the rights and duties of citizens, but that are not brought to the notice of the population by the procedure established by law, are not in force" (Article 57 (3)).

This suggests the need for a dissemination strategy that would ensure that the constitution is packaged to suit specific audiences.⁴³ In the case of rural communities, for instance, translating the constitution into local languages would serve their purpose, whereas in the case of

⁴³ As an example, Ghana has succeeded in reducing its 1992 Constitution into a simplified pocket-sized version, being sold at vantage points (e.g. book shops and news paper stalls) at a subsidised price and is suitable for use by adults and children above 11 years.

children, countries could consider simplified or illustrated versions. Effective dissemination of country constitutions would be in line with the spirit of Article 42 of the CRC on the issue of State responsibility “to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

4.3 Constitutional Litigation and Interpretation

Public and private organisations and individuals are encouraged to pursue constitutional litigation in favour of women’s and children’s rights. This would promote the growth of the law and affirm the very existence of the constitution as a living document. Constitutional litigation within many jurisdictions commences in specially designated Constitutional Courts (for example, South Africa and the Russian Federation) or in regular Superior Courts of Judicature (usually assigned to a designated High Court, Court of Appeal or Supreme Court, as the case may be (as in Ghana, where the Supreme Court has sole jurisdiction for determining constitutional issues)).

Procedures adopted for filing constitutional cases will differ among States. Interested persons should examine the procedural rules applicable to ensure that their respective courts do not dismiss any case even before the substantive issues are heard. Lawyers (especially those well versed in constitutional litigation and human rights) are encouraged to provide legal aid, while the State should consider waiving filing fees, especially in cases which relate to causes of the indigent and other vulnerable groups such as children.

Child-related constitutional litigation should lead to the growth of constitutional law in their favour. The Courts (whether designated Constitutional Courts or not) play a primary role in interpretation, enforcement and implementation. Provisions from the Constitutions of the Russian Federation and Madagascar demonstrate the potent force of Constitutional Courts in ensuring constitutional compliance:

- **Russian Federation:** Article 125 empowers the Constitutional Court to declare laws (both federal and state) and presidential and governmental decrees inconsistent with the Constitution (i.e. they violate certain rights and freedoms of citizens

enumerated in and protected by the Constitution). In such situations the law becomes unenforceable and implementing agencies are thereby barred from applying it. The law may be submitted to the Constitutional Court by the President of Russia, the government of Russia, the State Duma, the Federation Council of Russia, one-fifth of members of the State Duma or the Federation Council, the Supreme Court of the Russian Federation or the Supreme Arbitration Court of the Russian Federation. In a similar vein, any Federal Court may request that the Constitutional Court determine the constitutionality of a law. Additionally, any private citizen may submit a claim to the Constitutional Court, challenging the constitutionality of a particular law.

- **Madagascar:** Article 118 grants jurisdiction to the Constitutional High Court to determine the constitutionality of treaties, laws (central and provincial) and ordinances. In the process, the Court is to manage constitutional conflicts between two or several Institutions of the State or between the State and one or more autonomous provinces or between two or several autonomous provinces.

The independence of the judiciary must be expressly stipulated in constitutions in order to ensure that the courts do not feel impeded by political or other factors in the exercise of their functions. Judges are to facilitate the realisation of human rights by referring to and applying relevant treaties on the subject in question. In other words, for judges to give effect to general and specific constitutional provisions affecting children, they must become familiar with the international human rights instruments and principles outlined above.

Judges could also refer to the following additional tools:

- Constitutional Commission Proposals (in relation to past and present Constitutions);
- UN Committee concluding observations and recommendations to States Parties;
- UN Committee General Comments; and

- Local and international judicial precedent.⁴⁴

4.4 *Monitoring of Implementation of Constitutional Provisions*

Monitoring of constitutional implementation is needed for two reasons: firstly, States need to ensure that the provisions are being applied. Secondly, it will provide stakeholders with a body of evidence-based information to justify future constitutional amendments. It would be advisable to proceed with this in a holistic fashion, as part of a broad framework for monitoring implementation of all legal standards and not just the constitution. This could be spearheaded by a government agency, with the mandate to undertake periodic reviews of laws, such as Law Reform Commissions or their equivalent.

Indicators for measuring the effectiveness of Constitutions would have to be agreed upon by stakeholders. The following may be considered key measurement points:

1. The number of times the Constitution is used as a reference point for issues affecting children by: Parliament (in debates, statements, comments, questions and proposals); Judiciary (in judgments (concurring and dissenting), obiter dicta and practice notes); The Executive (through Cabinet, Ministries, Agencies and Departments); Lawyers (constitutional cases initiated in favour of children; Schools (in curriculum development, teaching, debates and civic education) and teacher training institutions; Media (in reportage, dissemination and follow up); Children (for in-school and out of school activities); Civil Society Organizations (in monitoring and public interest litigation); The UN system (in the design of, Country Assistance Strategies, Common Country Assessments and UNDAF)
2. The number of references made to the constitution in State reports to the UN CRC Committee and other UN Committee Reports

⁴⁴ The case of *Unity Dow* already used in text, presents a good example. Reference could also be made to the judgment of Lord Wright in the case of *James v Commonwealth of Australia*, [1936] AC 578, p. 613-614.

3. The number of capacity-building programmes on the constitution conducted
4. The number of professional and non-professional groups with knowledge of the constitution
5. The number of first-, second- and third-cycle institutions with aspects of the constitution integrated into their curricula
6. The existence, number and types of simplified versions of the Constitution and for which audiences

Part 5 CONCLUSIONS AND LESSONS LEARNED FROM CONSTITUTIONAL REFORM EXPERIENCES

The following conclusions and lessons may be drawn from the above:

1. Constitutions are potent tools for the enforcement of human rights in favour of children. They set the tone, direction and priorities of government policy, statutory reform and budgeting required for CRC and CEDAW implementation. They serve as sustainable frameworks for the continuation of policies and programmes in favour of children, regardless of which party is in power. Short of military interventions and political expediency, civilian governments are generally bound to continue with the policies and programmes of previous regimes. In other words, constitutions do not change with change of governments unless accompanied by a legitimate constitutional review process. This allows for continuity and sustainability of major interventions and investments that have been made in favour of children.
2. Supremacy clauses in most constitutions create an opportunity to test the constitutionality of various acts and omissions spanning across political and civil rights, on the one hand, to economic, social and cultural rights on the other. States are to review clauses and policy directives on the non-justiciability of the second category of rights in line with Recommendation No.

9 of the UN Committee on the Covenant on Economic, Social and Cultural Rights.

3. Opportunities are presented by global human rights frameworks to make children the central subjects of both general human rights law and specific norms affecting children. This is to be done with the objective of locating the rights of the children within the context of human rights and ensuring that they are guaranteed holistic protection.
4. Best practices could be learned across jurisdictions. Examples are in relation to:
 - Recognising children as subjects of rights (for example, Venezuela);
 - Expanding the definition of the child to include orphans and children born out of wedlock (for example, Nigeria);
 - Protecting the family and keeping it sacrosanct in favour of children (for example, Ireland);
 - Providing for an array of basic services (for example, Brazil);
 - Recognising pre-school as a constitutional right (for example, Ukraine);
 - Protecting children from slavery and institutions similar to slavery (for example, The Gambia);
 - Protecting children born out of wedlock (for example, East Timor);
 - Protecting children from participation in armed conflict and those affected by it (for example, South Africa);
 - Ensuring birth registration (Brazil);
 - Protecting children in conflict with the law (for example, Ethiopia); and
 - Protecting orphans (for example, Uganda).
5. States are to invest in constitutional bodies which have been set up to protect the rights of children, with a view to making them effective tools of change in favour of children. This is to be done by enhancing their financial, technical and human resource capacities.

6. The existence of a national constitution in any country will require a pragmatic programme of social mobilization and sensitisation as would ensure widespread appreciation and understanding of its contents. A national intervention of this kind creates a window of opportunity for children, as citizens, to appreciate their rights and responsibilities under their respective constitutions. In some countries, for example Ghana, this has worked through existing in-school constitution clubs, the creation of constitutional games, the publication and dissemination of abridged versions of the constitution and the celebration of national constitutional week.

7. Constitutional review initiatives serve as opportunities for child participation in the law reform process through existing child participation structures or the creation of Child Constitution Review Commissions. The experience of Timor-Leste has shown that child participation can make a difference in ensuring that child-specific concerns are addressed during the review process. Experience in Kenya has demonstrated that constitutional reviews also serve as opportunities to affect change in the content of previous frameworks for the purpose of giving effect to international treaty obligations through broad participation. The constitutional review of that country witnessed the consideration of more elaborate provisions on human rights (Bill of Rights), citizenship⁴⁵ and the creation of a Commission on Human Rights and Administrative Justice to monitor implementation of human rights treaties.

⁴⁵ Among the defects in the previous constitutional provisions on citizenship was the fact that it was gender discriminatory. A wife of a Kenyan man had the right to be a Kenyan, but not the husband of a Kenyan woman. Moreover, a child born of a Kenyan father outside the country automatically became a citizen, but the child of a Kenyan mother in the same situation did not (Constitution of Kenya Review Commission (2002), p. 26).

Constitutions used in the text:

1. Constitution Act of Canada (1982)
2. Constitution of Azerbaijan (1995)
3. Constitution of Cambodia (1993)
4. Constitution of Fiji (1998)
5. Constitution of France (1958, as amended)
6. Constitution of India (1950 as amended)
7. Constitution of Iraq (2005)
8. Constitution of Madagascar (1960)
9. Constitution of the Federal Republic of Nigeria (1999)
10. Constitution of the Islamic Republic of Pakistan (1973 as amended)
11. Constitution of the Republic of Brazil (1988)
12. Constitution of the Republic of Ghana (1992)
13. Constitution of the Republic of Ireland (1937, as amended)
14. Constitution of the Republic of Kenya (proposed, 2005)
15. Constitution of the Republic of South Africa (1996)
16. Constitution of the Republic of The Gambia (1997)
17. Constitution of the Republic of Ukraine (1996)
18. Constitution of the Russian Federation (1993)
19. Constitution of the United States of America (1787, as amended)
20. Constitution of Venezuela (1999)

Glossary

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

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

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

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

Child-friendly court procedures – Processes and procedures which are designed to make the court accessible to and less intimidating for children who appear as witnesses or victims. Such measures include courtrooms specially designed to put children at ease, legal and support staff trained to prepare children by explaining the process to them in ways that they will understand, and provisions to involve family or other trusted individuals in both the court proceedings, in support of the child, and in follow-up and recovery programmes.⁴⁶

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

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

⁴⁶ RESOLVE Manitoba, “Child Victim Support Service”, *Resolve News*, Winnipeg, Manitoba, Research and Education for Solutions to Violence and Abuse, Volume 7, Number 2, June 2005.

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

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

Civil law – A system of law derived mainly from Roman law, emphasising the arrangement of laws into comprehensive national codes. Civil law relies heavily on written law.⁴⁷

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

Common law – A system of law derived from English tradition, in which law is determined not only through written legislation (Statutes) but also by court decisions through the creation of judicial precedent from decisions on specific cases tried before the courts.⁴⁸ (See also **Case law** above).

Constitution – The fundamental law of a State, typically outlining the structure of government and the means by which the government will operate; may also include the principles of human rights which are intended to guide all government action, including legislation.⁴⁹

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

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

⁴⁷ See Chapter 2 for more details.

⁴⁸ See Chapter 2 for more details.

⁴⁹ See Chapter 3 for more details.

administered by traditional chiefs and their councils, often dealing with matters relating to children and family.⁵⁰

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

Duty bearers – Those who are responsible for ensuring that the rights of designated groups are protected, promoted and fulfilled; for the rights of children, the State is the primary duty bearer and is responsible for creating conditions in which other duty bearers, such as parents, service workers, community leaders, the private sector, donors and international institutions, can meet their responsibilities for also protecting, promoting and fulfilling the rights of children.⁵¹

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

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

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

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

⁵⁰ Heritage Community Foundation, "Nature's Laws: Customary Law", at Albertasource.ca, viewed 10 June 2008. See Chapter 2 for more details.

⁵¹ Thies, Joachim, "Introduction to Rights-based Programming", *Part 1: Rights Based Programming – An Evolving Approach*, Save the Children, Sweden, 2004, p.3.

criminal acts prejudicial to the interests of the country or of its nationals committed outside the territory in which the law is enforced and of which the accused is a national. The exercise of extra-territoriality may be limited by the sovereignty of the State in the territory where the acts take place.⁵²

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

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

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

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

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

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

⁵² Coughlan, Steve; Currie, Robert J.; Kindred, Hugh M.; and Scassa, Teresa, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, Dalhousie Law School, Prepared for the Law Commission of Canada, June 23, 2006, pp. 4-8.

both the legal areas involved and the measures needed to ensure effective application and enforcement of the law.⁵³

Homogeneous system – A legal system based on a single legal tradition, either civil law or common law.⁵⁴

Human rights-based approach (HRBA) to legislative reform – An approach based on international standards and norms and on the full recognition of the equal rights of children, boys and girls, men and women and the realisation of State obligations under the international human rights instruments to which the State is party.⁵⁵

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

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

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

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

⁵³ See Chapter 1 for more details.

⁵⁴ See Chapter 2 for more details.

⁵⁵ See Chapter 1 for details.

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

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

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

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

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

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

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

Legal system – Encompasses all the rules and institutions, based on its legal tradition, which determine how the law is applied.⁵⁶

Legal tradition – The cultural perspective under which the legal system is created, providing the philosophy for how the system should be organised and how law should be formed and implemented.⁵⁷

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

⁵⁶ See Chapter 2 for more details.

⁵⁷ See Chapter 2 for more details.

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

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

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

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

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

Mixed systems – Legal systems which involve combinations of more than one legal tradition often involving some form of customary or traditional law or Islamic law combined with civil or common law.⁵⁸ (Contrast to **Homogeneous systems**, above).

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

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

⁵⁸ See Chapter 2 for more details.

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

Non-refoulement – A principle of customary international law which opposes any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect *refoulement*.⁵⁹

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

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

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

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

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

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

⁵⁹ Global Consultations on International Protection, Cambridge Roundtable, 9- 10 July 2001, organised by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, *Summary Conclusions - The Principle of Non-Refoulement*.

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

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

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

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

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