

# LEGISLATIVE REFORM RELATED TO THE CONVENTION ON THE RIGHTS OF THE CHILD IN DIVERSE LEGAL SYSTEMS NATIONAL CASE STUDIES: ARMENIA, BARBADOS AND GHANA

LEGISLATIVE REFORM INITIATIVE  
PAPER SERIES



DIVISION OF  
POLICY AND PRACTICE  
MARCH 2008

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**LEGISLATIVE REFORM RELATED TO THE  
CONVENTION ON THE RIGHTS OF THE CHILD  
IN DIVERSE LEGAL SYSTEMS**

**NATIONAL CASE STUDIES: ARMENIA, BARBADOS  
AND GHANA**

**LEGISLATIVE REFORM INITIATIVE – PAPER SERIES**

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**This is a working document. It has been prepared to facilitate the exchange of knowledge and to stimulate discussion.**

**This paper is part of the Legislative Reform Initiative – Paper Series, (LRI - Paper series) spearheaded by the Global Policy Section of UNICEF. The aim of the Paper series is to explore and provide guidance on the role of legislation – including regulations which may have a direct or indirect bearing on children – in protecting and advancing children’s rights in a particular area. The Paper Series are intended to increase understanding of the human rights-approach to legislative reform.**

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## Foreword

UNICEF's promotion of law reform in favour of children, with particular emphasis on the rights contained in the Convention on the Rights of the Child, increasingly focuses on the interconnected nature of these rights. Examining national experiences in the legislative harmonization process can further advance CRC implementation and highlight both successes and challenges in the countries in which UNICEF works.

As part of its continuing efforts to fulfil its mandate under the Convention and promote a human rights-based approach to development, UNICEF began a Legislative Reform Initiative in 2003. The studies contained in this Working Paper are one result of this Initiative. They contain an analysis of CRC implementation in four countries with different legal systems—Armenia, Jordan, Ghana and Barbados. The countries identified for the project were limited by the timeframe and resources available. UNICEF offices chosen were asked to prepare desk studies on legislative reform in their countries. Because of UNICEF's emphasis on a rights-based approach to development and legislative reform, the studies did not limit their analysis to statutes and case law. The importance of institutional reform, law enforcement, effective budget allocations, social policies, and wider partnerships among concerned actors are also considered in the studies

A holistic understanding of the dynamics of legislative reform is important to effectively using reform to implement children's rights and integrate them into development efforts. The UNICEF Initiative hopes to enhance global understanding of both the scope and limitations of using law, policy and legal reform to implement children's rights in developing countries. These studies represent one of many stages and products of UNICEF's Legislative Reform Initiative. They, along with other country studies, were used as a foundation for studies comparing experiences from countries with similar legal traditions to examine how the CRC is and can be implemented in different country contexts.

Through this Initiative and the coordinated work of UN agencies, national governments and civil society, UNICEF hopes to witness improved achievement of children's rights across widely divergent legal traditions.

Elizabeth Gibbons  
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## **Executive Summary**

The objective of this working paper is to provide a review of legislative reform in relation to the Convention on the Rights of the Child (CRC) in three different countries – Armenia, Barbados and Ghana. The three countries selected have unique legal and political backgrounds. Armenia, a newly independent state whose legal framework for democratic governance was mainly put in place during the last 12 years, inherited a civil law tradition from the 1<sup>st</sup> independent Armenian Republic of the beginning of the 20<sup>th</sup> century, as well as from the former Soviet Union legal system. In contrast, Barbados is a constitutional monarchy with a parliamentary system of democracy that is modeled on the British Westminster system of government and a common law legal system. Ghana, on the other hand, is a democratically governed country with a mixed legal tradition. It is based on a written constitution, however, with immense influence from customary authority represented by traditional authority (Chiefs and Queen mothers).

Each of the three countries also has its individual experience with legislative reform related to the CRC. Armenian legislation related to children and their families is quite progressive and protective, as Armenia has initiated several reforms in different sectors affecting the lives of children and their families. Yet, there are certain gaps in the legislation, including the need for reformation of structures responsible for the implementation of child-related provisions. The adoption of the National Plan of Action for the protection of children’s rights for the period of 2004-2015, which was elaborated based on provisions of the CRC, was a major step forward in addressing these gaps. However, a wide range of consistent follow up measures should be undertaken.

In contrast, it appears that Barbados has not fully incorporated the CRC into domestic law through national legislation, and that legislative reform since Barbados ratified the CRC has been piecemeal and ad hoc. There has been marginal law reform with respect to juvenile justice, various amendments to the Education Act, and a significant amendment to citizenship provisions of the Constitution. In spite of the passage of legislation purporting to abolish distinctions between the status of children born within and outside of marriage, residual forms of discrimination persist, especially for children born outside marriage whose parents were not involved in a long-term cohabiting union. Juvenile justice also continues to be governed by outdated laws, and the child protection regime is under-inclusive, under-utilized and inadequate. Furthermore, legislative reform has not been part of a coherent policy in Barbados, which is why the reforms have been difficult to implement reforms.

Ghana’s law reform strategy has on the other hand entailed a total and comprehensive review of existing scattered laws on children rather than a piecemeal approach to amendments of these laws. The result is a consolidation of all these laws into three major instruments. However, some traditional practices that do constitute outright infractions upon the rights of children still persist even in the face of legislative provisions that seek to proscribe them. Various institutions have been established to police the guaranteed rights of children. Their scope of coverage is, however, limited to the cities and big towns. The problem of inadequate resources exists and frustrates the expansion and therefore effectiveness and efficiency of the various institutions and measures put in place. Therefore much still remains to be done to ensure maximum effectiveness.

With these three country studies this working paper hopes to share knowledge and inform future initiatives to support legislative reform for the implementation of the CRC. A number of important lessons can be gathered from an examination of the efforts to implement the CRC in Armenia, Barbados, and Ghana. Among other things, all of the studies demonstrate how important it is that the process of “putting the law in place” is accompanied by implementation measures, including institutions that support law enforcement, and prevent exploitation, and with the adoption of policies that ensure the sustainability of these mechanisms.

## Resumen Ejecutivo

El objetivo de este documento de trabajo es realizar un examen de la reforma legislativa en relación con la Convención sobre los Derechos del Niño en tres países diferentes: Armenia, Barbados y Ghana. Los tres países seleccionados tienen antecedentes jurídicos y políticos muy distintos. Armenia, un país recientemente independiente cuyo marco jurídico para la gobernabilidad democrática se estableció sobre todo en los últimos 12 años, hereda la tradición en materia de derecho civil de la 1ª República de Armenia independiente de principios del siglo XX, así como del antiguo sistema jurídico de la Unión Soviética. Por el contrario, Barbados es una monarquía constitucional con un sistema parlamentario democrático cuyo modelo es el sistema de gobierno del Reino Unido y un sistema jurídico de derecho común. Ghana, por otra parte, es un país gobernado democráticamente con una tradición jurídica diversa que, sin embargo, está basada en una Constitución escrita, con una gran influencia de la autoridad consuetudinaria representada por la autoridad tradicional (Jefes y Reinas madre).

Cada uno de los tres países ha llevado a cabo una reforma legislativa relacionada con la Convención. La legislación de Armenia con respecto a los niños y sus familias es bastante progresiva y protectora, ya que Armenia ha llevado a cabo varias reformas en diferentes sectores que afectan las vidas de los niños y sus familias. Sin embargo, hay algunas lagunas en la legislación, entre ellas la necesidad de reformar las estructuras responsables de la aplicación de las disposiciones relacionadas con la infancia. La aprobación del Plan Nacional de Acción para la protección de los derechos de la infancia durante el período de 2004-2015, que se realizó sobre la base de las disposiciones de la Convención, fue una importante medida destinada a abordar estas lagunas. Sin embargo, es preciso que se adopten una amplia serie de medidas uniformes de seguimiento.

Por el contrario, parece que la legislación nacional de Barbados no ha incorporado plenamente la Convención en el derecho doméstico, y que la reforma legislativa desde que Barbados ratificó la Convención ha tenido un carácter fragmentario y se ha llevado a cabo en situaciones especiales. Se ha realizado una reforma marginal de la ley relativa a la justicia juvenil, varias enmiendas en la Ley de Educación, y una importante enmienda sobre las disposiciones de la Constitución relativas a la ciudadanía. A pesar de la aprobación de leyes destinadas a eliminar las distinciones entre la situación de los niños nacidos dentro y fuera del matrimonio, persisten formas residuales de discriminación, especialmente para los niños nacidos fuera del matrimonio cuyos progenitores no han vivido en régimen de cohabitación a largo plazo. La justicia juvenil sigue rigiéndose por leyes arcaicas, y el régimen de protección de la infancia sufre tres problemas: no incluye a un número suficiente de niños, no se utiliza con la frecuencia necesaria y es inadecuado. Además, la reforma legislativa no ha formado parte de una política coherente en Barbados, por lo cual ha resultado difícil poner en vigor las reformas.

La estrategia para la reforma de las leyes en Ghana, por otra parte, se ha realizado mediante un examen total de las distintas leyes existentes sobre la infancia, en lugar de mediante un enfoque fragmentario de las enmiendas a estas leyes. El resultado es una consolidación de todas estas leyes en tres instrumentos principales. Sin embargo, siguen persistiendo algunas prácticas tradicionales que constituyen una clara infracción de los derechos de la infancia, incluso a pesar de que existen disposiciones legislativas que tratan de proscribirlas. Se han establecido varias

instituciones para supervisar los derechos garantizados de la infancia. Sin embargo, su cobertura se limita a las ciudades y los pueblos grandes. Hay un problema de recursos inadecuados que frustra la ampliación y por tanto la eficacia y la eficiencia de las distintas instituciones y medidas establecidas. Por tanto, todavía queda mucho por hacer para garantizar el máximo de eficacia.

Con estos tres estudios del país, este documento de trabajo espera compartir conocimientos y servir de base a las futuras iniciativas en apoyo de la reforma legislativa para la aplicación de la Convención. El examen de las actividades de Armenia, Barbados y Ghana para poner en práctica la Convención podría ofrecer algunas lecciones importantes. Entre otras cosas, todos los estudios demuestran la importancia de que el proceso de “poner la ley en vigor” se acompañe de medidas de ejecución, entre ellas la creación de instituciones que presten apoyo a la aplicación de la ley, y la adopción de políticas para garantizar la sostenibilidad de estos mecanismos.

## Résumé Analytique

L'objectif de ce document de travail est d'examiner les réformes législatives relevant de la Convention relative aux droits de l'enfant (CDE) dans trois pays : l'Arménie, la Barbade et le Ghana. Les trois pays choisis ont chacun un historique juridique et politique qui lui est propre. L'Arménie, nouvel État indépendant dont le cadre juridique de gouvernance démocratique a en majeure partie été mis en place au cours des 12 dernières années, a hérité d'une tradition de droit civil datant de la Première République arménienne indépendante au début du XX<sup>e</sup> siècle ainsi que du système juridique de l'ancienne Union soviétique. En revanche, la Barbade est une monarchie constitutionnelle dotée d'un système de démocratie parlementaire inspiré du système de gouvernement britannique de Westminster et d'un système juridique de droit commun. Le Ghana, lui, est un pays à gouvernement démocratique jouissant d'une tradition juridique mixte. Celle-ci, bien que se fondant sur une constitution écrite, reçoit une énorme influence de droit coutumier représentée par l'autorité traditionnelle (les chefs et reines mères).

Chacun de ces trois pays a également une expérience individuelle des réformes législatives relevant de la CDE. La législation arménienne sur les enfants et leur famille est relativement avancée et protectrice, l'Arménie ayant initié plusieurs réformes dans des secteurs affectant la vie des enfants et de leur famille. Pourtant, il y a certaines lacunes dans la législation, entre autres le besoin de réformer les structures responsables de la mise en œuvre des dispositions relatives à l'enfance. L'adoption du Plan d'action national pour la protection des droits des enfants pour la période de 2004 à 2015, qui a été élaboré sur la base des dispositions de la CDE, a été un pas décisif pour combler ces lacunes. Il faudrait toutefois mettre en œuvre une vaste gamme de mesures de suivi cohérentes.

En revanche, il apparaît que la Barbade n'a pas totalement incorporé la CDE dans le système juridique national en prenant les mesures législatives appropriées, et que les réformes législatives depuis la ratification de la CDE par la Barbade ont relevé du coup par coup. Il y a eu une réforme juridique marginale des tribunaux de la jeunesse, des amendements divers ont été apportés à la Loi sur l'éducation, et la Constitution a fait l'objet d'un amendement significatif portant sur les dispositions relatives à la citoyenneté. En dépit de la promulgation de lois qui sont censées abolir les distinctions de statut entre les enfants issus de mariages et d'unions libres, certaines formes résiduelles de discrimination persistent, surtout à l'endroit d'enfants naturels dont les parents n'ont pas connu de cohabitation à long terme. Les tribunaux pour mineurs continuent aussi à être régis par des lois dépassées, et le régime de protection de l'enfance, sous-utilisé et inadapté, a une application limitée. Qui plus est, à la Barbade, les réformes législatives ne sont pas intégrées à une politique cohérente, ce qui explique pourquoi elles ont été difficiles à appliquer.

Dans le cas du Ghana, la stratégie de réforme juridique a impliqué le réexamen total et exhaustif des lois dispersées qui existaient sur l'enfance et n'a pas consisté en un saupoudrage d'amendements. Le résultat en est une consolidation de toutes ces lois en trois grands instruments. Toutefois, certaines pratiques traditionnelles qui constituent bel et bien des infractions flagrantes des droits de l'enfant persistent, même en présence de dispositions législatives qui cherchent à les proscrire. Diverses institutions ont été créées pour veiller aux droits garantis de l'enfance. Leur champ d'action est toutefois limité aux villes et aux agglomérations principales. Il existe un problème d'insuffisance de ressources, qui entrave le

développement, donc l'efficacité et l'efficience, des diverses institutions et mesures mises en place. Il reste donc beaucoup à faire pour assurer une efficacité maximum.

Avec les études portant sur ces trois pays, ce document de travail vise à mettre les connaissances en commun et à informer les initiatives futures de soutien aux réformes législatives destinées à la mise en œuvre de la CDE. Il y a un certain nombre de leçons qui peuvent être tirés d'un examen des efforts déployés pour appliquer la CDE en Arménie, à la Barbade et au Ghana. Entre autres, ces études démontrent toutes trois à quel point il est important que le processus de « mise en place de la loi » s'accompagne de mesures d'application, notamment la création d'institutions soutenant l'exécution de la loi et empêchant l'exploitation, et corresponde à l'adoption de politiques assurant la viabilité de ces mécanismes.

# **Legislative Reform Related to the Convention on the Rights of the Child in Civil Law Countries: the Case of the Republic of Armenia**

**Hayk Khemchyan**

## **1. Executive Summary**

The Republic of Armenia (hereinafter Armenia or RA) is a newly independent State, which declared independence from the Soviet Union in 1991. Immediately following independence, the breakdown of the Soviet central planning system and disruption of trade and production led to a severe drop in living standards and a rise in poverty throughout the country. The social and economic problems were compounded by two additional factors: the continuing effects of the 1988 earthquake, that killed more than 25,000 people, left another half million homeless, and destroyed 40 per cent of production capacity; and the Nagorno-Karabakh armed conflict, which resulted in an economic blockade against Armenia and the influx of more than 350,000 refugees.

Since its independence, Armenia has been always in the forefront of the democratization process. The legal framework for the democratic governance was mainly put in place over the last 12 years, which, however has not turned Armenia yet into a State exceptionally 'ruled by law'. The laws need to evolve further. RA inherited a civil law tradition from the first independent Armenian Republic of the beginning of the 20th century, as well as from the former Soviet Union legal system.

The main emphasis of the study is legal reform directed at the wellbeing of children and their families and the protection of their rights, as well as their compatibility with international instruments. The existing infrastructures for child rights' protection and law enforcement mechanisms are also examined.

The study revealed that, over the last few years, Armenia has initiated several reforms in different sectors affecting the lives of children and their families (state governance, economic and social reforms, improvement of the judiciary, etc.). Besides the evident results achieved, the study has concluded that there are certain gaps in the legislation, including the need for reformation of structures responsible for the implementation of child-related provisions. The adoption of the National Plan of Action for the protection of children's rights for the period of 2004-2015, which was elaborated based on provisions of the Convention on the Rights of the Child (CRC), was a major step forward in addressing the above-mentioned gaps.

However, for translating the provisions of CRC and the national law provisions into practice, a wide range of consistent follow up measures should be undertaken, which will create a protective environment for all children in Armenia.

## 2. Introduction to Armenia's Legal System

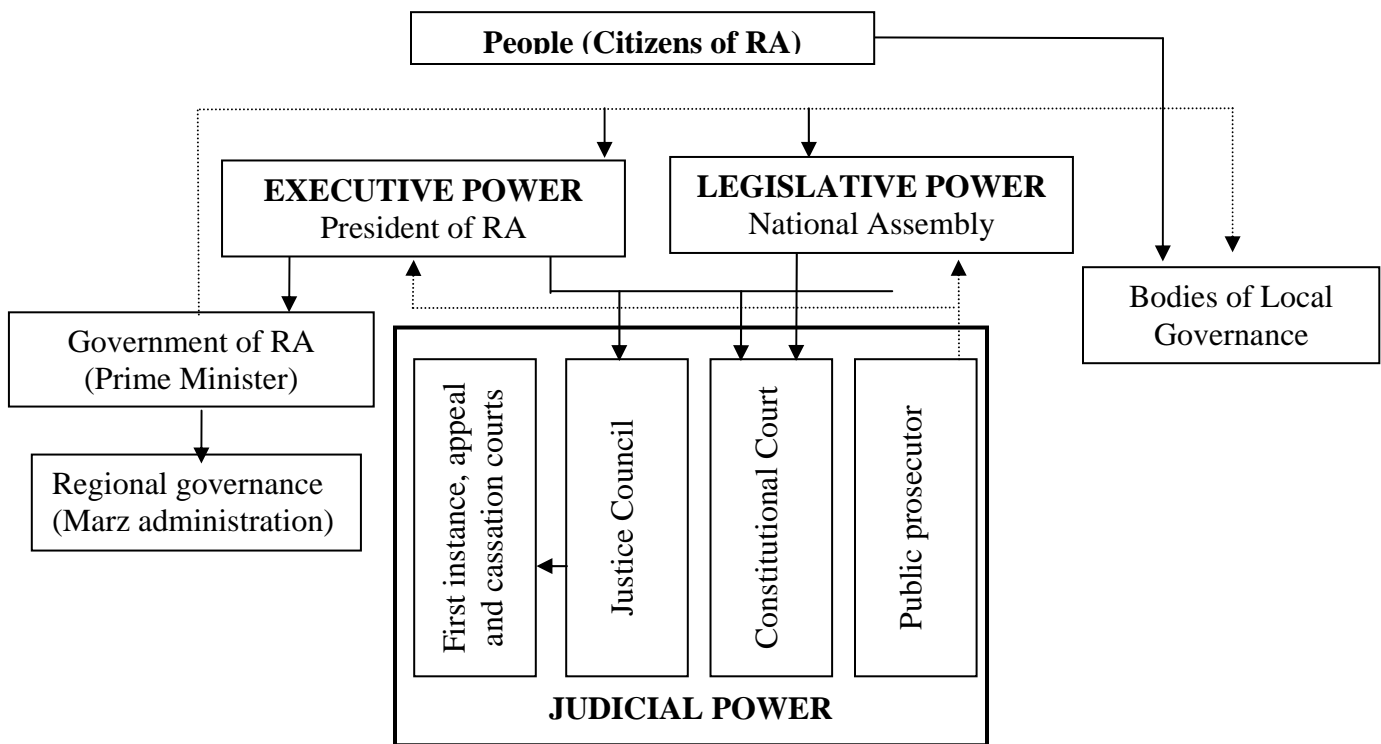
### 2.1. Legal system and political organization

The brief description of the Armenian legislative system and political organization is presented below.

Legislation of RA consists of the Constitution of RA and amendments to it, laws of RA, decrees of the National Assembly of RA, decrees of the Government (equal in force with the laws), decrees and orders of the President of RA, and decrees and acts of the Government or the Prime Minister. RA is an independent, social, and legal State. People vote in elections, referenda, and bodies of state and local governance.

Elections for the President of RA, National Assembly, and bodies of local governance as well as referenda are implemented based on general, equal, and direct election by secret ballot. The State's is responsible for guaranteeing the protection of the rights and freedoms of individuals based on the Constitution and laws, in compliance with the principles and norms of international law. State governance is implemented in compliance with the Constitution and laws of RA based on the principle of separation of legislative, executive bodies, and courts.

The rule of law is guaranteed in the RA under the Constitution. The political organization of RA is presented also through the following chart.





### *First instance, appeal, and cassation courts*

The President of RA, acting as the Head of the Council of Justice appoints and dismisses judges with the recommendation of the Minister of Justice (Deputy Head of the Council of Justice). However, according to the law, when implementing justice, the judge and members of Constitutional Court are independent and are guided by the law. The President of RA approves the yearly report on the professional aptitude and proposed promotion of judges, based on which chairmen of courts and judges are assigned.<sup>1</sup>

### *Justice Council*

Guarantees for the independence of courts are provided by the President of RA. The President is the head of the Council of Justice. The Minister of Justice and Public Prosecutor are the deputy chairmen of the Council. The Council is comprised of 14 members assigned by the President of RA for a five-year period. Two members are legal science specialists, nine are judges, and three prosecutors.<sup>2</sup>

### *Constitutional Court*

The Constitutional Court is comprised of nine members, of which five are appointed by the National Assembly and four by the President. The chairman of the Constitutional Court is assigned by the President.<sup>3</sup>

### *Public prosecutor*

The President of RA, by the recommendation of the Prime Minister, appoints and dismisses the Public Prosecutor. The President also assigns the deputies of the Public Prosecutor and Prosecutors in charge of the structural units of the Prosecutor's office.<sup>4</sup> The Prosecutor submits a yearly report to the President and National Assembly about the activities of the Prosecutor's office.<sup>5</sup>

### *Bodies of Local Governance*

The authority of the community leader (Mayors in town communities, heads of villages in village communities) comprises two parts - compulsory authority and that delegated by the State.<sup>6</sup> This means that the responsibilities of the community leader are dual. One type of responsibility stems from the people and the other from the executive power. Dependence on the executive power is not direct.

### *Language*

The state language of the RA is Armenian. Citizens, independent of their ethnic background, race, gender, language, beliefs, political and other views, social background, property, and other status are entitled to the rights, freedoms, and duties guaranteed by the Constitution and the laws of RA.

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<sup>1</sup> Constitution of the Republic of Armenia, arts. 55 & 95 [Armenian Constitution].

<sup>2</sup> Ibid., art. 94.

<sup>3</sup> Ibid., arts. 55& 99.

<sup>4</sup> Ibid., art. 55 .

<sup>5</sup> Law of the Republic of Armenia on Prosecutor, art. 5.

<sup>6</sup> Law of the Republic of Armenia on Local Self-Government, arts. 7 & 32.

Court proceedings are carried out in Armenian. When stipulated by law, persons involved in the case and having no command of the Armenian language have the right to use a translator's services to familiarize themselves with the materials of the court and participate in the proceedings in their language.<sup>7</sup>

The "free usage of the languages of ethnic minorities" is guaranteed in RA.<sup>8</sup>

## **2.2. Status of the CRC and other international instruments in domestic law**

International agreements with the participation of RA are in force only after ratification. Ratified international agreements are an integral part of the legislative system of the country. If a ratified international agreement contains norms other than those stipulated by the laws, the norms of the agreement apply. International agreements conflicting with the Constitution can be ratified after respective amendments to the Constitution are made (Article 6 of the Constitution of RA).

Principles and norms of international law as well as international agreements made by the country are part of the legal system. Laws and other legal acts of the country shall be in conformity with the generally accepted norms and principles of international law (Law of RA on Legal Acts).

RA acceded to the Convention on the Rights of the Child on 23 June 1993, without reservations. The Republic ratified the CRC's two additional protocols on 30 June 2005.

An international agreement of RA is any written agreement that has been formulated in the form of a contract, agreement, convention, memorandum, protocol, exchange of notes, or other document accepted in international practice.<sup>9</sup>

At present, Armenia does not have a single body in charge of coordinating and monitoring the process of implementing the CRC and CEDAW. One of the achievements in this area is the development of the National Plan of Action on Protection of the Rights of the Child for 2004-2015 (NPA).

The Republican Interagency Committee was established by the Government of RA on 21 June 2001. The committee has created a working group, which developed the NPA and the timetable of actions for the protection of children's rights. Decree No. 1745-N of the Government dated 18 December 2003 approved these. It is important to note that a number of NGO representatives were also involved in this committee.

The National Plan stipulates the solution of issues of the protection of the rights of the child through the realization of target programmes, processes, and outcomes that are to be monitored through a yearly report on the implementation of the programmes.

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<sup>7</sup> Law of Republic of Armenia on the Court System, art. 8,

<sup>8</sup> Law of the Republic of Armenia on Language, art. 1.

<sup>9</sup> Law of Republic of Armenia on the International Agreements of RA, art. 2.

The programme includes improvement of legislation related to children and their families, health, social welfare, education, leisure and cultural life, delinquency, and justice, as well as control mechanisms and further actions.

The NPA calls for the creation of a structure for the coordination and monitoring of implementation of child rights. In addition, the decree of the Government of Armenia dated 27 November 2003 adopted the state strategy on child care reforms.

The activities to be undertaken in the scope of this programme include: creation of a social work institute involved in children's issues; development of support mechanisms for children in conflict with the law and socially vulnerable children; expansion of the network of kindergartens; creation of day care centres for children in all Marzes;<sup>10</sup> assessment of the needs of the biological family of the child in order to reintegrate children in residential care back to their families; development of support mechanisms for families; parental education with regards to the necessary knowledge and skills for child upbringing; training of staff involved in child care; provision of opportunities for vocational training and higher education; implementation of support programmes for foster organizations; revision of legislation on children deprived of parental care; etc.

Structures responsible for the implementation of activities stipulated by the programme are the Ministry of Labour and Social Issues, Ministry of Finance and Economy, Ministry of Education and Science, and the Ministry of Health.

Another important document addressing one of the sensitive issues of child rights is the Anti-trafficking National Plan of Action (2003), which included separate activities directed to prevention of trafficking in children and identification and rehabilitation of trafficked minors.

The international documents to which Armenia is a party, and which directly or indirectly relate to women's and children's rights, are listed below<sup>11</sup> (the list includes only the key international documents related to child rights):

- Convention on the Rights of the Child (Armenia acceded on 1 June 1992, and the two additional protocols were ratified in 2005);
- Convention on the Elimination of All Forms of Discrimination against Women (Armenia joined on 9 June 1993, the additional protocol has been ratified on 23 May 2006, entered into force on 13 October 1993);
- Revised European Social Charter (ratified on 25 December 2003);
- Convention against Discrimination in Education and its Protocol (Armenia acceded on 22 June 1993);
- Convention on the Nationality of Married Women (Armenia acceded to on 16 March 1994);

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<sup>10</sup> Marz is the administrative unit. Armenia consists of 11 Marzes, including Yerevan, the Capital.

<sup>11</sup> All dates of UN treaties are obtained from the OHCHR website (<http://www.ohchr.org/english/countries/ratification>) or the United Nations Treaty Collection (<http://untreaty.un.org/English/access.asp>). All Council of Europe treaties are from their website (<http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp>) All websites accessed July 2007.

- Cooperation agreement on returning children to the places of their permanent registration signed between CIS countries;
- International Covenant on Civil and Political Rights and its Optional Protocol (Armenia acceded on 1 April 1991);
- International Covenant on Economic, Social and Cultural Rights;
- UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules');
- UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines');
- Protocol to prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime (ratified in 2003);<sup>12</sup>
- European Convention on Human Rights and its Protocol No 6;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- European Charter for Regional or Minority Languages (ratified on 28 December 2001);
- Framework Convention for the Protection of National Minorities (ratified on 17 February 1998);
- International Convention on the Suppression and Punishment of the Crime of Apartheid (Armenia acceded on 31 March 1993);
- International Convention on the Elimination of All Forms of Racial Discrimination (Armenia acceded on 31 March 1993);
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (for Armenia entered into force on 21 September 1993);
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Armenia acceded to on 31 March 1993);
- Geneva Convention relative to the Treatment of Prisoners of War (Armenia acceded to on 31 March 1993);
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Armenia acceded to on 31 March 1993);
- Geneva Convention relative to the Protection of Civilian Persons in Time of War (Armenia acceded to on 31 March 1993);
- Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees (Armenia acceded to on 12 April 1993);
- Convention against the illicit traffic in narcotic drugs and psychotropic substances (Armenia joined 24 May 1993);
- UN convention on psychotropic substances (Armenia joined on 24 May 1993);

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<sup>12</sup> According to the United Nations Office on Drugs and Crime, [http://www.unodc.org/unodc/en/crime\\_cicp\\_signatures\\_trafficking.html](http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html). Accessed July 2007.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Armenia acceded to on 9 June 1993)
- Equal Remuneration Convention (ILO Convention No. 100) (Armenia acceded on 21 December 1993)
- Discrimination (Employment and Occupation) Convention (ILO Convention No. 111) (Armenia accede to on 21 December 1993)
- Employment Policy Convention (ILO Convention No. 122) 21 December 1993
- Hague Convention related to civil procedure (Armenia acceded on 11 October 1995); (Hague Convention as of 1 March 1954)
- Standard Minimum Rules for the Treatment of Prisoners;
- Convention on the transfer of sentenced persons (Armenia ratified on 23 February 2000);
- Basic Principles for the Treatment of Prisoners.

### **2.3. Resource allocation and budget support**

The processes of classification, recording, adoption, implementation, and control of the state budget and budgetary system of Armenia are regulated by the Constitution of the Republic, the Law of RA on Budgetary System, the Law of RA on the Regulation of the National Assembly, and the Law of RA on the Budget of the given year. The Government presents the draft state budget to the National Assembly, ensures the implementation of the budget, and presents an implementation report to the National Assembly.

The National Assembly, upon presentation by the Government, adopts the state budget. If the budget is not adopted before the start of the budget year, expenditures are made in proportions identified in the budget of the previous year.<sup>13</sup>

The body responsible for the coordination of budget issues in the National Assembly is the Permanent Committee on Finances and Credit, Budget and Economic Issues.

The state budget finances programmes of state importance and expenditures in the following main areas: state services of a general nature, education and science, health, social insurance and social welfare, housing, culture, sports and religion, and environmental protection.<sup>14</sup> The Government organizes the drafting process for the state budget in consultation with the Central Bank.

The Ministry of Finance and Economy of RA gives the following to state and local governance bodies: methodological instructions, forms and procedures for the application of budget financing and calculation of budgets for the maintenance of budget institutions, and quotas for the allocation of financial means to community budgets from the state budget.

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<sup>13</sup> Armenian Constitution, op. cit., art. 76.

<sup>14</sup> Here, the author of the study has noted only those areas of the budgetary system of the Republic, stipulated by article 18 of the Law on the Budgetary System of the Republic of Armenia, that are directly related to the rights of the child.

The procedures for the discussion and adoption of the draft state budget in the National Assembly are stipulated by the Law of RA on the Regulation of the National Assembly of RA. Amendments and/or additions to the state budget already adopted by the National Assembly can be made according to suggestions by the Parliament members, Government, and as a legislative initiative. Budget relations are regulated by principles of budget uniformity, independence, balancing, and transparency stipulated by the law.

### **Poverty reduction strategy programme (PRSP)**

In order to face the threats posed by widespread poverty, income disparities, and considerable polarization of society as well as the development of civil society, the process of developing the PRSP was started by decree of the Prime Minister. The programme development process engaged branch Ministries involved in social and poverty issues, international organizations, Marz authorities, local governance bodies, permanent committees of the National Assembly, National Statistical Service, political parties, and representatives of non-governmental organizations. The project incorporates goals identified in the Millennium Development Goals adopted in New York.

The PRSP includes such areas related to child protection as social protection (social benefits, pension issues, employment, etc.), health (reducing mother and child mortality, etc.), education (increase of the number of children enrolled in mainstream education, etc.), and other areas. The programme was adopted by the Government of Armenia on 8 August 2003.

Parallel to the development of the PRSP and in order to be able to implement it, the Government has started the development of a medium-term state expenditure programme. For the coming few years, the State has identified the expenditure priority of separate social areas, in particular, education, culture, health, social welfare, and enhancing the effectiveness of social protection systems. In the period 2003-2006, budget allocations to the above areas will increase from 30.17% to 38.86%.

The issues of raising the effectiveness of the child protection in various areas of public life are also stipulated by the Action Plan of the Armenian Government, which was adopted by the National Assembly on 20 June 2003. Implementation of the budget is carried out by the Ministry of Finance and Economy.<sup>15</sup> The National Assembly controls implementation of the state budget as well as the usage of credits and loans received from foreign countries and international organizations.<sup>16</sup> The state budget is monitored by the Government and controlled by the Parliament.

In order to ensure the development, discussion, adoption, implementation, and transparency of the budget:

- After the presentation of the draft law to the National Assembly, the Government publishes it in the media within three days (except on questions of state secrecy).

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<sup>15</sup> Law on the Budgetary System of the Republic of Armenia, art. 23 [Armenian Budget Law].

<sup>16</sup> Law on the Budgetary System of the Republic of Armenia, art 24.

- Mass media is involved in the dissemination of information about the discussion of the draft in the National Assembly (except on questions of state secrecy).
- The quarterly allocation of the state budget is published within 15 days of its adoption by the Government.
- Within one month after the end of each quarter, the Government publishes a report about the budget's implementation.<sup>17</sup>

There is no single structure/state body that is responsible for the realization of the CRC. Each ministry dealing with child issues has a department or a specialist that regulates issues under its authority. This is certainly a deterrent to the necessary fine-tuning and streamlining of all activities targeted at the protection of children's rights.

In 2004, state spending on programmes in the social sector (health care, education, culture, etc.) was 111.7 billion Armenian Drams (AmD), or 35.3 per cent of the state budget. The education and science area is treated as one of the most important and priority areas. Resources allocated by the 2004 state budget for education exceeded the 2000 figure by 21.1 per cent. Special priority was given to elementary, basic, and high school general education programmes.

In the health care sector, the 2004 budget expenditure was formulated based on preserving existing health protection priorities (including mother and child health care) and keeping the social orientation of the health care system. Health care expenditures exceeded the 2003 level by 17.9 per cent.

In the area of social insurance and social security, budget expenditures are targeted to solving the social problems of population (including social protection of families, disabled etc.).

*Data on Basic Indicators Related to Social Sectors*

Basic data (2002 unless otherwise stated)	
Child population (millions, under 18 years)	0.8
U5MR (per 1,000 live births)	35
Underweight (% , moderate and severe, 2000)	3
Maternal mortality ratio (per 100,000 live births, 2001)	22
Primary school enrolment/attendance (% net, male/female, 2000)	69/70, 97/98
Primary school children reaching grade 5 (% , 2000)	100
Use of improved drinking water sources (%)	..
Adult HIV prevalence rate (% , 2001)	0.2
Child work (% , children 5-14 years-old)	..
GNI per capita (US\$)	790
One-year-olds immunized against DPT3 (%)	94
One-year-olds immunized against measles (%)	91

There is no law defining the allocation of financial resources to satisfy the needs of children in the state budget. Each state agency (including the line Ministries) involved in protecting the

<sup>17</sup> Armenian Budget Law, op. cit., art.23.

rights of the child presents yearly budget applications for their system to the Ministry of Finance and Economy.

The timetable of actions attached to the National Plan of Action for the protection of the rights of the child for 2004-2015 includes not only the titles of programmes and activities, their deadlines, and responsible agencies, but also the financing sources and approximately calculation of necessary resources. The state budget has an important role in securing necessary financing sources. Ministries include such expenditures in the mid-term programme of expenditures for the given year.

Some Ministries (Ministry of Justice, Ministry of Education and Science, Ministry of Labour and Social Issues, Ministry of Finance and Economy, Ministry of Culture and Youth Issues, Ministry of Health, etc.) implement reforms in the scope of international cooperation programs, with the help of the World Bank, United Nations, and other benevolent/donor organizations and foundations.

After the adoption of the state budget, the Government defines the quarterly proportions of budget implementation. The body responsible for the implementation of the state budget is the Government of RA. After the end of each quarter, the Government, within forty days, reports to the National Assembly in accordance with the budget classifications defined by the present law and structure of the Law of RA on Budget of the given year (Law on Budgetary System of RA).

### **3. Law Review and Law Reform**

#### **3.1. Law review**

##### **RA laws directly or indirectly related to children**

- Constitution of RA (5 July 1995).  
The family, motherhood, and childhood are under the guardianship and protection of society and the State (Article 32).
- RA Law on Children's Rights  
This law defines the basic rights and guarantees for children, protection of children's rights in unfavourable and crisis situations, as well as and the programme basics of the state policy in the area of child rights protection.
- RA Law on Human Rights Defendant (Ombudsman)  
This law defines the status, role, and responsibility of the Ombudsman, as well as the procedures of applying.

##### *Family law*

- Marriage and Family Code of RA (in force since 1969. The draft of the new code has been adopted by the National Assembly in the first reading).  
Personal and property relations arising between parents and children, relations emerging at adoption, trusteeship, and guardianship, and other issues are regulated under this code.



### *Laws on education and culture*

- RA Law on Education and RA Law on Adoption of the State Programme of Education Development for 2001-2005.  
The laws define principles of the state policy in education and organizational, legal, and financial-educational bases of the education system.
- RA Law on Basis of Cultural Legislation  
The law's objectives include ensuring and protecting the Constitutional right of citizens to freedom of speech, creation and participation in social life; regulating relations emerging during the implementation of cultural activities; defining the principles of state policy in culture; and creating legal guarantees for the conservation and dissemination of the cultural wealth of RA.

### *Laws on medical care, social welfare and labour*

- RA Law on medical care and services of the population.  
The law defines the organizational, legal, economic, and financial bases for provision of services to realize the constitutional rights of the citizens to the promotion of their health.
- Law of the RA on Social Protection of Children Deprived of Parental Care  
The law defines the legal, economic and organizational bases, goals, principles and forms of social protection for children deprived of parental care. The law applies to children deprived of parental care, as well as persons up to the age of 23 classified as being deprived of parental care.<sup>18</sup>

Article 6 defines social guarantees given to children deprived of parental care, and minimum state guarantees for the main indicators of quality of life for children deprived of parental care—including mainstream education, vocational training and higher education based on merit, free medical care and services, provision of food in accordance with minimum nutritional standards, organization of rehabilitation and leisure for children, professional orientation for children after the age of 16, selection of activity areas, securing employment in accordance with the legislation of RA, protection of employment, social support for social adaptation and psycho-social rehabilitation; ensuring realization of the right to housing, and provision of free legal assistance as stipulated by the legislation of RA.

Article 7 of the same law states that children who have graduated from secondary school and are deprived of parental care are accepted and can study in state vocational and higher education institutions free of charge, with financing coming from the state budget.

- Labour Code of RA (in force since 1972. The draft of the new code has been developed and was adopted by the National Assembly in the first reading).  
The law regulates labour relations arising between the employer and the employee (including persons who are 16-18 years old).

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<sup>18</sup> Art. 1.

### *Civil and civil procedure legislation*

- **Civil Code of RA**  
The present law defines the characteristics of adolescents' participation in civil legal relationships: the capabilities of children under the age of 18, procedures for defining trusteeship and guardianship, the legal force of transactions completed by adolescents, limitations of donations by adolescents, responsibilities of adolescents when causing harm, compensation for the harm caused to the health of an adolescent, right to inheritance, and conflicts (not the material) law characteristics.
- **Code of Civil Procedure of RA**  
The present law defines the characteristics of adolescents' participation in civil procedures, particularly, involvement in a civil case as a witness, right to legal representation and the conduct of cases to recognize an adolescent as fully capacitated.

### *Laws on citizenship and refugees*

- **RA Law on Citizenship of RA**  
The present law defines the procedures for obtaining and terminating RA citizenship and a separate chapter deals with the issues of children's citizenship when parents change citizenship.
- **RA Law on Refugees**  
16-year-old children who have received refugee status can apply to authorized bodies to obtain a refugee certificate and travel documents. If persons below the age of 16 do not have parents or other legal representatives in the RA, they are immediately placed under the guardianship of the State.<sup>19</sup>

### *Laws related to juvenile justice*

- **RA Criminal Code**  
The Criminal Code defines the characteristics for criminal responsibility and punishment of minors as well as some criminal assaults against minors and circumstances when a criminal assault is considered 'aggravated' due to the fact that it is committed against a minor. The code has a separate chapter on assault against the interests of the family and the child.<sup>20</sup> The following are considered criminal assaults: violence against children, involving a child in a crime, involving a child in anti-social acts, illegally separating a child from his or her parents or substitution of the child at the maternity hospital, trafficking of children, publishing information about the identity of adopted children or their natural parents adoption, failure to realize the duty of child upbringing, failure to realize the duty of ensuring the security of the life or health of the child as a result of child neglect, improper realization of parental responsibilities, and abusing the rights a foster parent or guardian.
- **RA Law on Amendments and Additions to the Criminal Code of Armenia**  
The law stipulates criminal responsibility in case of providing false information to civic registration agencies. The disposition of the article of the law on human trafficking has

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<sup>19</sup> Arts. 5 and 12.

<sup>20</sup> Ibid., ch. 20.

also been expanded by clarifying the characteristics of the corpus delicti of this criminal assault.

- Code of Criminal Procedure (a draft law amending and adding to the existing codes is being developed currently).  
The code stipulates the characteristics of court proceedings dealing with minors' cases. In particular, it specifies the conditions for the following: pre-trial detention of an adolescent, freeing an adolescent from punishment by applying educational enforcement measures and other characteristic norms.<sup>21</sup>
- RA Code on Administrative Offences  
The code defines the minimum age for administrative (non-criminal) responsibility at 16 years, the scope of the authority of the Commissions on Minors with regards to administrative legislation, legal consequences of the involvement of adolescents in administrative offences, consequences for failure to realize duties of child upbringing and education by parents and persons substituting for them, and special requirements for the arrest of an adolescent by administrative order.
- Corrective Labour Code of RA (in force since 1971. The draft Penitentiary Code has been developed and presented to the National Assembly of RA.)  
The law defines the conditions for the imprisonment of an adolescent in the penitentiary system.
- RA Law on Detention of Arrested and Detained Persons  
The law defines the special requirements for the detention of adolescents. The law provides an opportunity for arrested or detained persons to keep children up to the age of three with them.

#### *Other relevant legislation*

- RA Law on Religious Organizations and Freedom of Consciousness  
Under this law, children below the age of 18 cannot be involved in religious organizations, irrespective of participation in religious ceremonies and other circumstances.<sup>22</sup>
- Law on VAT  
Services targeted at the organization of care and education of children in pre-school institutions, boarding schools, orphanages, institutions caring for children with difficult behaviour and disabilities, services for people in elderly housing as well as realization of goods and services produced by the above persons are VAT-exempt under this law.<sup>23</sup>
- RA Law on Advertising  
The law regulates issues of the moral and physical protection of children during the production, placement, and dissemination of advertising. In particular, involving children in the production of advertising of tobacco and alcohol ads in TV, radio programmes, and publications for children, is prohibited.

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<sup>21</sup> Ch. 50.

<sup>22</sup> Art. 5.

<sup>23</sup> Art. 15.

The first comparative analysis of the CRC and national legislation was conducted in 1999 by the experts of the Ministry of Justice of RA and a local NGO. In 2002, during the development of the National Plan of Action for the Protection of the Rights of the Child, further analytical comparison of RA legislation and basic norms of CRC was carried out. The identified gaps were addressed in the National Plan of Action.

In the scope of the project ‘Support to Gender Development in Armenia’, a gender analysis of RA legislation was implemented in 1998 by the working group created for that purpose.

Taking into consideration the frequent changes in national legislation, periodic review and comparison of legal instruments with the CRC articles should be undertaken. For example, the draft Marriage and Family Code, draft Labour Code, draft Penitentiary Code, and draft amendments and additions to RA Code of Criminal Procedure that were submitted to Parliament, have now been adopted.

### **3.2. Obstacles to legislative reform**

There are a few obstacles deterring legislative reforms, including social factors, legislative gaps, and the absence of relevant structures. Over the past few years, all legal acts were developed in line with the State commitments based on signed or ratified international documents (in particular, CRC and CEDAW). Meanwhile, the acts adopted before the reforms have not been comprehensively analysed or compared with international standards. The absence of coordination in activities to protect child rights is another challenge for the implementation of the reforms.

Given the social-economic situation of Armenia, it is impossible to talk about implementation of legal and legislative norms, which could create conditions more favourable for the realization of children’s rights than those stipulated by the norms of CRC. Until now, the state budget allocation for the social sector (health, education, and social welfare) remains below international standards. This impacts the realization of basic rights for child in the above mentioned sectors (see the examples below).

But the possibility of more favourable conditions in certain sectors of social life cannot be ruled out. For example, Article 28 of the CRC calls for free compulsory basic education under the right to education (basic education is up to the 4th grade in RA), whereas Article 18(7) of the RA Law on Education makes secondary education compulsory until the age of 16. An individual can this right up to this age if it has not been fulfilled earlier (secondary education is defined as school education up to the 8th grade in RA). Moreover, Article 35 of the Constitution of RA stipulates that secondary education is free in state educational institutions.

The main circumstances creating obstacles for the implementation of the reforms are:

- Inconsistency between legislative requirements and the social-economic situation of the country;
- Poor law enforcement mechanisms related to child rights (regulations, standards, professional guidelines, etc.);

- Immaturity or absence of the infrastructure for the enforcement of laws regulating the child right area; and
- Absence of a single structure coordinating the child rights' protection.

### **3.3. Controversies present in the legislation**

#### **Health**

The Law on Medical Services for the Population regulates only the relations arising during the provision of medical services, whereas the area of health is much more comprehensive. It is necessary to adopt a Law on Health.

Article 10 of the Law on Medical Services for the Population stipulates the right of each child to receive free medical care and services within the scope of state health targeted programmes. It is obvious that the right of the child to free medical care and services is greatly dependent on the state budget allocations for the given year, that is, the right cannot be considered as guaranteed. For example, the right of each child in Armenia to be immunized is guaranteed by the State Expanded Programme of Immunization, which is being implemented with the support of UNICEF (the majority of vaccines are procured with UNICEF funding).

Agreement for medical intervention is given by the legal representative of a person who has not attained the age of 18, patients who have been recognized as incapacitated by the law, and for cases in which the state of the patient does not allow expressing his or her will. Each child has the right to receive free medical care and services within the scope of the state programmes targeted to mother and child health protection (e.g. Strategy paper for 2003-2015 on Mother and Child Health Protection, Government decree No 1000 from 8 August 2003).<sup>24</sup>

The CRC clearly expresses the view that States parties should take effective and necessary means to eliminate traditional habits adversely affecting the health of the child.<sup>25</sup> The RA Law on Advertising identifies cases and places where and when placement of advertisements for alcohol and tobacco is prohibited.<sup>26</sup> However, it is still legal to advertise alcohol and tobacco on the streets, although advertising of these products is banned in other areas.

#### **Education**

Although the Armenian Law on Education guarantees equal rights to primary and secondary education, for many families, the costs associated with general schooling combined with an inability to meet even basic needs such as food and clothes have forced them to enroll their children in special boarding schools and orphanages, where education and food are free. As a result, many children are deprived of their basic right to grow up in a family environment.

Based on this law, the State must create necessary conditions for the education of children with special needs. However, most children with disabilities in Armenia still lead very isolated lives, either in institutions or in their homes, and only few have access to mainstream education.

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<sup>24</sup> See the 'Health' section below for examples of gaps in enforcing the law.

<sup>25</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 Sept. 1990, art. 24.

<sup>26</sup> Art. 14.

On 31 July 2001, the RA Law on the State Programme for the Development of Education 2001-2005 was adopted. The descriptive part of the law provides a picture of the main issues present in the area of education, including: limited financing, imperfect legislation, the absence of legislative acts and incomplete enactment of laws, deficiencies of the management system, unclear division of authority, incompatibility of different levels of management, slow pace of integration with international educational community and low level of competition, low level of accessibility and involvement in education, and a number of other issues.

## **Social Welfare**

Since 2002, the Government had initiated child welfare reforms, including a package of policy documents, new laws, regulations, and other amendments to legislation, namely:

- Labour Code (including articles on child labour in compliance with ILO standards);
- Family Code;
- Law on Foster Care;
- Law on Health;
- Amendment to the Government decree on adoption; and
- A de-institutionalization strategy, etc.

“The Regulation of Child Adoption” decree was approved by the Government by decree on 12 February 2000. According to the preliminary edition of the decree, if several persons want to adopt a child, preference is given to the person first recorded as a candidate. To regulate the increasing number of inter-country adoption cases the Government has made an amendment to the previous decree. At present, preference is given to citizens of RA (if after 3 months, no citizen of RA has adopted the child, data on the child is provided to foreign citizens). The 3-month period does not apply to the step father, step mother, and relatives of the child living outside RA, as well as in cases in which there is a prior written agreement between the parents of the child and the person wanting to adopt the child. The amendment, thus, is positive, except for the norms on prior written agreement mentioned above, which can become a factor contributing to trafficking of children.

Regulation of the trusteeship and guardianship bodies has been approved by the above-mentioned decree. The goal of these bodies, as defined in the decree, is ensuring the protection of the rights and interests of children deprived of parental care for one of the following reasons: incapacity of parents; parents recognized as having limited capacities; absence of parents or adoptive parents; parents deprived of parental rights due to a court decision, or any other cause).

Foster care as an alternative to institutionalization is not functioning in the country at all, but it is already included in the draft Family Code and the Ministry of Labour and Social Issues has initiated a pilot project on foster care.

The rights of the child are directly or indirectly related to the mother’s rights. This is particularly clear in RA Marriage and Family Code, in questions related to the care, upbringing and adoption of children; in defining trusteeship and guardianship in those cases; and in a number of other issues.

High migration trends over the past few years have an important role in the overall situation with regards to the protection of children's rights. This is particularly true for children whose parents live in another country or have an uncertain or illegal status, which results in the child's fundamental rights being violated or limited. Moreover, a considerable number of women have become single mothers because of the tendency of men to look for employment in other countries. Based on the situational assessment of childcare institutions, study of orphanages, and screening of boarding schools implemented by UNICEF, it has become clear that the majority of children in residential care institutions come from these families.

## **Justice**

A special emphasis on the protection of child rights is included in the new Penal Code of RA, endorsed by Parliament in 2003.<sup>27</sup> An important step in the area of juvenile justice is the development of the draft Law on Amendments and Additions to the Code of Criminal Procedure. During the development of the draft law, comparisons have been made with a number of international documents, in particular, the UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')<sup>28</sup> and the UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines')<sup>29</sup>.

One of the important advancements in juvenile justice is the more frequent application of alternatives to imprisonment (such as fines—applicable only to those, who have their own income—and community sanctions), foreseen under the new Penal Code.

The absence of specialized juvenile judges in the courts is an issue to be addressed in judiciary reforms.

## **Culture**

The decree of 28 October 2000 expressed the approval of the Government to the basic principle of the preservation, dissemination, and development of culture in RA. The mid-term plan defines the titles of legal acts derived from the concept as well as the deadlines for their adoption. Particular examples are: the Law on Basic Principles of Cultural Legislation, Law on State Support to Cinematography, Law on Libraries and Their Activities, Decree on State Support to Theatrical Arts, and other laws. It should be noted that the majority of deadlines have passed, but the acts have not been adopted.

Additionally, a three-year state programme for the preservation, dissemination, and development of culture for 2005-2008, has been developed.

Some of the issues in the area of culture are: absence of favourable conditions for the creation and dissemination of children's art; necessity of incorporating elements of cultural and science education in the educational plans of mainstream educational, vocational training, and higher educational systems.

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<sup>27</sup> See the list in the 'Review of Laws' section of this study.

<sup>28</sup> *Adopted by General Assembly resolution 40/33 of 29 Nov. 1985.*

<sup>29</sup> *Adopted by General Assembly resolution 45/112 of 14 Dec. 1990.*

There is no effective cooperation between authorized bodies of state, regional, and local governance bodies, as a result of which the consistent policies cannot be maintained.

Given the above-mentioned, the most important reason for not making a complete analytical comparison of RA legislation is the absence of one single body in at least one of the following branches of power—legislative, executive, or judicial—to deal specifically with the child rights issues. As a result, all analyses are fragmented and cannot be completed.

### **3.4. Types of legislative reforms undertaken**

As can be seen from the actions stipulated in the National Plan of Action for the Protection of the Rights of the Child, reforms encompass almost all areas of children's life, including improvement of legislation, health, social welfare, education, leisure, entertainment and cultural life, delinquency and justice, etc.:

Reforms are not only targeted at the review of the discriminative legislation but more at ensuring the system and basis for the enforcement of laws, improvement of policy towards child issues and consolidating steps to achieve these. In order to be able to solve issues in each of the areas outlined, specific goals and objectives have been defined. Reforms encompass all areas of the life of the child in the society.

Recently, a few amendments were made to the Law on the Rights of the Child, which also have an important impact on the protection of children's rights. For example, the amendment to the law reads "Each child has the right to freely express his/her opinion, seek, receive and exchange ideas and information by any means of communication. The right of the child to receive information can be limited by the law."<sup>30</sup> This norm, in fact, guarantees a child's right to awareness of and participation in various aspects of public life. One of the obstacles to the realization of this right is the age-old tradition of not taking the child 'seriously' and treating him or her as a 'child'.

### **3.5. Rationale for undertaking legislative reform**

Reforms undertaken in the area of children's rights are an integral part of the comprehensive reforms taking place in the country.

The Government decree of 18 December 2003, which adopted the National Action Plan on the Protection of the Rights of the Child, notes, as a justification, the responsibilities assumed under the UN Convention on the Rights of the Child and the Special Session of the General Assembly dedicated to the 'World Fit for Children', as well as the principles stipulated by the Law on the Rights of the Child of RA.

As noted in the introduction to the National Plan of Action, its development has taken into consideration the Concluding Observations and Recommendations of the CRC Committee, responsibilities assumed in the scope of the Vienna Declaration and Plan of Action, data presented in the Initial State Party Report under the Convention on the Rights of the Child, as

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<sup>30</sup> Art. 10, Law on the Rights of the Child.



well as the principles stipulated by the outcome document adopted at the Special Session of the General Assembly in 2002 in New York ('A World Fit for Children'), and principles stipulated in the Poverty Reduction Strategy Plan adopted by the Government of RA.

Actions targeted at the protection of children's rights in various areas of public life were supported by the international organizations working in the country (United Nations agencies, the European Commission, the OSCE Yerevan office, the International Committee of Red Cross, the European Committee, international NGOs, etc.). The cooperation has been implemented both on the basis of long-term plans and agreements and short-term measures.

UNICEF Armenia has been the leading agency supporting the implementation of the majority of steps directed to the protection of children's rights. Assistance was given in the form of consultancies as well as organizational and material support, including practical support rendered to the Government in the implementation of following projects during last five years:

- CRC awareness-raising for care providers and staff of institutions (orphanages, boarding schools, juvenile police, juvenile and women's colony);
- Projects directed to early identification and community integration of children with disabilities and children at risk;
- Projects directed to equality of rights for all children (including, for example, inclusive and special education for children with disabilities and school dropouts);
- Improvement in the quality of education (life skills education, student councils);
- Revision of juvenile justice administration;
- Projects directed at de-institutionalization and prevention of institutionalization (support to child welfare reforms, creation of alternatives to institutionalization);
- Promotion of early childhood development projects (parental education); and
- Projects implemented with the Ministry of Health (safe motherhood, National Plan of Immunization, integrated management of childhood illnesses, promotion of breastfeeding, growth and development of the child, basics of infant care).

### **3.6. Institutional arrangements to support the laws**

There is no state structure for enforcing children's rights as guaranteed by the CRC. Within the staff of the Ombudsman of RA there is a special department, which, in addition to other matters, deals with child rights protection issues.

As Point d of Article 2, Part II of Decree No.558 of the Government of RA on 21 June 2001, the Republican Interagency Committee created a working group responsible for the development of the National Plan of Action on the Protection of the Rights of the Child but not for its implementation and monitoring.

According to the Law on the Rights of the Child, "The protection of the rights of the child is implemented by state and local governance bodies having respective authorities. The state cooperates with persons and public institutions involved in child protection through respective

bodies.”<sup>31</sup> The Marriage and Family Code of RA stipulates, “RA Government and Republican and regional governance bodies authorized by the Government implement control over the activities of the trusteeship and guardianship bodies.”<sup>32</sup> According to the 13 March 2000 Government decree, the authorities of the state body of Republican governance were granted to the Ministry of Social Security (Ministry of Labour and Social Issues since the beginning of 2004). As for the authorities of the regional governance bodies, they were granted to Marz administrations. The latter periodically report to the Ministry of Labour and Social Issues.

Apart from trusteeship and guardianship committees, other structures existing in regional and local governance bodies include commissions on minors at the Marz, city, and community level. Their primary function is the implementation of prevention activities and ensuring the link between the child and the family. The most important issue in the activities of these structures is the absence of exemplary regulations. Previously, these commissions were guided by regulations adopted in 1968. Once an exemplary regulation existed, it would be possible to ensure the unity and consistency of policies and activities implemented in different dimensions of children's needs in the territory of the whole Republic, taking into consideration, of course, the characteristics of any given region.

In addition to the structures mentioned above, medical-psychological-pedagogical committees are working in the bodies referred to above.

There is no separate structure dealing with children's rights within the Ministry of Justice of RA. There is a Department of Legal Reforms in the ministry, from which specialists responsible for cooperation regarding children's issues are assigned.

One of the expected changes in the area of justice is the assignment and training of specialized juvenile judges in the courts of first instance, appeal courts, and cassation courts. This issue has been presented in the Concluding Observations of the Committee on the Right of the Child to Armenia.<sup>33</sup> The issue was initially presented in the context of the necessity for specialized juvenile courts. However, due to limited number of children's cases brought to the court (over the past three years, no more than 30 children in the only juvenile prison), creation of juvenile courts in the regions is not advisable. The idea of having one general court in the capital city or elsewhere did not meet approval from the points of view of geographical and organizational inconveniences. Moreover, the creation of a new court implies amendment to the relevant legislation or adoption of a new law, whereas having one or more specialized judges on child issues in each court does not require special laws. The issue is to be addressed at the court system level with the support of the Council of the Chairmen of Courts (this opportunity is stipulated by RA Law on Courts).

Regional departments for registering civil status acts, located within the structure of the Ministry of Justice, were handed over to communities on 18 December 2003 under Decree No. 1699. Both before and after this placement, a serious problem is the non-registration of civil status acts for persons having old Soviet passports (particularly the under-reporting of births). The government

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<sup>31</sup> Op. cit., art. 3.

<sup>32</sup> Art. 144.

<sup>33</sup> Committee on the Rights of the Child, 'Concluding Observations: Armenia', U.N. Doc. CRC/C/15/Add.225 (30 Jan. 2004).

decree adopted the “Regulation of the Passport System of RA”, which stipulates that citizens’ old passports are considered in force until they are replaced with new ones. However, the same decree notes that the provision of these replacement passports was to end on 1 July 2000. As a result, if parents have not replaced their old (Soviet) passports with the new ones, then the birth of a child cannot be registered. This is considered a serious violation of child rights. For example, in only one of the Marzes, more than 500 children have no legal registration.

However, the State had undertaken serious steps to address this issue by introducing new regulation mechanisms in the new Family Code and the draft Civic Registration Law, which has been submitted to the Parliament for endorsement.

There is a mother and childcare department within the Directorate of the Organization of Medical Care of the Ministry of Health. Functions of this department include: situation analyses of the mother and child health care area; needs assessment, planning, development, and implementation of programmes; and overall coordination of the field. The department provides organizational and methodological support to health institutions providing mother and child care services; regulates the legal bases of the field; prepares the state order package; and coordinates the activities of polyclinics, hospitals, and resorts under the authority of the Ministry.

The seventh department under the authority of the Criminal Investigation Directorate of the State Police deals with adolescents’ issues. The goals of this department are: detection and prevention of juvenile delinquency; protection of the rights of the child; recording of children involved in begging and vagrancy; implementation of various activities with families and parents (education, training, securing employment, etc.); cooperation with trusteeship and guardianship committees acting within the structure of regional and local governance as well as commissions on minors acting at city, Marz, and community levels; joint activities with the Children’s Reception and Orientation Centre of the Fund for Armenia Relief (within which a branch of the seventh department exists); and coordination and guidance of branches of the seventh department across the territory of the Republic (approximately 60 branches).

There is no separate structure dealing with children’s rights within the Ministry of Culture and Youth Issues. These issues are dealt with by the Department of State Programmes, Cultural Cooperation, Education, and Science within the Directorate of Cultural Policy.

There is no structure dealing with children’s issues in the Ministry of Education and Science. There is a mainstream education department, which coordinates the development of basic education programmes of mainstream schools, including development of standards and guidance for higher educational institutions and special schools (previously boarding schools). There is also a department of information analysis and development programmes in the Ministry, which coordinates programmes implemented in the area of education and science.

The Department of Family, Women’s and Children’s Issues within the Ministry of Labour and Social Issues directs and coordinates the activities of the Republic’s state and non-state orphanages, studies issues of children deprived of parental care, develops relevant programmes and policies (as well as proposals for amendments and additions to laws and other legal acts), implements central recording of children to be sent for adoption and candidates for adopting

parents, implements control over the activities of trusteeship and guardianship committees, and other functions related to the field.

Article 6 of the RA Law on Court System stipulates that courts must implement justice in accordance with the Constitution of RA, international agreements, and the laws of RA.

In issues of child rights protection, the role of the courts is difficult to define. Indeed, neither special court, nor judges dealing with child issues are specified in the court system of the RA. Court proceedings in cases involving children are implemented based on general principles, taking into consideration the special dimensions of court proceedings for adolescents stipulated by the RA Code of Criminal Procedure<sup>34</sup> and other laws. According to the Code, courts have the authority to free the adolescent of punishment and apply educational measures if the court concludes that the adolescent will be able to correct his or her behaviour without applying punitive measures.

The Committee of the Chairmen of Courts summarizes and provides consultative clarifications with regards to the application of laws. The Committee involves Chairmen from the appeal courts and its chambers, cassation courts, and economic court as well as those of the first instance courts. The Chairman of the Committee is the Chairman of the Appeal court. The Committee of the Chairmen of Courts has the authority submit proposals for the improvement of laws and other legal acts to the authorized state bodies.

In order to raise the application of CRC norms in the activities of courts, UNICEF Armenia, the Ministry of Justice of RA, and the Union of Judges of RA have started a cooperation program which, for the first time in 2003 (after the adoption of the Criminal Code of RA and before its enactment) resulted in the organization of training courses for the judges of RA, where almost all judges of first instance courts and some of the judges from respective chambers of the cassation and appeal courts were involved. For assessment of the effectiveness of the courses, the experts of the Ministry of Justice, with the support of UNICEF, have prepared comparative analyses of the CRC and norms of the new Criminal Code of RA related to the protection of the rights of women and children in the penitentiary system. Similar courses are to be implemented following adoption of the Penitentiary Code of RA.

The Civil Code of RA recognizes the capacity of all citizens to have rights and bear duties, in other words, legal capacity, which emerges with the birth of the person and stops with his or her death. Nonetheless the Code also presents the limitations of the citizen's legal capacity. It defines the capacity of the citizen (civil capacity) to attain and realize civil rights and defines civil responsibilities for him or her to accomplish these responsibilities. This capacity emerges with adulthood, that is, at the age of 18.

Recognition of the adolescent as fully capacitated (emancipation) is implemented based on the decision of the trusteeship and guardianship body, in agreement with parents, adopting parents or guardians, and, where such agreement cannot be achieved, based on the decision of the court. The Code defines the limitations of recognizing adolescents as fully capacitated for those below the age of 14 and those between 14 and 18. These are cases in which legal representatives for the

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<sup>34</sup> Op. cit., Ch. 50.

adolescent realize their rights as well as cases in which adolescents realize their rights on their own. The right to apply to courts is not mentioned among the above rights. Thus, it could be concluded that only the adolescent's legal representatives can apply to courts in cases of violation of the adolescent's rights in civil relations.

Furthermore, the RA Code of Criminal Procedure stipulates that “the rights and legal interests of adolescents, persons recognized as incapacitated or having limited capacities are defended in the courts by their parents (adopting parents), foster parents or guardians.”<sup>35</sup>

The right to present complaints regarding violations of adolescents' rights in the penitentiary system is dealt with in Article 176 of the RA Code of Criminal Procedure, under which, reasons for initiating a criminal prosecution include reporting a crime to the investigating body, investigator or prosecutor by natural or legal persons. It is important to note that the article does not mention the age of the reporting ‘natural persons’. This becomes clear from the following article, which reads: “If the person presenting the claim has attained 16 years of age, he/she is warned against deceptive reports and this fact is fixed by a signature”.<sup>36</sup> Thus, it can be concluded that adolescents under the age of 16 also have the right to report crimes.

The same Code stipulates: “Legal representatives of the victim, civil claimant, suspect or accused are their parents, adopting parents, foster parents or guardians, who during the criminal court proceedings presented the legal interests of the adolescent or incapacitated participant of the proceedings.”<sup>37</sup> Article 59(4) stipulates that the rights of adolescent or incapacitated victims are realized by his or her legal representatives. The same norms are defined for adolescent claimants (Article 61), adolescent suspects (Article 63) and adolescent accused (Article 65).

Creation of a joint body composed of representatives of state and regional governance, community self-governance bodies, civil society and international organizations, and independent experts dealing with child rights issues, as well as participation by children, would make it possible to bring together actions targeted at the enforcement of norms of the Convention on the Rights of the Child and relevant documents addressing children's rights, attain consistency of these actions, and increase their effectiveness.

## **4. The Process of Legislative Reform**

### **4.1. Strategy and role of interested parties**

Broad-ranging reforms implemented in the country including the development and especially carrying out of child rights protection policies would not be possible without cooperation between agencies, international organizations, and NGOs involved in different aspects of social life. As already noted above, the working group developing the National Plan of Action of RA for the Protection of the Rights of the Child 2004-2015 included a number of representatives from NGOs as stipulated by Article 3 of the Law of RA on the Rights of the Child.

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<sup>35</sup> Op. cit., art. 43.

<sup>36</sup> Ibid., art. 177(3).

<sup>37</sup> Ibid., art. 76.

As to participation of children in the mentioned processes, the changes and amendments to RA Law on the Rights of the Child, adopted by the National Assembly on 5 November 2003, are relevant. According to this law: “Each child has a right to freely express his/her opinion, search for, obtain and communicate ideas and information by any means of communication. The right of the child to obtain information can be restricted by the law.”<sup>38</sup> Yet, there are no adequate mechanisms ensuring the enforcement of this norm.

Cooperation between agencies involved in the reforms is as follows. The agency developing the draft of a legal act, before submitting it for discussion to the Government, the National Assembly of RA, or another body adopting it, presents it to other interested agencies for discussion. Following discussion of the comments and suggestions of these interested agencies, the draft is finally edited and forwarded for further discussions or adoption.

In the absence of a single structure dealing with the protection of children’s rights, UNICEF Armenia is in fact trying to coordinate the implementation of steps directed at the protection of the rights of the child at the state and NGO levels. This is evidenced by various long and short-term projects implemented in cooperation with various Ministries and NGOs, the detailed but not comprehensive list of which is presented above in Part 2.5. In addition to the programmes mentioned, over the past ten years UNICEF has implemented programmes directed at raising awareness of CRC principles and norms amongst various types of specialists providing services to children.

The strategy of the reforms is the following: the working group created for the development of the National Plan of Action has implemented a comprehensive study, needs assessment, identification of issues, and goals in different areas of children’s life in society. Based on this, a timetable of actions to be implemented over the next decade, noting the amount and sources of financing needed for the implementation of these actions, has been developed. Both the National Plan of Action and strategy adopted have a sectoral nature. In order to ensure their effectiveness and monitor the process of programme implementation, a child protection structure will be created in the executive branch of the government.

Political instability and war conditions have certainly played a significant role in the emergence of the following problems. The deficiency, if not lack, of attention to child rights protection also has played a major role. The belief that the child is owned and is the ‘sole property’ of his or her family also has had a certain impact. Additionally, the inconsistency of steps aimed at raising awareness has been very important. However, at present the main factors hindering resolution of those problems are the:

- Inconsistency of legislative norms and the social-economic situation of the country;
- Weakness of infrastructures ensuring the enactment of adopted legal acts in the sector;  
and
- Lack of a single body dealing with child rights issues.

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<sup>38</sup> Op cit., art. 10.

## **4.2. Implementation of the law and follow-up**

One of the main reasons for the continuation of traditional beliefs is the deficiency, if not lack, of dissemination and awareness of newly-adopted and existing laws. Legal information disseminated by television, radio, and media is random and not comprehensive. Progress on raising legal awareness can be achieved through consistent and systematic actions.

In school programmes, knowledge of rights and law is taught starting from the 8th grade: Human Rights in the 8th grade, Civil Education in the 9th grade, State and Law in the 10th grade.

Law is included in the curricula of the higher educational institutions, as it relates to the future professions of students of that institution. With the aim of raising the level of active participation by civil society in all levels of governance, research is being carried to develop legal regulation of participation policies, within the framework of UNDP. A Law of RA on Lobbying was drafted and subjected to public discussions with interested parties.

The Police of RA, with the assistance of UNICEF, have implemented and continue to implement regular training programmes for relevant police departments on issues of dealing with children in difficult situations.

As to the training of lawyers, the Ministry of Justice of RA has developed a new draft Law of RA on Lawyers' Activities, in which regular trainings for lawyers and authorities responsible for them are discussed, along with other issues related to lawyers' activities. The last training for lawyers, in which only about 10% of lawyers was involved, was conducted with cooperation between the Lawyers' Union of RA and American Bar Association (ABA). Generally, trainings for lawyers, officers of law enforcement bodies, and other professionals are not regular.

## **4.3. Social policies supporting legislative reforms**

Children's rights issues have not only social, but also psychological bases (notwithstanding the fact that the difficult social situation of a considerable part of society is the source of the majority of issues related to children's rights). This is also the reason for not ensuring the rights guaranteed by the CRC and RA Law on the Rights of the Child in all areas of life. Research has shown that the causes of children being left out by families have a social dimension. In the case of reducing family poverty, it will be possible to ensure the realization of every child's right to grow in their family and a number of related rights. Social policies targeted at strengthening and protecting families will have a direct and positive impact on raising the effectiveness of child rights protection.

## **5. Conclusion: Lessons Learned and Recommendations**

As mentioned in the study, although Armenia ratified the CRC in 1992 and passed a comprehensive Law on the Rights of the Child (LRC) in 1996, which closely mirrors the CRC and provides legislative basis for child rights in Armenia, both documents are still unfamiliar in many governmental institutions and groups that work specifically with children.

In the meantime, it has to be mentioned that much of the post-independence legislation was prepared using international standards and documents. As a result, Armenian legislation related to children and their families is quite progressive and protective. However, the majority of laws remain on paper only and child rights' violations occur on a regular basis.

The adoption of new laws and amendments and additions to existing laws is not sufficient for the creation of a friendly, protective, and participatory environment for children. In order to put the laws into action it is necessary to develop and improve legislative and infrastructural bases and ensure full conformity with the CRC.

The study determined the following gaps and accordingly identified the future steps based on lessons learned:

### **Absence of a unique child rights' protection body**

A child rights protection body, which would be responsible for coordinating and monitoring implementation of the National Plan of Action in cooperation with different bodies at international, national, regional and community levels, needs to be established at the Governmental level;

### **Lack of coordination among key state actors**

Very often, state agencies are developing legislation related to certain areas of child rights with narrow sectoral approach, creating overlap or contradiction between state bodies' strategies and activities. Thus, a multi-sectoral cooperation mechanism is crucial to ensure a comprehensive approach to child rights protection.

### **Poor cooperation between governmental and non-governmental organizations**

The study revealed that the main advocates for child rights have been local and international NGOs. During the last 2-3 years, some NGOs have been actively involved in the development of important policy documents, such as National Plan of Action on Child Rights Protection, Anti-trafficking National Plan of Action and PRSP. However, there is a need to improve this cooperation in order to combine all the professional efforts to create 'a country fit for all children'.

### **Gaps in legislation related to children and their families**

Together with the strength of the domestic legislation, the study identified the main gaps that should be addressed in the process of legislative reforms.

In keeping with Armenia's ratification of certain international instruments (such as ILO Conventions 138 and 182, the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption, etc.), the country should prioritize and address certain aspects of child rights protection (such as birth registration, de-institutionalization, child labour, violence against children, minimum legal age of marriage for girls and other legal gaps raised in the CRC Committee's Concluding Observations to the Armenian state report).



**Poor law enforcement mechanisms**

Unfortunately, progressive legislation does not necessarily ensure a protective environment for all children. The majority of law enforcement mechanisms, inherited from the Soviet Union, became non-functional as a result of non-compliance with international standards and several challenges that the country has faced since independence. Administrative measures, such as development of standards, regulations, and guidelines, should be undertaken for effective enforcement of existing legislation. Complex of measures should be initiated to transform the existing structures and establish new ones that comply fully with international standards.

**Lack of awareness of child rights in society**

Lack of awareness of child rights in society in general and by state officials in particular are one of the major obstacles to the implementation of the child rights-related international and national legislation. An ongoing comprehensive programme for the dissemination of information concerning the CRC, child rights-related domestic legislation, and its implementation should be elaborated. Emphasis must be placed on raising the awareness of professionals working with children (teachers, doctors, law enforcement officials, social workers, etc.) in domestic legislation.

# **Legislative Reform Initiative: National Study of Barbados**

**Tracy Robinson<sup>39</sup>**

## **1. Executive Summary**

### **1.1. Presentation of the State party**

#### **Legal system and political organization**

Barbados is a constitutional monarchy with a parliamentary system of democracy that is modelled on the British Westminster system of government. There is a strict separation of powers between the judiciary and other organs of government, but not between the executive and legislature.

Barbados has a common law legal system and the principal sources of law are the Constitution, legislation, and the common law.

International treaties ratified by Barbados cannot be directly enforced in the domestic courts unless they have been incorporated into domestic law by legislation. However, international treaty obligations can, in some circumstances, be used to assist in interpreting the provisions of domestic law.

#### **Status of the CRC in domestic law**

Barbados has not entered any reservations to the CRC or CEDAW, and the Conventions have not been fully incorporated into domestic law through national legislation. In the event of a conflict between the Conventions and national legislation, the national legislation will prevail except where the national legislation is also inconsistent with the provisions of the Constitution of Barbados 1966.

The Ministry of Social Transformation has the general responsibility for coordinating policies relevant to children and monitoring progress achieved. Responsibility for preparing the Initial Report to the UN Committee on the Rights of the Child was assigned to the Child Care Board, a statutory agency under its jurisdiction. The second Report is being prepared by the Ministry.

In addition, there is a National Committee for Monitoring the Rights of the Child with some responsibility for monitoring the implementation of the CRC. However, the distinct roles of the Committee, the Board and the Ministry are not clear.

#### **Budget**

The Minister of Finance and his or her staff in the Budget Division guide the preparation of the budget after consultations with the relevant Ministries. The Minister is responsible for laying

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before the House of Assembly the annual estimates of revenue and expenditure for public services.

There is no law or administrative rule that requires a determination of the proportion of the budget devoted to children.

## **1.2. Law review and law reform**

### **Law review**

No systematic analytical review of laws related to children to determine their compliance with the CRC, with a view to law reform, has been completed by the National Committee for Monitoring the Rights of the Child. A review was conducted for the purposes of preparing the Initial Report to the United Nations Committee on the Rights of the Child.

The Child Care Board has forwarded concerns on the appropriateness of some laws dealing with the care and protection of children to the Ministry of Social Transformation, and the Minister in turn has put these before the Cabinet for discussion.

The Family Law Council reviewed the Family Law Act and made recommendations, among other things, to broaden the definition of a child of a marriage and a child of a 'union other than marriage' and to require the courts to have regard to international human rights commitments and the findings of published research in taking into account the needs of a child in child maintenance issues.

The Constitution Review Commission reviewed citizenship provisions in the Constitution and recommended, among other things, that children born of Barbadian males and females should be treated equally.

### **Types of legislative reform undertaken**

Legislative reform since Barbados ratified the CRC has been piecemeal and ad hoc. It has included the enactment of legislation dealing with the care and protection of children. There has been marginal law reform with respect to juvenile justice, various amendments to the Education Act, and a significant amendment to citizenship provisions of the Constitution.

In spite of the passage of legislation purporting to abolish distinctions between the status of children born within and outside of marriage, residual forms of discrimination persist, especially for children born outside marriage whose parents were not involved in a long-term cohabiting union.

Juvenile justice continues to be governed by outdated laws.

The child protection legal regime has been expanded by law reform. However, here too, the reform has been piecemeal and the result is that the child protection regime is under-inclusive, under-utilized, and inadequate.

Laws relating to corporal punishment and other aspects of the punishment of children may now be inconsistent with the current interpretation of the Constitution as it relates to ‘inhuman and degrading punishment’ and the separation of powers doctrine.

### **Rationale for undertaking legislative reform initiatives**

Legislative reform relating to children has been guided by the policy objectives of different ministries, but the combined goals of protecting the rights of women and children are a recurring theme in reforms dealing with sexual and domestic violence. Whether this is due to the exposure of public officials to prevailing trends in children’s rights from projects and events which are hosted by UNICEF or in response to daily expediencies of duty is very hard to determine. What is obvious, however, is that the CRC does not provide an overt framework for the work of state agencies

### **Institutional changes put in place to support laws**

No institutions have been created aimed at supporting the implementation of the CRC.

## **1.3. Process of legislative reform**

### **Strategy and actors**

Ministries have been the principal engine of legislative reform relating to children, along with specialized agencies like the Child Care Board, and committees and commissions such as the Family Law Council and the Constitution Review Commission. The Men’s Educational Support Association (MESA) has emerged as an influential voice in debates concerning the rights of men, women, and children. The National Committee on the Rights of the Child has yet to play a decisive role in legislative reform.

## **1.4. Implementation of the law and follow-up actions**

The attendance centres for young offenders provided for in the Penal Reform Act have not been established. No implementation measures have been put in place to ensure that domestic violence legislation becomes a viable child protection mechanism.

### **The use of law in court disputes and by judges in court decisions**

There is no evidence of the courts in Barbados making direct reference to the provisions of the CRC. However these courts have adopted principles embodied in the CRC, such as the ‘best interests of the child’ principle, in applications for custody, care and control, and maintenance of children.

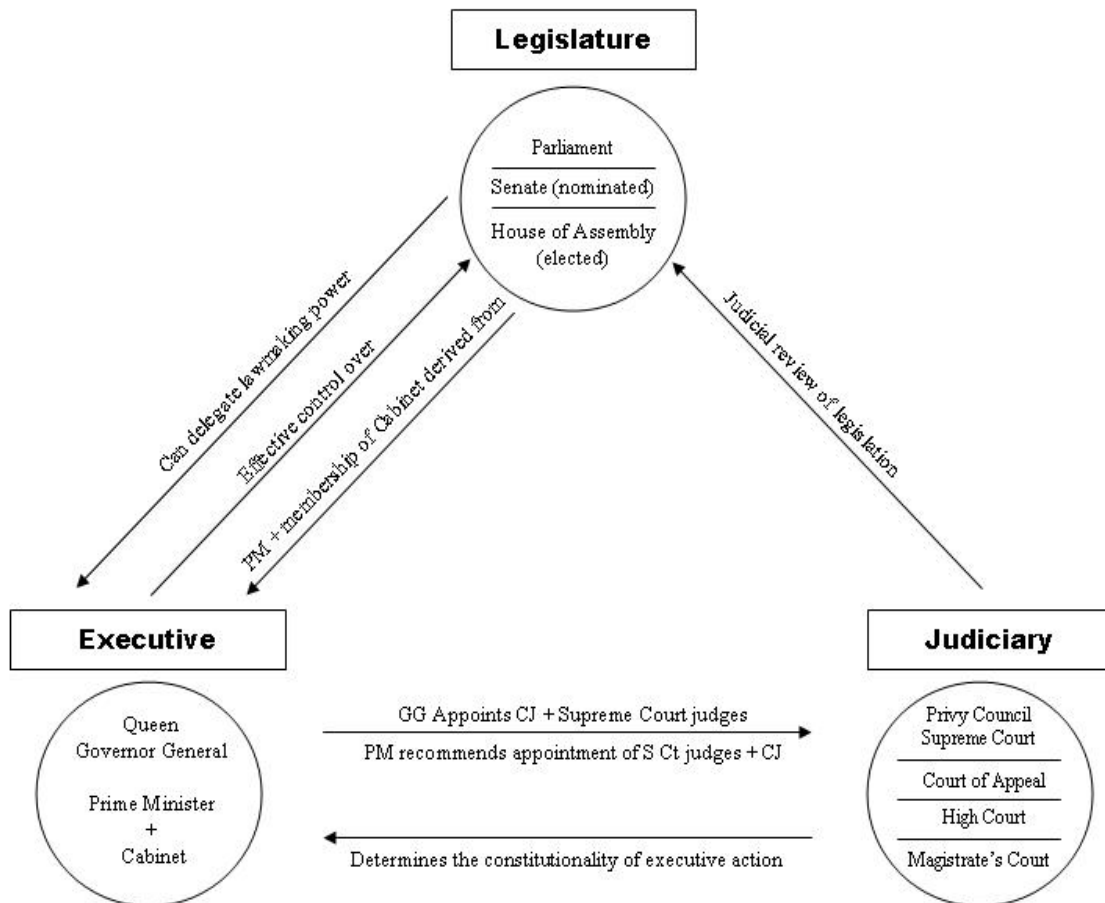
## 2. Presentation of the State Party

### 2.1. Legal system and political organization

#### Political organization

Barbados is the most easterly island in the chain of islands in the Caribbean Sea. English is the official language and is used in the courts and administrative institutions. A Barbadian dialect is spoken in addition to English.

The island gained its independence from Britain in 1966. The Independence Constitution of 1966 is still in force in Barbados and it models the British Westminster system of government. The country is a constitutional monarchy with a parliamentary system of democracy. The Constitution is supreme and the organs of government must act in accordance with its provisions.



#### *The Executive*

Formal executive authority is vested in Her Majesty, the Queen of Britain. She is represented in Barbados by the Governor General, who is appointed by the Queen on the advice of the Prime Minister. Effective executive authority lay with the Prime Minister and Cabinet, who are charged with the general direction and control of the government. They are collectively responsible to

Parliament. The members of the Cabinet are appointed by the Governor General, acting in accordance with the advice of the Prime Minister, from among the members of the two Houses.

### *The Legislature*

Parliament has the power to make laws for the peace, order, and good government of Barbados. It consists of Her Majesty, a Senate, and a House of Assembly. The House of Assembly is an elected body with 30 members. The Prime Minister is appointed by the Governor General from that House on the basis of his or her ability to best command the support of the majority of the members of that House. In practice, the person appointed is the leader of the political party that wins the most seats in the House of Assembly. The Senate consists of 21 persons appointed by the Governor General, 12 of whom are appointed on the advice of the Prime Minister, 2 on the advice of the Leader of the Opposition, and 7 on the discretion of the Governor General.

For expediency, an Act of Parliament can delegate subsidiary law-making functions for more detailed rules and regulations ancillary to the Act to public authorities or functionaries in the executive branch. For example, the Child Care Board Act, Cap. 381, provides that the Child Care Board, with the approval of the Minister of Social Transformation, may make regulations with respect to foster care, among other things.

### *The Judiciary*

The Caribbean Court of Justice (CCJ) was established by a 2001 treaty signed by twelve member states of the Caribbean Community (CARICOM) and inaugurated on 16 April 2005. It has assumed final appellate jurisdiction for Guyana and Barbados, replacing the jurisdiction of the Judicial Committee of the Privy Council in London. The Court comprises the President and six other judges. The President is appointed by a qualified majority vote of three-quarters of the contracting parties on the recommendation of the Regional Judicial and Legal Services Commission. The other judges are appointed by a majority vote of all members of the Commission.

The Supreme Court of Judicature, which comprises the Court of Appeal and the High Court, is next in the hierarchy. The Chief Justice is the head of the Supreme Court. Both the Chief Justice and the other judges of the Supreme Court are appointed by the Governor General on the recommendation of the Prime Minister, after consultation with the Leader of the Opposition. The Supreme Court judges enjoy financial security and security of tenure. They are entitled to remain in office until retirement and can only be removed by an elaborate process for inability to discharge the functions of their office or for misconduct. The provisions in the Constitution dealing with the method of appointment, financial security, and security of tenure are designed to assure judges a high degree of independence from the two other branches of government.

The Magistrate's Courts are inferior courts with summary jurisdiction. They are presided over by trained lawyers who do not enjoy the constitutional protections of judges of the superior courts. In theory, Parliament has the power to abolish, by ordinary legislation, the office of the lower judiciary, reduce their salaries while they are in office, or provide that their appointments are for a short period of time.

### *Separation of powers*

The separation of powers doctrine is a feature of ‘Westminster model’ constitutions like the Barbados 1966 Constitution.<sup>40</sup> Notwithstanding this fact, there is no strict separation either in theory or in practice between the executive and legislative branches. All of the members of the Cabinet come from the Houses of Parliament. The Prime Minister has extensive power because he or she has the power to dissolve Parliament and substantial control over the appointment and removal of the Ministers in his or her Cabinet. Though the Constitution provides that the Cabinet and Prime Minister are collectively responsible to Parliament, in practice the legislature is controlled by the executive because the ruling political party is generally guaranteed the support of the majority of the members in both Houses of Parliament.

The executive authority of Cabinet and the Prime Minister is to some extent diffused by the creation under the Constitution of a Judicial and Legal Service Commission, a Public Service Commission, and a Police Service Commission to deal with the appointment, dismissal, and discipline of members of the public services.

The separation of powers is most clearly defined with respect to judicial power. Judicial power can not be granted to or assumed by a non-judicial body, without an amendment to the Constitution. The jurisdiction of the superior courts is jealously guarded against encroachment by the executive or legislature. Any attempt by ordinary legislation to strip the Supreme Court of its jurisdiction and transfer it to tribunals presided over by persons who are not judges of the Supreme Court will be invalidated by the courts.

### **The legal system**

Barbados has a common law legal system. The island was ‘settled’ by the British in 1625 and remained under British rule until its independence in 1966. The principal sources of law in Barbados are the Constitution, legislation, and the common law.

### *The Constitution*

The Constitution is the supreme law of the land and any other law, whether statute or common law, that is inconsistent with its provisions, is void to the extent of the inconsistency. The High Court is viewed as the guardian of the Constitution. It has the power of judicial review, that is, the power to determine the constitutionality of any law or act of the executive and grant appropriate relief.

The Constitution contains a chapter protecting fundamental rights and freedoms, commonly referred to as the ‘bill of rights’. The chapter uses very broad language and, as a result, judges play a crucial role in determining the meaning of the provisions. Any person alleging that any of these protected rights has been infringed in relation to him or her has a right to approach the High Court for redress. There is one crucial limitation: the Constitution constrains the High Court from holding that anything contained in or done under the authority of any legislation that was in force before Independence is inconsistent with the provisions protecting fundamental rights and freedoms.

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<sup>40</sup> *Hinds v. R* [1977] AC 176.

## *Legislation*

Legislation enacted by Parliament and delegated legislation made by public functionaries and authorities are the most important sources of laws relating to children in Barbados.

During the colonial period, the usual practice was for the colonial legislature in Barbados to enact the British legislation verbatim or with some modifications.<sup>41</sup> These existing laws, including the common law, were continued in force after Independence. Some existing statutes have been repealed since Independence and others have continued in force, often with amendments. For example, the Reformatory and Industrial Schools Act was enacted in 1926 and since then has been amended approximately ten times.

From the late 1970s to the early 1980s, Barbados began comprehensive reform of its social legislation. Some of the reforms went beyond the applicable legislation in the United Kingdom at the time, and Barbados began looking to other jurisdictions in the Commonwealth, such as Australia and New Zealand, for guidance on progressive law reform. The result is that the legislative regime relating to children includes statutes that were enacted during the colonial period and modelled on UK legislation and legislation enacted during the post-independence period, some of which are modelled on laws from other parts of the Commonwealth. Barbadian courts have insisted that precedents developed by English courts are generally irrelevant to the interpretation of Barbadian legislation that is not modelled on UK statutes.<sup>42</sup>

## *The common law*

The common law, or judge-made law, is a crucial source of law in Barbados.<sup>43</sup> English common law was received in Barbados from the date of settlement of the island.<sup>44</sup> The common law, understood narrowly as legal principles developed by judges in the absence of legislation, is a rapidly diminishing source of child law in Barbados. Some of the English common law principles received during the colonial period continue to apply, such as the inherent jurisdiction of the court to act in the interests of the child by making the child a ward of the court. Parliament has the power to enact laws that overrule the common law and many of those principles have been superseded by legislation.

If the term ‘common law’ is understood more broadly to refer to all judicial decisions, then its continued importance to the development of laws relating to children in Barbados is indisputable because judges are central to the development of the law through their interpretation and application of legislation. This is especially true in family law in Barbados, where legislation generally gives the courts wide discretion to determine the outcome in each case.

The doctrine of judicial precedent orders the common law system. Judges are required to take into account the decision of other judges in earlier cases on the same point or issue. Although Barbados is a sovereign state, its courts generally treat judicial precedent developed by the Privy

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<sup>41</sup> Antoine, Rose-Marie Belle, *Commonwealth Caribbean Law and Legal Systems* (London, Sydney: Cavendish Publishing Limited, 1999), pp. 60 – 62.

<sup>42</sup> See *Proverbs v. Proverbs* (2002) 61 WIR 91 (Court of Appeal, Barbados).

<sup>43</sup> The term ‘common law’ is notoriously ambiguous and taken to mean many different things depending on the context in which it is used.

<sup>44</sup> Antoine, op. cit.



Council in other Caribbean countries as binding. Relevant precedents developed by the House of Lords of England or the Privy Council in other Commonwealth countries are extremely persuasive in Barbados and, in many instances, treated as binding.

The development of law through judicial decision-making is ad hoc because the courts can only respond to the cases that come before them. Poor reporting of written judicial decisions in Barbados further weakens the development of law. More significantly, many matters in the courts dealing with children are heard in the Magistrate's Courts and only an infinitesimal number of decisions in these courts are written.

### *International treaties*

Like in most Commonwealth countries, international treaties ratified by Barbados cannot be directly enforced in the domestic courts unless they have been incorporated into the domestic law by legislation.

Notwithstanding this, international obligations can have relevance in the domestic courts. It has been acknowledged that the antecedents of the human rights provisions of the Constitution are international instruments—notably the European Convention on Human Rights and the UN Universal Declaration of Human Rights of 1948. In the well-known Privy Council decision of the *Minister of Home Affairs v. Fisher* from Bermuda, which is good law throughout the Commonwealth Caribbean, the Privy Council stated that these antecedents called for a generous interpretation of those provisions of the Constitution, avoiding what has been called 'the austerity of tabulated legalism'.<sup>45</sup> As a result, in interpreting the provisions protecting fundamental rights and freedoms in that Constitution, the Privy Council rejected the narrow meaning of 'child' as legitimate child that had been accepted at common law and under many UK statutes at the time.

The leading decision on the status of international treaty obligations in domestic law is *Boyce & Joseph v R* decided on 7 July 2004 by the Privy Council on an appeal from Barbados.<sup>46</sup> It confirmed that treaty obligations can be used to clarify domestic law where there is ambiguity, especially where the domestic law was enacted to give effect to treaty obligations. There Lord Hoffman giving the decision of the Board said that:

“The rights of the people of Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations. Where there is ambiguity in the domestic law, international treaty obligations can be invoked to clarify the law. 'So far as possible' means that if the legislation is ambiguous ... the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty.

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<sup>45</sup> [1980] AC 319 (Privy Council, Bermuda).

<sup>46</sup> *Boyce (Lennox) and Joseph (Jeffrey) v R* (2004) 64 WIR 37, [2004] 3 WLR 786, [2004] UKPC 32, PC.

This principle is obviously at its strongest when it appears that the domestic law was passed to give effect to an international obligation or may otherwise be assumed to have been drafted with the treaty in mind. Its application to laws which existed before the treaty is more difficult to justify as an exercise in construction but their Lordships are willing to proceed on the hypothesis that the principle requires one to construe the constitution and other contemporary legislation in light of treaties which the government afterwards concluded.”

The recent CCJ decision *Att Gen v Joseph*, involving the same defendants has not interfered with this ruling.<sup>47</sup>

*Child related treaties to which Barbados is a party*

<b>Child-related treaties</b>	<b>Ratification /Accession</b>	<b>Date</b>
Convention on the Rights of the Child	Yes	9 October 1990 (no reservations)
Optional Protocol to CRC on the involvement of children in armed conflict	No	
Optional Protocol to CRC on the sale of children, child prostitution and child pornography	No	
Convention on the Elimination of All Forms of Discrimination against Women	Yes	16 October 1980 (no reservations)
Optional Protocol to CEDAW	No	
International Labour Organization Minimum Age Convention No. 138	Yes	4 January 2000
International Labour Organization Worst Forms of Child Labour Convention No. 182	Yes	23 October 2000
Protocol to the Convention on Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, especially women and children	No (signed 26 Sept. 2001)	
The Convention Relating to the Status of Refugees	No	
Protocol to the Convention Relating to the Status of Refugees	No	
The Convention Against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment	No	
Inter-American Convention on Support Obligations	No	
Inter-American Convention on The International Return Of Children	No	
Inter-American Convention on Conflict of Laws Concerning The Adoption of Minors	No	
Inter-American Convention on International Traffic In Minors	No	
Inter-American Convention on The Prevention, Punishment And Eradication of Violence Against Women ‘Convention Of Belem Do Para’	Yes	8 February 1995
Convention on the Recovery Abroad of Maintenance	Acceded to 18 June 1970	
Convention on the Nationality of Married Women	Acceded to 26 October 1979	
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	Acceded to 1 October	

<sup>47</sup> *Att-Gen v Joseph* 8 November 2006, CCJ, Barbados (CCJ Appeal No. CV 2 of 2005).

	1979	
International Covenant on the Protection of Migrant Workers and their Families	No	

## 2.2. Status of the CRC in domestic law

Barbados has not entered any reservations to the CRC or CEDAW.

Neither the CRC nor CEDAW has been incorporated into domestic law through national legislation. Therefore the Conventions cannot be directly enforced in domestic courts. In the event of a conflict between the Conventions and national legislation, the national legislation will prevail. The exception is where the national legislation is also inconsistent with the provisions of the Constitution of Barbados. In that case, the High Court has the power to declare the legislation void to the extent of its inconsistency with the Constitution. However this depends on an action being brought by a person affected.

The responsibility for matters relating to children and women is shared across many Ministries and government departments. The Ministry of Social Transformation has ministerial responsibility for the agencies most explicitly charged with matters relating to children and women—the Child Care Board and the Bureau of Gender Affairs. It also has the general responsibility for coordinating policies relevant to children and monitoring progress achieved. In the past, the Ministry of Social Transformation has assigned the responsibility of preparing reports to the UN Committee on the Rights of the Child and the UN Committee on the Elimination of Discrimination against Women to the Child Care Board and the Bureau of Gender Affairs, respectively. Responsibility for the preparation of Barbados’ second report has been assumed by the Ministry.

The Child Care Board has the responsibility to provide and maintain child care centres for children in need of care and protection, to provide counselling and other services, to place children in foster homes and to supervise foster children and foster parents and any other responsibility assigned to it by the Minister of Social Transformation. The Initial State Party Report of Barbados to the Committee on the Rights of the Child in 1996 states that “the Child Care Board is the authorized body to advocate on behalf of child and as such through its supervising ministry . . . will be responsible for the monitoring and implementation of the Convention.”<sup>48</sup> The Board is not currently performing the role of monitoring implementation of the CRC, and its focus remains almost entirely on matters relating to the care and protection of children.

There is understandable confusion about the role of the Board in monitoring the CRC because the National Committee for Monitoring the Rights of the Child, first set up in 1998, was established to monitor implementation of the Convention. The Director of the Child Care Board sits on the National Committee but the Board does not provide administrative or other support to the Committee. The Committee reports directly to the Minister of Social Transformation and, through the Minister, to the Cabinet. That Ministry provides the secretariat for the Committee.

<sup>48</sup>CRC Committee, ‘Initial reports of States parties due in 1992: Barbados’, U.N. Doc CRC/C/3/Add.45 (11 Feb. 1997), para. 11 [‘Barbados: Initial CRC Report’].

### 2.3. Budget

The Cabinet is charged with the general direction and control of the government and therefore has the power and duty to develop and prepare the budget. The Minister of Finance is responsible for laying before the House of Assembly the annual estimates of revenue and expenditure for public services during the succeeding financial year, in the form of an Appropriation Bill.

The process for adopting the budget is as follows:

- The Ministry of Finance develops the short, medium, and long-term goals, objectives, and policies of the government and uses a development plan as an analytical tool to prepare the estimates. It outlines the government's development strategies, including the implementation of social and economic legislation.
- That Ministry of Finance issues a budget circular to the Ministries to guide the preparation of their submissions, which include the schedule of personal emoluments, draft estimates of expenditure and revenue, and programme budgets. Ministers are instrumental in shaping the priorities put forward in the programme budget document, which reflect the objectives, plans, funding required, and key performance indicators for different areas. These documents are used for control and accountability purposes after the budget is approved.
- An NGO seeking government funding for its activities will do so through the Ministry with responsibility for the particular programme or project. The Ministry must ensure that the request is consistent with government policy and the Attorney General must ensure that it fulfils all legal requirements. A cabinet paper is prepared by the line Ministry and sent to the Ministry of Finance for support before Cabinet approval is sought.
- The budget staff in the Ministry of Finance holds Preliminary Estimates Meetings with the line ministries and departments on expenditure budget allocations. Then there is a Major Estimates Meeting, in which personnel from the various line ministries and departments are required to justify their need for the funds requested. The Minister of Finance settles any disagreements in the allocation of funds.
- The Ministry of Finance prepares the draft budget documents and Appropriation Bill and cabinet paper. The Cabinet Paper is vetted by the Attorney General and approved to be laid in Parliament. The documents are submitted to Cabinet for approval and then laid in Parliament (presented to Parliament for debate and approval.)
- Members of Parliament debate the Estimates and any amendments to the Estimates are made. The parliamentary debates are broadcast in various media and there is wide public debate accompanying the parliamentary debate.
- The House of Assembly votes to approve the Appropriation Bill. The Senate does not have the power to change or amend the sums being voted on.
- The Appropriation Bill is sent to the Governor General for his or her assent, at which point it becomes a legal document authorizing the execution of the Government's fiscal programme for that budget year.<sup>49</sup>

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<sup>49</sup> Correspondence with Mr. Edison Alleyne, Budget Division, Ministry of Finance.

- The sums voted in the Estimates by the House of Assembly for a financial year represent the limit of the public expenditure for that financial year.<sup>50</sup> The Minister of Finance can, during the financial year, present supplementary estimates of expenditure before the House of Assembly.
- The Ministry of Finance allocates funds on a quarterly basis to the line Ministries. In releasing the funds for the second, third, and fourth quarters, the line Ministries must justify their expenditure in the previous quarter to receive further funding. The budget staff may visit the Ministries to inspect the status of the work being done. Analyses are carried out the budget staff on the financial performance of the various Ministries.

There is no law or administrative rule that requires a determination of the proportion of the budget devoted to children. Government officials in some Ministries can roughly identify line items in the budget where there is significant expenditure on children.

There has been an attempt to introduce gender budgeting. Barbados was part of the Commonwealth Secretariat’s pilot project, which was spearheaded by a high-level secondment from the Central Bank to the Ministry of Finance. The Commonwealth Secretariat delegation met with key players and, in April 1999, a workshop was held involving approximately three representatives from each key Ministry. Participants developed skeletons of reports for each sector on the basis of gender-targeted, employment equity, and mainstream expenditures. A report elaborating on the skeleton produced by the workshop was produced by a consultant.<sup>51</sup> However, the Ministry of Finance and the various Ministries never took ownership of the project. This may be partly attributable to the absence of institutional continuity because the person spearheading the initiative was seconded from another agency. Second, the report produced was “fairly academic and probably more attractive to the sophisticated gender analysts in the country than to government officials.”<sup>52</sup> The lessons learnt from this effort should be instructive for any attempt to institutionalize budgetary practices that disaggregate social expenditure for children.

The table below reflects only those line items under each Ministry for which one can easily assume the expenditure is on children. It is not possible to accurately state the proportion of the budget devoted to social expenditure for children.

*Central Government Expenditure on Children*

	Projected 2004 – 2005 (BDS\$ millions)	Actual 2002- 2003 (BDS\$ millions)
<i>Ministry of Health</i>	242.668	
Maternal and Child Care Polyclinics	18.006	16.204
<i>Ministry of Social Transformation</i>	76.613	
Welfare Department	20.018	25.815
Child Care Board	16.112	15.051

<sup>50</sup> Barbados, ‘Financial Management in the Public Sector: A Manual for Executive Managers and Junior Staff’, Edison Alleyne, compiler and Donald Derman, ed. (Bridgetown: Government of Barbados, 1996).

<sup>51</sup> Commonwealth Secretariat, *Review of Gender Budget Initiatives* (Commonwealth Secretariat: London, 2000), p. 9.

<sup>52</sup> Ibid.

<i>Ministry of Education, Youth Affairs &amp; Sports</i>	243.310	
Primary and Composite Schools	92.130	89.886
Primary Education Domestic Programme	2.102	1.978
Special Schools	.775	.775
Education Sector Enhancement Programme	30.221	26.545
Samuel Jackman Prescod Polytechnic	10.689	10.172
Assisted Private Schools	1.707	1.879
Grants to Non-Profit Agencies	.645	
Secondary Education CDB	2.121	8.761
Children at Risk	.613	.494
Secondary Schools	103.526	98.88
Barbados Language Centre	2	.138
Examinations	3.782	2.714
Transport of Pupils	3	5.743
Audio Visual Aids Departments	1.825	1.563
School Meals Department	19.558	18.065
Project Oasis	.8	
Youth Programmes	8.01	6.362
<i>Ministry of Home Affairs</i>	26.553	
Probation Department	1.669	1.491
Industrial Schools	3.491	2.9
Total	2,438.188	2,239.060

Source: Barbados, Estimates 2004-5 (Bridgetown: Government Printing Office, 2004).

### 3. Law Review and Law Reform

#### 3.1. Law review

No systematic analytical review of laws related to children has been undertaken to determine their compliance with the CRC and with a view to law reform. A review for the purposes of preparing the Initial State Party Report to the Committee on the Rights of the Child and smaller reviews of laws relating to children have been conducted by the Child Care Board, the Family Law Council, and the Constitution Review Commission.

#### Initial State Party Report to the Committee on the Rights of the Child

In the preparation of the Initial State Party Report to the Committee on the Rights of the Child, presented in 1996, the existing laws were reviewed for the purpose of reporting to the Committee and not as a preliminary step in a law reform process. Barbados' assessment in that Report was that it "found itself in a fortunate position in that it had enacted much of the legislation required to implement the Convention."<sup>53</sup>

<sup>53</sup> 'Barbados: Initial CRC Report', op. cit., para. 7, reprinted in UNICEF, *From Ratification To Implementation: Reporting on Child Rights in the Caribbean* (Bridgetown: UNICEF Caribbean Area Office, 2000), p. 7.

The Committee on the Rights of the Child in its Concluding Observations after considering the Report identified a number of areas in which there was a need for law reform to comply with the Convention, and these concerns remain largely valid today.<sup>54</sup> They include:

- The definition of child in the Sexual Offences Act 1992 and the limited protection given to children between the ages of 16 and 18, and in some instances between 14 and 18;
- The absence of legislation explicitly requiring the courts to give due weight to the views of the child in accordance to his or her evolving capacity in accordance with Article 12 of the Convention;
- The statutory acceptability of corporal punishment in schools;
- The absence of mandatory reporting for suspected cases of child abuse;
- The failure of the Domestic Violence (Protection Orders) Act 1992 to adequately protect children in cases of domestic violence;
- Lack of clarity on the exact types and amount of work that are acceptable at different ages;
- Absence of special provisions for juvenile delinquents over the age of 16 years who are dealt with by adult criminal courts;
- The lack of flexibility in sentencing children under the Reformatory and Industrial Schools Act;
- The possibility that a child can be placed in the Reformatory and Industrial Schools for behavioural problems that do not constitute a crime if carried out by an adult, such as ‘wandering’, and where the more appropriate interventions would be psycho-social services with necessary family support; and
- The need to raise the age of criminal responsibility above 11 years.

### **The Child Care Board and Ministry of Social Transformation**

The Child Care Board has provided guidance to the Ministry of Social Transformation on the efficacy and appropriateness of some laws dealing with the care and protection of children. In particular, the Child Care Board forwarded to the Ministry concerns about discriminatory legislation prohibiting single men from adopting children, the absence of mandatory reporting of child abuse, the definition of child in the Sexual Offences Act, and the need for regulations dealing with private day care facilities. These comments have been presented to the Cabinet as areas for urgent reform.

### **The Family Law Council**

The Family Law Council is a body created by the Family Law Act, Cap. 214, and set up by the Attorney General to advise and make recommendations to her with respect to the operation of the Family Law Act and other legislation relating to family law, the provision of legal aid in proceedings relating to family law, and any other matters relating to family law. The Council recommended that, among other things, the Family Law Act be amended to:

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<sup>54</sup> CRC Committee, ‘Concluding Observations: Barbados’, U.N. Doc. CRC/C/15/Add.103 (24 Aug. 1999), *reprinted in* UNICEF, *From Ratification to Implementation: Reporting on Child Rights in the Caribbean* (Bridgetown: UNICEF Caribbean Area Office, 2000).

- Provide that a child born to a husband or a wife before their marriage is a child of the marriage under the Act if the child is ordinarily a member of the marital household;
- Extend the categories of children who are deemed by the Act to be children of a union other than marriage to include a child adopted during the subsistence of the union by either of the parties to the union, or a child of the parties to the union born before the commencement of the union, or a child of either of the parties to the union if the child is ordinarily a member of the household;
- Have regard to relevant principles adopted in any conventions or other international instruments to which Barbados has adhered and any relevant findings of published research in taking into account the needs of a child in child maintenance issues;
- Authorize the courts to order the transfer or settlement of property for the maintenance of a child; and
- Provide for strengthened enforcement of maintenance payments under the Family Law Act.

In 2004 the Family Law Act was amended to increase its membership by two.<sup>55</sup> The Council now comprises a High Court judge, a magistrate, the Chief Welfare Officer, Chief Probation Officer and nine other persons appointed by the Attorney General.

### **The Constitution Review Commission**

The Constitution Review Commission was set up in 1996 to review the provisions of the 1966 Independence Constitution. In its 1998 Report, it highlighted the gender discrimination in the citizenship provisions in the Constitution. The Commission did not describe these provisions in terms of their discrimination against children. However their proposals for reform had clear implication for children's rights to nationality and citizenship. The Commission recommended that:

- The Constitution be amended to recognize as citizens by birth, and not by descent, the children born overseas to citizens of Barbados serving in a diplomatic or consular capacity;
- Children born in Barbados should be deemed citizens at birth only where at least one parent is a citizen of Barbados, a permanent resident, or an immigrant of Barbados, or is registered under the Immigration Act by the provision enacted in 1996, thus restricting the present entitlement of all children born in Barbados to citizenship;
- A child aged not more than five years found in Barbados whose parents are not known shall be presumed to be a citizen of Barbados by birth;
- A child under the age of 18 years, neither of whose parents is a citizen of Barbados, who is adopted by a citizen of Barbados shall, on application, be registered as a citizen of Barbados; and
- Children born of Barbadian males and females should be treated equally so that children born overseas of Barbadian married women and Barbadian unmarried men are entitled to

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<sup>55</sup> Family Law (Amendment) Act 2004-10.



citizenship by descent in the same way as children of Barbadian married men and Barbadian unmarried women.<sup>56</sup>

### **The National Committee for Monitoring the Rights of the Child**

The National Committees for Monitoring the Rights of the Child established in 1998 and 2003 have not produced any systematic review of laws relating to children. The first Committee was set up in 1998 by the Minister of Social Transformation for a three-year period and chaired by the Registrar of the Supreme Court. It produced no written progress reports during its tenure. A member of the Committee who was frustrated with the slow pace at which the Committee conducted its work observed that she “had never been on a committee that achieved so little.”<sup>57</sup>

A subcommittee was created by the 1998 Committee to undertake an analytical review of laws relating to children to assess their compliance with the CRC and chaired by an eminent legal expert in family law. The Legal Subcommittee was comparatively more productive. It reviewed the Initial State Party Report of Barbados to the Committee on the Rights of the Child and the Concluding Comments of the Committee and identified areas for reform. The differing definition of ‘child’ in various statutes was identified as a priority area and a background paper was prepared and discussed by the Subcommittee. The more substantial review of laws did not take place before the end of the tenure of the Committee. It has been suggested that the inertia of the larger Committee constrained the progress of that subcommittee, and also that its members were not committed to expending their time and resources to ensure that the Committee met its objectives.

The Ministry of Social Transformation constituted a new Committee after the general elections in 2003, two years after the end of the tenure of the first one. The Chief Education Officer in the Ministry of Education was the Chair of this Committee and the Deputy Chair was a primary school principal. The Permanent Secretary of the Ministry of Social Transformation and a representative from the Child Care Board sat on the Committee, as well as a representative from the Ministry of Health. The Committee included an attorney-at-law and three students, one representing a secondary school and the others tertiary institutions. There was strong civil society representation, with representatives of PAREDOS, the Barbados Youth Development Council, National Council of Parent Teachers Associations, Optimist Club, Israel Lovell Foundation, Council for the Disabled, and the Family Support Group.

This Committee whose tenure ended in 2006 acknowledged the importance of a comprehensive review of laws. However, it had not developed a credible plan for conducting this work, through the creation of a subcommittee or otherwise. The only subcommittee that had been established had the responsibility to examine corporal punishment and to review provisions dealing with corporal punishment in the Education Act. This sub-committee comprised a teacher, primary school principal, student, and representatives from the national parent-teachers association and a community group, but did not include a legal expert. To some extent, the priority given to matters related to education reflects the institutional location of the Chair of the Committee.

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<sup>56</sup> Constitution (Amendment) Act 2000-18, section 4.

<sup>57</sup> Interview with N. M. Forde, former member of the Committee.

This Committee also faced capacity challenges in carrying out a comprehensive review of laws. Only one lawyer sits on the Committee. A thorough review cannot be undertaken without additional legal expertise and without remuneration. Even if there had been significant legal expertise on the Committee, consultant(s) would have been needed to facilitate the time consuming and technical process of reviewing laws in consultation with relevant stakeholders, with a view to holistic law reform. Lessons can be learned from the professionalization of technical aspects of the family law review exercise in the countries of the Organization of Eastern Caribbean States which strengthened that process. UNICEF is on record in its offer of technical assistance to the Government of Barbados, through the Ministry of Social Transformation, for a holistic review of laws. A new Committee with the same leadership and membership profile was appointed from 15 May 2007 to 15 June 2010.

A number of the obstacles faced by the Committees have been structural or related to its design. There has been no clear demarcation of responsibilities for monitoring the Convention between the National Committee, the Child Care Board and the Ministry of Social Transformation and neither has the role of the Ministry of Social Transformation in supporting the work of the National Committee, been clearly defined.

The Committees have included a significant number of civil society representation, alongside strong government participation and have been chaired by public servants. The experience of the 1976 National Commission on the Status of Women and the 1996 Constitution Review Commission suggests that commissions that have the responsibility to critically assess state action and laws may be more successful when there is not only civil society participation in them but also civil society leadership of them. A Chair located outside the government machinery can improve the independence of the committee or commission from the government. Leadership and management issues have influenced the productivity of the Committees. The Committees would have been strengthened by the development of a clear work plan and timetable, related to its terms of reference and derived from the member consensus on how to conduct the Committee's work and effectively use the human and other resources available to it.

### **3.2. Types of legislative reform undertaken**

Legislative reform since Barbados ratified the CRC has been piecemeal and ad hoc. It has consisted primarily of new legislation dealing with the care and protection of children—the Protection of Children Act, Sexual Offences Act, Domestic Violence (Protection Orders) Act, Drug Abuse Prevention and Control Act and Bail Act. Very marginal reform has taken place with respect to juvenile justice—the Penal Reform Act and the Reformatory and Industrial Schools (Amendment) Act. Amendments to the Education Act have ranged from establishing every child's right to five years of secondary education to giving teachers increased powers to search children in school. Finally, the government accepted the recommendations of the Constitution Review Commission regarding reforms to the provisions of the Constitution dealing with citizenship. The main legislative reforms relating to children since ratification of the CRC are:

- Community Legal Service Order 1990  
The order amends the First Schedule to the Community Legal Service Act Cap 112A by

extending the provision of legal aid to include “all family matters except divorce”,<sup>58</sup> and the Act already included legal aid for other civil “matters involving minors”<sup>59</sup> and “all offences where the person charged is a minor.”<sup>60</sup>

- Drug Abuse Prevention and Control Act 1990-14  
Among other things, this Act forbids the possession of a controlled drug in or within a 100 yard radius of a school with the intent to distribute. It protects children or young persons from being used to contravene any provision in the Act, and it makes knowingly supplying a controlled drug to a child or young person an offence.
- Education (Amendment) Act 1990-21

The Amendment Act includes Reformatory and Industrial Schools as part of the of public education system. It also gives the School Attendance Officer wider powers to investigate non-attendance at school.

- Protection of Children Act 1990-36  
The Act was aimed at protecting children from exploitation by preventing the making of indecent photographs of them. The maximum penalty is five years’ imprisonment where the charge is brought on indictment and two years if it is brought summarily.
- Sexual Offences Act 1992  
This Act revises and reforms the law relating to sexual crimes. Persons convicted of having sexual intercourse with children under 14 years of age are subject to a maximum penalty of life imprisonment and of ten years if the child is between the ages of 14 and 16 years.
- Domestic Violence (Protection Orders) Act 1992  
The Act defines domestic violence, by implication, as criminal conduct or harassment. Applications with respect to domestic violence experienced by a child must be made by a member of the household, parent, Child Care Officer, or Welfare Officer. The Magistrate’s Court has the power to grant various forms of relief including excluding the abuser from the premises where the child is living and ordering counselling. The Act prioritizes the welfare of children as a relevant consideration in granting orders.
- Education (Amendment) Act 1995-23  
Child is defined under the amendment as any person under the age of 17, rather than 16. It also gives every child a right to five years of secondary education and requires children to attend the school in the zone where they reside.
- Education (Amendment) Act 1996-13  
The Amendment Act provides school authorities with increased powers to search the person and possessions of students. It allows a teacher who has reasonable grounds for believing that a student has in his or her possession any intoxicating liquor, controlled drug, gun, or offensive weapon, or any article that has been reported stolen, to search the student’s person and property. If any of these articles is found, the Principal must report the matter to the Chief Education Officer, parent, school board, and the police. The

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<sup>58</sup> Community Legal Service Order 1990 s 2.

<sup>59</sup> Community Legal Services Act, First Schedule part II (a).

<sup>60</sup> Community Legal Services Act, First Schedule part I (f).

teacher has all the powers, privileges, and immunities in carrying such searches as a constable.

- **Bail Act 1996-28**

A constable has the power under the Prevention of Cruelty to Children Act to take into custody without a warrant a person who has committed an offence under the Act. That Act had provided that the constable could release the person arrested on his or her entering into a recognisance. The Bail Act now provides that the person can only be released on bail in accordance with the provisions of that Act.

- **Penal System Reform Act 1998-50, 2000-3**

The Penal Reform Act is designed to enlarge the powers of criminal courts to pass sentences other than imprisonment, to enable civil mediation as an alternative to criminal prosecution, and to lay down certain principles to be followed by courts when exercising their sentencing powers. The Act raises the age of criminal responsibility from 7 to 11. It gives the court the power to order that a young person under the age of 21, who would have been eligible for a sentence of imprisonment or other serious punishment, go to an attendance centre for a specified number of hours, where they would be given appropriate training, occupation, or instruction under supervision. The Act also provides for community service orders to be made with respect to persons over the age of 16 who are convicted of an offence punishable with imprisonment.

- **Reformatory and Industrial Schools (Amendment) Act 1998-15**

The Amendment creates an Advisory Board appointed by the Minister and made up of the Superintendent of Prisons, a Magistrate, and seven other members that will advise the Minister on all matters relating to the welfare of the children within its care, and proper maintenance and overall management of the Schools. The Board is to advise the Principal of the schools on management and supervision; welfare and conduct of staff; education, training, recreation, and discipline; and welfare of the children.

- **Constitution (Amendment) Act 2000-18**

The Act followed the report of the Constitution Review Commission and introduced reforms that allow the child of an Barbadian diplomat born overseas while his or her parent was serving in the diplomatic or consular service to obtain citizenship by birth. It also provides that a person born outside Barbados is a citizen if at least one of his or her parents is a citizen of Barbados who was born in Barbados, removing the discriminatory provisions.

Despite these reforms, there is residual discrimination on the basis of birth status, the juvenile justice laws are antiquated, there are inadequate and under-utilized child protection laws, and aspects of the law relating to the punishment of children are not only inconsistent with the CRC but also with the Constitution.

### **Residual discrimination on the basis of birth status**

The Status of Children Reform Act, Cap. 220, purports to abolish legal status distinctions between children born within or outside of marriage. However, contrary to Article 2 of the CRC, there are residual forms of discrimination on the basis of birth status because the Family Law Act and other legislation have constructed different statutory regimes for children born within a marriage or long term cohabiting relationship and other children born outside marriage.

The Family Law Act enacted in 1981 revolutionized family law in Barbados by reducing the role of fault in all family law proceedings, rationalizing the laws relating to the welfare and custody of children, and strengthening provisions dealing with property and maintenance in relation to married persons and their families. The Act extended this new statutory regime to “unions other than marriage”—defined as a man and a woman who had been living together continuously for at least five years—and their families.<sup>61</sup> The need to protect the rights of children and to promote their welfare is one of four factors the court must have regard to when exercising its jurisdiction under the Act or any other enactment.

The provisions of this modern Act regulate most aspects of family relations but not all families. The Act applies only to families based on marriage or other heterosexual unions of at least a five-year duration. It therefore excludes all unions of shorter duration and their children. The number of children who fall into this latter category is considerable because of the low marriage rates and multiplicity of family structures in Barbados. These children are governed by a collection of other statutes, most of which isolate family law proceedings in the Magistrate’s Court.

The discrimination is most evident in child support proceedings. The Family Law Act allows child support applications with respect to children born of a marriage and long-term cohabiting unions to be heard in the High Court while the Maintenance Act, Cap. 216, which is “an Act to provide for the maintenance of certain children born out of wedlock and for related matters,” gives the Magistrate’s Courts jurisdiction in respect of all other children.<sup>62</sup> The system for collection of child support awards within the Magistrate’s Courts is notoriously inefficient and many applicants describe it as humiliating.<sup>63</sup>

Moreover, the Maintenance Act is overly narrow because it makes court-ordered support available for children only when a single mother is making the application. This limits the availability of support to children whose mothers have subsequently married and are no longer single and where the father wishes to make the application.

The result is a dual family justice system. The upper tier, with proceedings in the High Court under the modern Family Law Act, is available only to child born to a marriage or a long-term cohabiting heterosexual relationship. Other children are largely relegated to the lower courts, which are generally viewed as less dignified and a less desirable venue for resolving family disputes.

Discrimination is evident in the Status of Children Reform Act because the evidentiary requirements for proving paternity of a child born outside of marriage and to parents who never lived together can become onerous if the purported father dies. That child will not be entitled to a declaration of paternity in relation to the purported father if he the man did not conduct himself in ways that acknowledged that he was the father or if no court had adjudged him to be the father

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<sup>61</sup> Section 39

<sup>62</sup> Section 2.

<sup>63</sup> See Sealy-Burke, Jackie, ‘The Role of Maintenance Enforcement and Female Poverty: A Barbadian Perspective’ (paper presented at Faculty of Law UWI/ Women and Development Studies Conference ‘Engendering Justice: Gender and the Rule of Law in the Commonwealth Caribbean’ 3–6 December 1990, Barbados).

during his lifetime. Without a declaration of paternity, these children are effectively excluded from the rights of children to succeed to their father's property.

### **Antiquated juvenile justice laws**

The Reformatory and Industrial Schools Act, Cap. 169, enacted in 1926, is the best example of a statute relating to children still in force in Barbados that was enacted by the colonial legislature well before current understandings of the rights of the child emerged. Occasional reform to this Act has not altered its ethos. The conception of children in the Act is antithetical to their inherent human dignity. They are referred to almost as forms of property, with terms like 'apprenticeship' and 'indentureship' that are redolent of the slavery, early post-emancipation, and indentureship periods in the Caribbean. The marginal note to section 20 speaks of children being 'licensed' to live with a trust-worthy person. Despite provisions in other legislation limiting child labour, this Act allows the Principal of one of the schools to apprentice a child to a trade or to bind a child by indenture under hand and seal to perform work on a British ship or outside of the island and within the Commonwealth as specified in the indenture.

Astonishingly, the Act allows children in need of care and protection to be incarcerated in a penal juvenile facility with other children under the age of 16 years convicted of an offence punishable by imprisonment. This would include a girl child whose father committed certain sexual offences against any of his daughters, or who has been found begging or receiving alms, found wandering and not having any home or settled place of abode, found destitute, or found living in circumstances calculated to cause or encourage seduction (where it is a girl child), lodging with common prostitutes, or whose parent has been sent to prison.

### **Inadequate and under-utilized child protection laws**

The child protection regime has been expanded by law reform but this has not created a coherent and unified body of laws with a common ideology that is grounded in the CRC. A number of the new statutes toughen the criminal sanctions for child abuse, but few are aimed at reinforcing the mechanisms and institutions that are designed to ensure the care and protection of children.

Almost all the applications made under the Domestic Violence (Protection Orders) Act since its enactment in 1992 have been made with respect to adults. In public consciousness, the law is almost exclusively associated with protecting and empowering women victims of domestic violence. The public advocacy around the Act by women's NGOs and the Bureau of Gender Affairs has emphasized the agency and autonomy the legislation gives to women victims to seek relief on their own behalf. The position of children under the Act stands in sharp contrast because applications with respect to them must be made by a parent, another member of the household, or a Child Care or Welfare Officer.

Domestic violence legislation has been very ineffective as a protective device for children because there have been no accompanying laws and policies to implement it, such as mandatory reporting of child abuse and guidelines and duties of the Child Care Board with respect to the Act. The Act has deficiencies but it offers child protection authorities an important remedy that is not readily available under other statutes: the right to apply for a protection order to remove the abusive parent from the household, rather than removing the child. Child Care Officers have in some instances suggested to a parent that they can themselves make an application on behalf of a

child who is being abused by their partner, but there is no indication that since 1992 the Board has ever initiated such proceedings on behalf of a child.<sup>64</sup> The manuals produced by the Board for its officers mention the Act, but there is no discussion of the ways in which officers can use the Act to safeguard the interests of children.<sup>65</sup>

### **Inconsistencies between laws dealing with the punishment of children and the Constitution**

Some laws relating to corporal punishment and other aspects of child punishment are arguably inconsistent with the current interpretation of the Constitution as it relates to ‘inhuman and degrading punishment’ and the separation of powers doctrine. Where inconsistencies remain, these should become a priority for legislative reform because of the limits of judicial review of legislation. Firstly, the laws will only arise for judicial scrutiny and invalidation if an action for judicial review is brought by someone affected by the law. Secondly, judicial review of legislation enacted during the colonial period or punishments that were authorized by laws during the colonial period are severely constrained by the Constitution.

The Privy Council, in a 2003 decision from Jamaica, ruled that a statutory provision stating that a minor convicted of a serious offence is “to be detained during Her Majesty’s or the Governor General’s pleasure” is a violation of the separation of powers doctrine under the Constitution because it effectively gives the sentencing power, which belongs to the judiciary, to a member of the executive.<sup>66</sup> To conform with the constitution, the statute was judicially altered to read that the court and not the executive had jurisdiction to determine when the juvenile should be released.

This case raises questions about the constitutionality of the Juvenile Offenders (Amendment) Act 1989-26 which ensured that a person convicted of an offence committed when the person was under the age of 18 could be sentenced to death, but provided that the person was “to be detained during Her Majesty’s pleasure.”<sup>67</sup>

In *Scantlebury v R*,<sup>68</sup> the Barbados Court of Appeal explained that it was clear that the amendment was incorporated as a response by the Government of Barbados to the requirements of the UN Convention on the Rights of the Child. They said, “Although the Convention as a whole has not been transformed into domestic law, the enactment of s 14 seems to suggest that Parliament, in 1989, desired to act in a manner consistent with Barbados’ international treaty obligations. Article 37 of the Convention contains an express prohibition against capital punishment for crimes committed by juveniles under the age of eighteen.”<sup>69</sup>

In *Griffith v R*,<sup>70</sup> the Privy Council held that the reasoning in the Jamaican case applied to the Barbados. Where a person, under the age of eighteen at the date of the offence, has been subsequently convicted for murder, he/she shall be sentenced to detention ‘during the court’s

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<sup>64</sup> Mills, Norman, ‘The Barbados Domestic Violence Act as a source of protection of children’ (unpublished Law and Society II Thesis, Faculty of Law, UWI, 2003).

<sup>65</sup> Ibid.

<sup>66</sup> *DPP v. Mollison* [2003] UKPC 6; (2003) 62 WIR 268.

<sup>67</sup> Section 2.

<sup>68</sup> (2005) 65 WIR 88 (CA, Barb).

<sup>69</sup> Ibid. at 103.

<sup>70</sup> (2004) 65 WIR 50.

pleasure'. In *Scantlebury v R*,<sup>71</sup> the Barbados Court of Appeal set out guidelines for the exercise of this power, which include regular reviews. These guidelines were influenced by the English Criminal Justice Act 2003

In a decision from the Bahamas, the Privy Council held that it was accepted that flogging is an inhuman and degrading punishment.<sup>72</sup> The Barbados Court of Appeal has ruled that the whipping of a person with a cat-o'-nine-tails is inhuman and degrading, accepting that "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant.... What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances."<sup>73</sup> The elaboration of these constitutional principles raises questions about the appropriateness of a number of statutory provisions including those found in the:

- Reformatory and Industrial Schools Act, which allows boys to be punished by whipping with a birch, tamarind rod, or suitable cane and to be kept in solitary confinement for up to five days for wilfully refusing or neglecting to conform to school rules.
- Education Act, Cap. 41, which permits senior teachers to administer corporal punishment 'when necessary' and fails to provide guidelines on which instruments of correction can be used and the precise manner and circumstances in which the punishment can be administered.

The High Court of Barbados ruled that, in the absence of any device being prescribed by the Education Regulations as to the instrument to be used by the teacher administering corporal punishment under the Education Act, it was open to a headmaster or authorized officer to select from the birch-rod, tawse, whip, stick, ruler, cane, strap and cat-o-nine tails.<sup>74</sup> In light of the judicial precedents of higher courts mentioned above, this is a questionable decision.

The challenge in addressing laws authorizing corporal punishment in schools is that there is extensive public support for it. The Men's Educational Support Association (MESA), an increasingly important actor in public debates on laws relating to children, has recently entered the debate. It has suggested that it would be the "thin [end] of a wedge" to tell children that "even if you do something wrong, no one is allowed to punish you in a way that humiliates you or hurts you badly." They have said that this "would seriously undermine the rights of parents, guardians and teachers to discipline children."<sup>75</sup>

UNICEF is currently providing significant policy advocacy and technical assistance to a multi-partnered project including the Barbados Union of Teachers, Ministry of Education, Youth Affairs and Sports and the Child Care Board to support change processes in the disciplinary practices towards children in the classroom and in homes.

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<sup>71</sup> (2005) 65 WIR 88 (CA, Barb).

<sup>72</sup> *Pinder v. R* [2002] UKPC 46; (2002) 61 WIR 13.

<sup>73</sup> *Hobbs & Mitchell v. R* (1992) 46 WIR 42.

<sup>74</sup> *Mayers v. Attorney General and King* (unreported) 27 July 1993, High Court, Barbados (No. 1231 of 1991).

<sup>75</sup> MESA, 'Men's Forum: No children's rights without accounting', *Daily Nation*, 2 June 2004, p. 22A.



### **Aborted Family Law Act amendments**

The Family Law (Amendment) Bill consolidated the recommendations of the Family Law Council and was first introduced by the Attorney General in Parliament in 2001 with little controversy. Among other things, the Bill attempted to broadly incorporate international human rights norms relating to children into domestic laws. The Attorney General introduced the Bill to Parliament for another reading in 2002. On this occasion, the provision proposing that the definition of child of a 'union other than marriage' include a child of either of the parties who is ordinarily a member of the household attracted extensive debate and criticism.

The provision was characterised in the public debates as designed to extract child support from men in long-term cohabiting relationships with respect to children born to their female partner from a previous relationship. MESA argued strongly that men should not end up with financial responsibilities to children biologically fathered by other men. MESA's position garnered strong public support, including that of many women, and informal support from some men in the Cabinet.

The broader implications of the expanded definition of 'child' for custody, access, and protection of children against domestic violence under the Family Law Act were largely overlooked in the contentious public debate. The focus was almost exclusively on the rights and duties of parents in contrast with the best interests and rights of the child. Ironically, the enlarged definition of child of a 'union other than marriage' was consistent with social understandings of what is a family in Barbados and with the policy of the 20 year old Family Law Act to treat persons in a 'union' similar to those in a marriage.

In the face of the vociferous criticism, the Attorney General suspended promotion of the Bill, including the other provisions addressing the welfare and rights of children. A new Family Law Council was set up in 2003 and, in 2004, the Family Law Act was amended to increase the members of the Family Law Council appointed by the Attorney General by two.

Stronger civil society participation in the Family Law Council, more meaningful public consultations about law reform prior to drafting, and a proper public education strategy to explain the provisions of the Bill and frame the debate in terms of children's rights may have averted the demise of the amendments and should be considered when the matter is revisited.

### **3.3. Rationale for undertaking the legislative reform initiative**

The CRC and other international human rights conventions have only marginally influenced the reform process. The ill-fated Family Law (Amendment) Bill 2001 would have become one of the clearest attempts to directly incorporate the CRC in domestic law. The UNICEF Country Office will need to play an important role in supporting the revival of this important process in Barbados.

Legislative reforms have been primarily motivated by:

- Specific policy objectives of various Ministries;
- Growing public concern about the sexual abuse of children; and

- Combined goals of protecting the rights of women and of children and the advocacy of the Child Care Board and the Bureau of Gender Affairs to promote law reform in the areas of child protection and violence against women and children.

However, in practical and conceptual terms, the human rights regime in Barbados remains adult-centred. There is public resistance to focusing on the rights of the child, best evidenced in the public debates on corporal punishment. In legislative reform processes, children are rarely viewed as legal subjects with human rights. Children sometimes become the incidental beneficiaries of law reform designed to meet other goals, such as promoting gender equality or penal reform.

### **3.4. Institutional changes put in place to support laws**

No institutions have been created that aim at supporting implementation of the CRC. As mentioned earlier, the domestic violence legislation contemplates that the Child Care Board and Welfare Department will play a critical role in protecting children under its provisions. However, there have been no institutional mechanisms put in place to ensure this. The Penal Reform Act provided for the establishment of attendance centres, which offenders under the age of 21 would go to as an alternative to imprisonment and other forms of punishment. These attendance centres have not been set up and it is not expected that they will be set up in the form presently provided for by the legislation.

## **4. The Process of Legislative Reform**

### **4.1. Strategy and actors**

#### **Ministries**

The Ministries have been the engines of the legislative reform relating to children in Barbados since ratification of the CRC, along with specialized agencies, committees, and commissions.

The Ministry of Social Transformation is the key Ministry- for promoting legislative reform relating to children. Other Ministries have been significant actors in legislative reform, consistent with their respective policies. In some instances, these ministries use committees comprised of representatives from different Ministries and agencies to develop legislation. This is the case with the committee recently created by the Ministry of Labour to review laws dealing with child labour to ensure compliance with ILO Convention No. 182. By comparison, the Ministry of Home Affairs has set up a Committee of stakeholders in that Ministry to spearhead the establishment of a Department of Correctional Services, which will have a separate division to deal with juveniles. This Committee is expected to review legislation dealing with juvenile justice.

The Chief Parliamentary Counsel within the Attorney General's Office has responsibility for drafting new legislation. Her office generally invites Ministries to identify areas under their purview in need of legislative reform. The proposals for reform must be presented to the Cabinet,

which must approve the identified areas as priority ones for reform, and authorize the preparation of drafting instructions for the Chief Parliamentary Counsel.

### **Government agencies**

The Child Care Board has played a critical role in the law reform process by forwarding concerns about the shortcomings of laws dealing with the care and protection of children to the Ministry of Social Transformation, which in turn has presented them to the Cabinet for approval to be included as priorities on the legislative schedule.

The Board is in an advantageous position to do this. It is directly involved in the provision of services to children in need of care and protection. It has built productive collaborative links with other Ministries and NGOs promoting children's rights. It has strong community involvement and public credibility. The Board has occasionally involved children in policy discussions. For example, the Ministry of Social Transformation with the collaboration of the Board facilitated a group of young people to attend the 5th Ministerial Conference on 'Children and Social Policy in the Americas' held in Jamaica in October 2000. And finally, the Board closely interfaces with the legal system and retains the services of a very senior legal practitioner as legal adviser.

The use of the Board as a mechanism for reviewing laws relating to children ensures that its experiences are taken into account in the law reform process, but this cannot compensate for holistic and comprehensive review. Matters that fall outside the range of care and protection issues dealt with by the Board or with which it has less experience will be excluded from this review, as seen most clearly with respect to domestic violence legislation.

The Bureau of Gender Affairs has been the lead agency in promoting some legislation, such as the Sexual Offences Act and the Domestic Violence (Protection Orders) Act. It involves women men and children's NGOs in its activities.

### **Ad hoc committees**

The National Committee on the Rights of the Child has yet to play a decisive role in legislative reform for reasons discussed above. The Committee has engaged in public education and consultations about the CRC around the island. It held two town hall meetings in the parishes of St. Philip and St. Peter in 2004. Among the issues raised in the meetings were the access to education of children with disabilities, corporal punishment, and child protection laws. It is not clear how and when the National Committee will address law review beyond the area of corporal punishment, for which a subcommittee has been created.

The Family Law Council comprises a Judge of the High Court (who is the Chair), a Magistrate, the Chief Welfare Officer, the Chief Probation Officer and a maximum of nine other persons appointed by the Attorney General. In the past, lawyers have dominated the membership of the Council and there has been little participation by civil society. The Council established in 2003 has stronger civil society participation but it has not yet met. The most senior and experienced lawyers on the Council have generally assumed responsibility for reviewing legislation, and thus the recommendations of the Council, although quite extensive, have tended to reflect the concerns of legal practitioners about the operation of family law legislation, rather than

representing multidisciplinary concerns. The Council has occasionally hosted public meetings, but public consultations and education have not been central to its work.

The Constitution Review Commission is comprised of 10 members representing the political parties, social partners, voluntary organizations, the Church, and youth. It provided the public with information about the Constitution before it began its consultations, invited written and oral submissions from the public, and consulted with constitutional law specialists. The Commission held public meetings at strategic locations across the island and met privately with individuals, groups, and organizations, and held public and private hearings in England, Canada, and the United States. Strong public interest facilitated meaningful public consultations.

The terms of reference of the Commission included “strengthening the fundamental and basic rights, liberties and freedoms of the individual and ensuring that there is no discrimination in the national life of the State” and “ensuring the elimination of gender discrimination in the Constitution.”<sup>76</sup> Having reviewed the provisions of the Constitution dealing with fundamental rights and freedoms, the Commission made no recommendations about the rights of the child. This is a serious omission because, in the absence of clear constitutional norms, it will be difficult to challenge the constitutionality of, for example, laws that still discriminates against children born out of wedlock.

The tenure of this Commission has ended, but opportunities still exist to ensure the rights of children to form part of the framework of the human rights provisions of the Constitution. It is recommended that UNICEF undertake an independent assessment and present its findings to the Government of Barbados.

### **Civil Society**

Many NGOs are playing an influential role in shifting public attitudes to parenting and the rights of children, and are working closely with government ministries and agencies. However, in the last three years, MESA has emerged as a distinct and decisive voice in debates about the rights of men, women, and children. MESA has emerged at a time when the women’s movement is relatively weak and there are few children’s rights organizations. The association has expressed concern about some initiatives to promote children’s rights because of the constraints they will place on parental rights. The organization has been afforded a weekly newspaper column to report its activities and views in the most widely read newspaper. MESA’s force lay less in its organizational structure and more from its sustained visibility in the media and the informal support it has within the community.

### **UNICEF**

The UNICEF Office for Barbados and the Eastern Caribbean, whose Programme of Cooperation spans 10 English-speaking countries has sought, through a series of sub-regional conferences and meetings, to advocate and mobilize Governments to re-examine their provisions for children from the child rights lens. This process led to the quick ratification of the CRC by all countries, including Barbados. Subsequent processes for the follow-up of established goals at the CARICOM and wider Latin America and the Caribbean region have been avenues for

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<sup>76</sup> Barbados *Report of the Constitution Review Commission* (1998) at 1.

mobilizing countries to report on their progress. However, while UNICEF, in collaboration with other development partners, is working with the OECS countries in bringing about a reform process in line with the CRC, UNICEF needs to convince the Government of Barbados, through the presentation of its own assessment of the deficiencies of national law from a CRC perspective, of the urgent need for holistic reform.

## **4.2. Difficulties encountered during the legislative reform process**

There have been a number of difficulties encountered during the legislative reform process, namely:

- The absence of a multidisciplinary and inter-ministry policy on children that establishes the responsibilities of the various ministries, agencies, and committees and a mechanism for coordination. The Ministry of Social Transformation is in the early stages of developing a policy on children that will hopefully achieve these goals.
- Elections and changes in ministerial assignments, even within the same administration, have impacted the rhythm of law reform by creating lulls in the appointment of new committees and because new Ministers have sometimes been less enthusiastic about promoting the initiatives and policies of their predecessor.
- The Government's view that it is already in substantial compliance with the CRC with respect to its laws has circumscribed the impetus for legislative reform. This strengthens the case for a holistic appraisal of the laws by an independent consultant(s).
- Inattention to public education and consultation as part of the strategy for law reform and weak civil society participation in some Committees has undermined creditable reform initiatives.
- The rise of an influential men's rights lobby challenging fundamental premises of the human rights of women and children.
- Little knowledge among policy makers and those involved in the law reform process of the CRC.

## **4.3. Implementation of the law and follow-up actions**

The Penal Reform Act, which provided for the establishment of attendance centres, had financial implications for its implementation. The Government has yet to establish these centres and the reluctance to do so does not appear to be related to financial resources. The proper implementation of the Domestic Violence (Protection Orders) Act may have had resource implications for the Child Care Board, whose officers would be making applications for protection orders and who might need to secure legal advice in some applications. No implementation measures have been put in place to ensure the Act becomes a viable avenue for child protection.

The legislative reforms since ratification of the CRC have not been part of a coherent policy. The sexual offences and domestic violence legislation have been most widely publicized of these, through the activities of the Bureau of Gender Affairs. The shortcomings of public education activities on the domestic violence legislation have already been highlighted. The Child Care

Board provides information on laws relevant to its work to those using its services and through public education activities in schools and the wider community.

The most notable area of training has taken place with respect to police officers in relation to the domestic violence legislation. Here again, the training has focused primarily on domestic violence against women.

#### **4.4. The use of law in court disputes and by judges in court decisions**

There is no evidence of the courts in Barbados making direct reference to the provisions of the CRC. However, there are principles embodied in the CRC that have been articulated by courts. Consistent with Article 3, the ‘best interests of the child’ is the governing principle in applications for custody, care and control, and maintenance of children.

For example, in 1981, Justice Williams refused to grant care and custody of a ten-year-old boy to the father, saying that the welfare of the child was the dominant consideration and, when all the circumstances were considered, it would be wrong to remove the child from the household in which he had grown up.<sup>77</sup> In this case, the mother died in childbirth and the father was unable to take care of the child and none of his relatives was willing to do so. A young mother took the infant into her care and brought him up as a member of the family.

The principle was also applied in a custody dispute between a mother and the foster parents of a four-year-old girl. Care, custody, and control were granted to the biological mother with whom the child had been living at the time of the dispute.<sup>78</sup>

In 2004, in *Edwards v Edwards*<sup>79</sup>, the High Court ruled that there was no presumption that it is in the interest of the children to be with either parent. In considering all the evidence however, the court said that it could not be ignored that nature provided a mother with a special source of easily available nutritious food for her young and in the very act of feeding a close bond is created between mother and infant child. It was only for some compelling reason that a Court should seek to over-rule nature. The judge agreed with the finding of another court that the wife had “willfully, deceitfully, and clandestinely” taken the children out of Barbados, but said that misconduct had to be weighed against all the other factors to determine which, in this case, is the lesser of two evils. The fact that the children were very young and the younger one has until recently been still breast-fed, tipped the scale in favour of the mother.

Having regard for the age and maturity of the child, courts have consistently taken into account the views of teenage children in custody proceedings.<sup>80</sup>

In applying and interpreting legislation, judges have tended to be sensitive to the country’s particular socio-cultural context. Sometimes judges, lawyers, and courts develop practices over

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<sup>77</sup> *Clarke v. Bushell*, (1981) 16 Barb LR 126.

<sup>78</sup> *Nicholls v Goulding* BB 1994 HC 33, 1 September 1994 (CARILAW) (HC, Barb).

<sup>79</sup> BB 2004 HC 8 5 April 2005 (CARILAW) (HC, Barb).

<sup>80</sup> See, for example, *Haloute v. Admiral*, No. 233 of 1989 (unreported), 5 June 1991 (High Ct., Barb.); *Abed v. Abed*, No. 346 of 1987 (unreported), 7 Dec. 1992; *Green v. Green*, No. 275 of 1998 (unreported), 27 Sept. 2000 (Barb.).

time that do not strictly conform with statutory provisions, but become accepted as ‘common sense’ approaches to resolving family disputes. As early as 1961, in an application for adoption by a grandmother, a High Court judge stated that he was not prepared to accept the view taken in some English cases that only in exceptional circumstances should a grandmother be allowed to adopt grandchildren because, in a West Indian community, a grandmother often had to train and assist in maintaining the family while her daughter went out to work.<sup>81</sup>

The ruling of the High Court in *Mayers v. Attorney General & King* mentioned earlier is disappointing because of its failure to recognize the ways that children’s rights are protected under the Constitution.<sup>82</sup> Mayers was a student at secondary school and had been disciplined using corporal punishment on three occasions. On the fourth occasion she was disciplined, along with four other girls, for placing cow itch on a teacher’s desk. No injuries occurred and the evidence is that she later instructed one of the four girls to remove the cow itch. The Headmaster asked each child to come to the front of the class and to bend over and place their hands on the desk and he administered the lashes with a leather strap on their buttocks. Mayers was unsuccessful in the action she brought for injuries suffered by reason of assault and battery with respect to the last incident. The court has held, quite correctly, that the punishment was authorized by legislation. However the more pertinent question was whether the legislation authorizing the punishment was in conformity with the Constitution, and this question was not addressed by the court.

#### **4.5. Social policies accompanying law reform**

There is no evidence that any social policies have been drafted and implemented to accompany law reform and make it more effective.

### **5. Conclusion: Lessons Learned and Recommendations**

The following lessons have been learned:

- Legislative reform in favour of children will be initiated by a wide range of actors, including the various ministries, government agencies, and specialized commissions. Ad hoc commissions like the Family Law Council and the Constitution Review Commissions provide excellent opportunities for reform to laws affecting children. Their terms of reference should include explicit reference to protecting children’s rights and international human rights conventions.
- Specialized commissions involved in reviewing legislation affecting children, like the National Commission on the Rights of the Child and the Family Law Council, should be mandated to develop a strategy for legislative reform that prioritizes an initial review and analysis of the laws and consultations with stakeholders prior to drafting, and public education after the legislation is drafted.
- There is a need for evaluation of government and other institutions involved in the provision of services for children and developing policies in relation to children with a

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<sup>81</sup> *A.B. v. Social Welfare Officer*, BB 1961 HC 6 (CARILAW) (S. Ct., Barb.).

<sup>82</sup> No. 1231 of 1991 (unreported), 27 July 1993 (High Ct., Barb.).

view to institutional reform and the development of a multidisciplinary and inter-ministry policy on children.

- Careful attention should be given to the composition of specialized committees and commissions involved in reviewing legislation affecting children. Where possible children and young people should participate and be consulted, and the expertise represented on the committees and commissions should be multidisciplinary. There must be adequate legal expertise, but lawyers should not dominate the process. Strong civil society leadership can improve the efficiency and integrity of the committees and commissions.
- Independent consultants with expertise in child law and policy may be necessary to ensure that the review of laws affecting children is comprehensive, candid, and expeditious. The resource implications of this expertise need to be assessed.

Barbados provides many opportunities for UNICEF advocacy and expertise.

- UNICEF can encourage the expeditious development of a policy on children that will address procedures for law reform and provide expertise to this process.
- UNICEF has substantial experience in the countries of the OECS on methods to effectively carry out a review of laws and public education strategies. It can provide technical assistance to Barbados on developing a holistic strategy for legislative reform.
- UNICEF should present a paper on constitutional reform in line with the CRC to the Ministry of Social Transformation and the Attorney General.



# **Legislative Reform Related to the Convention on the Rights of the Child: the Case of Ghana**

**Professor Kofi Quashigah**

## **1. Executive Summary**

This study is intended to assess the impact of the Convention on the Rights of the Child (CRC) in Ghana as a mixed legal tradition.

- Ghana is a democratically governed country based on a written constitution but with immense influence from customary authority represented by traditional authority (Chiefs and Queen mothers).
- The Constitution of Ghana recognizes the right to profess and practice any cultural practice subject to the rights and freedoms guaranteed under the Constitution.
- Chiefs and Queen mothers are significant players in the socio-economic life especially of rural communities and their potential as institutions for the protection and promotion of the rights and welfare of children is acknowledged.
- Ghana's ratification of the CRC and the Convention on the Elimination of Discrimination Against Women (CEDAW) without reservations is not to be understood as an indication of the non existence of dramatically conflicting cultural practices but rather as a ratification without critical consideration.
- The influence of the CRC and CEDAW is the resultant promulgation of a package of laws (e.g. the Children's Act 1998, Act 560) which are designed to domesticate the international legal provisions on the rights of the child.
- The law reform strategy adopted by Ghana was a total and comprehensive review of existing scattered laws on children rather than a piecemeal approach to amendments of these laws. The result was a consolidation of all these laws into three major instruments: The Children's Act 1998, Act 560, the Criminal Code (Amendment) Act 1998, Act 554 and the Juvenile Justice Act 2003, Act 653.
- Some traditional practices that do constitute outright infractions upon the rights of children still persist even in the face of legislative provisions that seek to proscribe them.
- Various institutions have been established to police the guaranteed rights of children. Their scope of coverage is, however, limited to the cities and big towns.
- The problem of inadequate resources exists and frustrates the expansion and therefore effectiveness and efficiency of the various institutions and measures put in place.
- Much still remains to be done to ensure maximum effectiveness. However if the statistical figures available at Institutions such as the Women and Juvenile Unit of the Ghana Police Service are anything to go by then one may say that the reforms have had some limited positive impact on the protection of the rights of children.

- International agencies such as UNICEF and UNESCO, together with local NGOs have been very supportive in the promotion of the rights of children.

## 2. Presentation of the State Party – Ghana

### 2.1. Political organization and legal system

#### The country of Ghana

Ghana is a country located in sub-Saharan Africa, with a population of 18,912,079<sup>83</sup> according to 2000 population census estimates, of which 9,690,596 are children below the age of 19.<sup>84</sup> Agriculture accounts for 49.2 per cent of the economically-active population.<sup>85</sup> The dominant economic activity is agriculture, of which peasant farmers form the dominant segment. Mining has emerged as another important economic activity. Ironically, however, surface mining activities have continued to threaten the economic survival of many farming communities located in the mining zones, with dire consequences for rural families and therefore children.<sup>86</sup>

Irrespective of a long period of colonial domination by the British, ending in political independence in 1957, the country continues to be influenced by two streams of authority: the modern political system, which is the constitutionally recognized political authority, and the traditional authority, which revolves around the institution of chieftaincy.<sup>87</sup>

#### Political organization and decentralization

##### *Political organization*

Following the attainment of independence in 1957, Ghana became a Republic in 1960. While the country has experienced bouts of military rule, all civilian administrations have been governed by written constitutions, the current one dating from 1992. Ghana is also a member of the United Nations<sup>88</sup>, a founding member of the erstwhile Organization of African Unity (now African Union) and also a member of the Economic Community of West African States (ECOWAS).

The system of government instituted under the 1992 Constitution is presidential in nature. Except as otherwise provided by the Constitution, all executive authority vests in the President,<sup>89</sup> who is elected directly by the people, and answerable to them. He or she could, however, be impeached by a process involving the participation of Parliament.<sup>90</sup>

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<sup>83</sup> Ghana Statistical Service, *2000 Population and Housing Census: Summary Report of Final Results*, March 2002, p.31.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Journalists for Human Rights (an NGO) produced revealing evidence of the effects of surface mining on a rural community and especially the children in *The Chronicle*, Wednesday, 23 June 2004, p. 6.

<sup>87</sup> For purposes of this paper, any reference made to ‘Chieftaincy’ unless otherwise stated includes queen mothers.

<sup>88</sup> Ghana joined the United Nations in 1957 when the country attained independence from Great Britain.

<sup>89</sup> See Constitution of the Republic of Ghana, art. 2 [Ghanaian Constitution].

<sup>90</sup> Ibid., art. 69.

The legislature has the legislative authority vested in it, except as may be otherwise stated in the Constitution.<sup>91</sup> In addition to its power to impeach, Parliament has the authority to approve the President's nominees before they are finally appointed by him to take office as Ministers.

Under ordinary circumstances, the President has the power of assent, without which bills passed by Parliament will not attain the status of law. Parliament could override a Presidential veto if need be.<sup>92</sup>

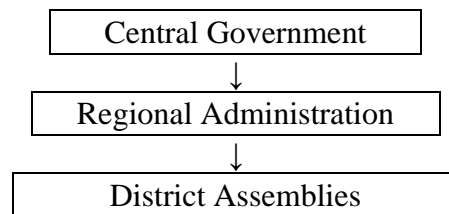
The Judiciary is conferred with judicial, administrative, and financial independence.<sup>93</sup>

Constitutionally, the three organs of government, the Legislature, Executive, and Judiciary, are equal. They are, however, constitutionally required to complement each other in the performance of their functions for a smooth running of the country.

### *Decentralization*

Ghana is organized as a unitary State with a central government; however, it has a decentralized local government system.<sup>94</sup> In between the central government and the local governments are ten 'regions', administrative divisions within which the local government institutions, called District Assemblies, are located. The structure of the decentralization system may be graphically depicted as follows:

#### *Structure of the decentralization system in Ghana*



The District Assemblies constitute the administrative structures at the local levels and operate as the "highest political authority in the district, and shall have deliberative, legislative and executive powers."<sup>95</sup> District Assemblies therefore do exercise delegated legislative and executive authority but not judicial authority.

Notwithstanding, the District Assemblies are enjoined to undertake certain functions that impact generally on the interests of children. The Children's Act imposes a very important obligation on the District Assemblies to protect and promote the welfare of children. According to the section:

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<sup>91</sup> *Ibid.*, art. 94.

<sup>92</sup> *See* *ibid.*, art. 106(10).

<sup>93</sup> *See* *ibid.*, art. 127(1). The structure of the court system is described below.

<sup>94</sup> *See generally*, *ibid.*, ch. 20.

<sup>95</sup> *Ibid.*, art. 241(3).

“A District Assembly shall protect the welfare and promote the rights of children within its area of authority and shall ensure that within the district, governmental agencies liaise with each other<sup>96</sup> in matters concerning children.”<sup>97</sup>

As an additional responsibility, the District Assemblies are required by law to take steps to empanel Child Panels created under the Children’s Act by receiving nominations for appointments and forwarding those nominations to the minister responsible for local government for his or her approval and appointment.<sup>98</sup> The District Assemblies have the additional responsibilities of providing the premises of the panels together with the requisite administrative staff needed for their servicing.

By virtue of the new Local Government Service Act, 2003, Act 656, the District Assemblies now have responsibility for some departments, such as the Department of Social Welfare, in the District. This means that the District Assemblies will have duties to perform through these departments for the realization of children’s rights.

Although the idea of decentralization is laudable, what is doubtful is the capacity of the various District Assemblies, in terms of financial capabilities, to effectively perform the functions required of them. Earlier research on the right to education indicated that the capacity of the District Assemblies to meet the educational demands of the children in their areas of authority was very low.<sup>99</sup>

#### *Structure of the Judiciary*

The Judiciary is not organized along decentralized lines. The court system, as discussed below,<sup>100</sup> is therefore not decentralized. Ghana has a single court system with the Supreme Court at the apex.

#### *The Position of Chiefs in Governance under the 1992 Constitution*

By virtue of Ghana’s dualist legal nature, which is one part modern and another part traditional, the 1992 Constitution recognizes and guarantees the existence of the institution of ‘chieftaincy’, as established by customary law and usage.<sup>101</sup> This follows from the realization that the chieftaincy institution is the pivot around which life in the traditional set up oscillates.

As a consequence of policies that had their genesis in the time from colonial administration through to the post independence era, the formal powers of chiefs have been almost completely taken away from them. Traditional rulers in Ghana therefore no longer possess recognized executive, legislative, or judicial authority. Article 58(1) of the Constitution, for instance, vests all executive authority of Ghana in the President; Article 93(2) vests the legislative power of Ghana in Parliament; by Article 125(3) and (5) the judicial power of Ghana vests in the judiciary, which has jurisdiction in all matters civil and criminal. Although denuded of its

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<sup>96</sup> This is to promote the interdependency of rights through interagency collaboration.

<sup>97</sup> Section 16. of the Children’s Act of 1998 (Act 560).

<sup>98</sup> See Child Rights Regulations, 2002, LI 1705 (Ghana), § 8.

<sup>99</sup> See Ghana Education Service, ‘Report of The Study on the Constitutional and Legal Framework for the Right of the Child to Pre-Tertiary Education’, November 2001 (conducted with assistance from UNICEF), pp. 42 & 43.

<sup>100</sup> See Section 4.2 below.

<sup>101</sup> Art. 270(1).

original complement of political power, the position of the Chief in the modern context can be summed up as follows, in the words of the Committee which prepared the Draft Constitution of the 1992 Constitution:

Although stripped of all formal powers, the chief continues to command the traditional loyalty of most Ghanaians, particularly in the rural areas. He or she remains a leader in a very meaningful sense, and is particularly well placed to mobilize and inspire the community in the execution of development projects or other social and economic ventures.<sup>102</sup>

This is the extent to which the traditional rulers of Ghana are today involved with the governance of the country. It is necessary to bear this fact in mind when taking practical steps to implement policies and even legislative reforms, including those that relate to children.

#### *The position of Queen Mothers*

Most traditional areas in the country have in place the institution of Queen Mothers (female traditional rulers).<sup>103</sup> The position of queen-mothers is not typically known among the tribes of Northern Ghana<sup>104</sup>, where women leaders known as ‘Magazias’ exist. However, among the Akans of southern Ghana, Queen Mothers play very significant roles in the governance of their communities. However their role is very much diminished within the context of decision making in important matters such as land distribution and the management of local resources like forest reserves and minerals. Queen Mothers are also traditionally responsible for the welfare of women and children. Specifically, within the context of the HIV/AIDS pandemic; for instance, the Queen Mothers of Ashanti and Manya Krobo have been proactive in promoting community-based care of orphans and vulnerable children.

It is interesting to note that the Constitution recognizes the role of female traditional authority and guarantees their right to play an equal role as men in leadership and decision making. To this extent therefore, the Constitution defines ‘chief’ in the following manner:

A person, who hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage.”<sup>105</sup>

This is just a reflection of the general nature of political authority between the genders in traditional Ghanaian societies.

#### *Major Ethnic Groups and Languages*

Ghana is a multi-ethnic society, possessing a diversity of ethnic groups and languages of which the major groups are Akan, Dagbani, Ga-Adangbe, Ewe, and Nzema. Although the official language is English, any local language, even if not one of the major ones, is a recognized medium of communication in the courts of law. Every individual that has anything to do in the

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<sup>102</sup> Government of Ghana, ‘Proposals for a Draft Constitution of Ghana’, 1991, p. 156.

<sup>103</sup> The position of queen-mothers is known to have been popular among the Akan.

<sup>104</sup> Northern Ghana is known to have a prominent female Chief whose role exceeds that of the ordinary queen mother or magazia.

<sup>105</sup> Ghanaian Constitution, op. cit., 277

courts has the legal right to an interpretation of proceedings into the language that he or she understands.<sup>106</sup>

Of particular interest is the Juvenile Justice Act, 2003, Act 653, which requires that “the juvenile court shall at the commencement of proceedings in court, inform the juvenile in a language that the juvenile understands” of the right to certain matters including the right to legal representation.<sup>107</sup>

Inability to communicate in the English language does not therefore constitute a disability to effective participation in court or other legal processes in Ghana.

## **2.2. Legal system**

The Constitution is the supreme law of the land, to which all legislation and policies must conform.<sup>108</sup> Parliament is constitutionally recognized as the ultimate legislative authority<sup>109</sup> while the Executive, which finds embodiment in the office of the President, has the constitutional mandate to formulate and implement policies that conform to the tenets of the Constitution and laws formulated by Parliament.

In addition to legislation as a source of law, the Constitution recognizes the customary laws of the various peoples of Ghana as sources of applicable law.<sup>110</sup> For this purpose, customary law is interpreted to mean “the rules of law which by custom are applicable to particular communities in Ghana.”<sup>111</sup> Customary laws and practices are therefore accorded constitutional recognition. Nevertheless, even though the Constitution provides that “Every person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution,”<sup>112</sup> it also stipulates in the same article that “All customary practices which dehumanise or are injurious to the physical and mental well-being of a people are prohibited.”<sup>113</sup>

Customary practices are therefore made subject to the rights guaranteed in the Constitution and, in addition, could be circumscribed by an Act of Parliament.

### **1992 Constitutional Provision**

The first in a line of local legislative initiatives was the inclusion of specific provisions for protecting the rights of children in the 1992 Constitution, which mandates Parliament to enact such laws as are necessary to ensure the realization of certain rights of children.<sup>114</sup> These rights include:

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<sup>106</sup> Ibid., art. 19(2)(h), which guarantees to anyone who is charged with a criminal offence, the assistance of an interpreter where the language used at the trial is not familiar at no cost to the person.

<sup>107</sup> Ibid., Section 22.

<sup>108</sup> See *ibid.*, arts. 1 & 2.

<sup>109</sup> See *ibid.*, art. 95.

<sup>110</sup> See *ibid.*, art. 11.

<sup>111</sup> See *ibid.*, art. 11(3).

<sup>112</sup> Ibid., art. 26(1).

<sup>113</sup> Ibid., art. 26(2).

<sup>114</sup> See *ibid.*, art. 28.

- The right to special care, assistance, and maintenance from its natural parents as is necessary for the child’s development;
- The right, whether or not born in wedlock, to a reasonable provision out of the estate of a child’s parents;
- The obligation on parents to undertake their natural functions of care, maintenance, and upbringing of their children;
- Protection of the child against exposure to physical and moral hazards;
- Protection and advancement of the family as the basic unit of society;
- Protection from engagement in hazardous work;
- Protection from being subjected to torture or other cruel inhumane or degrading treatment or punishment; and
- Protection from deprivation of medical treatment, education, or social or economic benefits by reason of religious beliefs of others.

### **Directive Principles of State Policy**

Chapter Six of the Constitution provides for what are described as the ‘Directive Principles of State Policy’, which require, inter alia, that the State enact appropriate laws to assure the protection and promotion of all basic human rights and freedoms, including the rights of the disabled, the aged, children, and other vulnerable groups in the development process.<sup>115</sup> It is significant to note that the Constitution requires, in the discharge of these obligations that “the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.”<sup>116</sup> The educational objectives under the Constitution anticipate that the State will provide educational facilities at all levels and in all the Regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to all citizens.<sup>117</sup> Article 38(2) further calls for the provision of free, compulsory, and universal basic education.

The Directive Principles are intended to “guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties, and other bodies and persons applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society”.<sup>118</sup>

### **Status of treaties under Ghanaian law**

Of equal significance for our present purposes is the fact that the Constitution proclaims respect for international law. Nevertheless, Ghana is an adherent to the monist tradition, and so requires that every international treaty be specifically incorporated into the national law by Parliament, either through the process of legislation or by resolution.<sup>119</sup>

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<sup>115</sup> Ibid., art. 37(2) (b).

<sup>116</sup> Ibid., art. 37(3).

<sup>117</sup> Ibid, art. 38(1).

<sup>118</sup> Ibid, art. 34(1).

<sup>119</sup> Ibid., art. 75.

## **Status of the CRC and CEDAW in domestic law**

### *Extent of ratification*

Ghana deposited her instrument of ratification of the CRC on 5 February 1990, and thereby became the first country to do so. The ratification was without reservations and the country is therefore bound by the provisions of the treaty in its totality. Prior to this, in 1986, Ghana ratified CEDAW, also without reservations.

Considering the limits that these conventions place on customary practices that affect children and women, some may have anticipated that they would be ratified with reservations. Their absolute ratification by the country should not come as a surprise if one understands the political system and the controlling social and political interests at the time. Between 1981 and 1992, when these two conventions were ratified, Ghana was not a democratically governed country; there was no Parliament and laws were passed by decree by the military junta then in place.

This was a government that was anxious to court international acceptance. Signing those two documents to satisfy interested international concerns and also local interest groups was easy for a government that was very interested in courting legitimacy. The absence of a parliament, some of whose members might have raised objections to unreserved ratifications, did not help matters.

In any case, virtually no opposition is expected to come from that portion of the population whose life styles are more likely to be significantly affected by the absolute ratification of CEDAW and the CRC. These are predominantly rural populations, whose lives are governed by customary law and practices and who have little say in matters of an international character such as the ratification of treaties.

Additionally, the religious interests that dictate the cultural and religious content of laws in some countries such as Nigeria and Egypt are not as strong in Ghana.

### *Effects on domestic law*

In keeping with the Vienna Convention on the Law of Treaties (1969), Ghana's treaty obligations take precedence over municipal or domestic law obligations. Also under the Vienna Convention, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>120</sup>

The CRC and CEDAW, which are both treaties which Armenia has ratified, therefore take precedence over national legislation. Through ratification, the country incurs the obligation to reformulate its existing legislation and any new legislation to conform to the requirements of the various treaties.

Customary laws, being a recognized aspect of the domestic laws, must also conform to the treaty requirements. This position often creates a situation of clash of cultures unless one is not prepared to accept the position that customary law is often what it is because it takes from the peculiar character of the particular society in which it is found.

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<sup>120</sup> Vienna Convention on the Law of Treaties, U.N.T.S, vol. 1155, p. 331, *adopted* 23 May 1969, *entered into force* 27 Jan. 1980, art. 27.



*State reporting status to some treaty bodies*

Ghana's reporting obligations under the CRC and CEDAW are not at pace with existing standards. With respect to its CEDAW obligations, the country's second periodic report, which became due on 1 February 1987, was submitted together with the initial report on 29<sup>th</sup> January 1991. The third and fourth periodic reports, which both become due in February 1995, have yet to be submitted. In the case of the Convention on the Rights of the Child, the country submitted its initial report in 1995. The second periodic report, which was due in 1997, was completed and signed in January 2004 by the Minister in charge of the Ministry for Women and Children's Affairs. That report covers the period of 1997-2003.

*Status of ratification of some relevant treaties by Ghana*

<b>Instrument</b>	<b>Ratification Status</b>
1. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) <sup>121</sup>	Not yet ratified
2. Convention on the Political Rights of Women (1952) <sup>122</sup>	Ratified on 28 December 1965
3. Convention on the Elimination of All forms of Discrimination against Women (1979) <sup>123</sup>	Ratified on 2 January 1986
4. Optional Protocol to the Convention on the Elimination of Discrimination against Women (1999) <sup>124</sup>	Acceded to on 14 September 2006
5. Convention on the Rights of The Child (1989) <sup>125</sup>	Ratified on 5 February 1990
6. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict <sup>126</sup>	Ratified on 24 September 2003
7. Optional Protocol on Sale of Children, Child prostitution and Child pornography (2000) <sup>127</sup>	Ratified on 30 Jun 2005
8. ILO Convention (No. 138) concerning the Minimum Age for Admission to Employment (1973) <sup>128</sup>	As of 1 April 2003, the process of ratification has begun. <sup>129</sup>
9. ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) <sup>130</sup>	Ratified on 13 June 2000.
10. Protocol to Prevent, Suppress and Punish	Not ratified <sup>132</sup>

<sup>121</sup> 521 U.N.T.S. 231, *entered into force* 9 Dec. 1964.

<sup>122</sup> 193 U.N.T.S. 135, *entered into force* 7 July 1954.

<sup>123</sup> G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* 3 Sept. 1981.

<sup>124</sup> G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* 22 Dec. 2000.

<sup>125</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 Sept. 1990 [CRC].

<sup>126</sup> G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* 12 Feb. 2002.

<sup>127</sup> G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* 18 Jan. 2002.

<sup>128</sup> *Entered into force* 19 June 1976.

<sup>129</sup> See Global March Against Child Labour, 'Convention Campaign', <http://www.globalmarch.org/convention-campaign/status-182-132.pdf>, assessed 6 June 2004.

<sup>130</sup> 38 I.L.M. 1207 (1999), *entered into force* 19 Nov. 2000.

Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (2001) <sup>131</sup>	
11. Convention Relating to the Status of Refugees (1951)	Ratified on 18 March 1963
12. African Charter on Human and Peoples Rights (1981)	Ratified
13. African Charter on the Rights and Welfare of the Child (1990) <sup>133</sup>	Ratified
14. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) <sup>134</sup>	Ghana yet to ratify

## 2.3. Budget

### Budget Preparation

Budget preparation has a cycle that begins in May each year. It commences with a series of workshops organized by the Ministry of Finance and Economic Planning (MoFEP) for all Ministries, Departments, and Agencies (MDAs). The workshops are aimed at informing the MDAs of the anticipated ceilings within which they would be expected to operate as well as government policy and specific targets that each would be expected to achieve. The main focus of the present administration within which the MDAs are required to operate is poverty reduction.<sup>135</sup> In this respect, therefore, each MDA would be expected to draw up a budget estimate that would address poverty issues relevant to its area of operation. For example, the Department of Social Welfare would be expected to draw up a budget proposal addressing the issue of street children.

The MDAs are expected thereafter to prepare their respective budgets using data generated at their own level. It is at this stage that they are expected to work in collaboration with the relevant NGOs and civil society groups having an impact on their activities. Unfortunately, the general opinion is that this is not being done.

The budgets of individual MDAs are subjected to discussion, following which a composite draft budget is prepared and submitted to Parliament as the 'Appropriation Bill'. The various subcommittees of Parliament deliberate on the specific aspects relating to their oversight responsibilities. Thereafter the bill is discussed on the floor of Parliament and then passed into law. The Constitution requires that the Appropriation Bill be submitted to Parliament at least one month before the end of the fiscal year, which is 31 December.<sup>136</sup>

<sup>131</sup> G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* 25 Dec. 2003.

<sup>132</sup> See *Ghanaian Chronicle*, 7 May 2004.

<sup>133</sup> OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* 29 Nov. 1999.

<sup>134</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (13 Sept. 2000); *reprinted in* 1 Afr. Hum. Rts. L.J. 40, *entered into force* 25 Nov. 2005.

<sup>135</sup> See generally Government of Ghana, 'Ghana Poverty Reduction Strategy 2003-2005: An Agenda For Growth and Prosperity', Vol. 1 (19), Feb. 2003.

<sup>136</sup> Ghanaian Constitution, *op. cit.*, art. 179.

## **Monitoring budget implementation**

Monitoring structures have been put in place by the Ministry of Finance and Economic Planning to ensure that MDAs strictly apply the government resources for approved activities. Examples include the Project Implementation Monitoring Unit (IMU), which undertakes physical inspection of projects and purchases, and the Public Expenditure Monitoring Unit within the Budgetary Division of MoFEP.

The important role of Parliament as a monitoring agency cannot be underestimated. The Parliamentary Committees created under Article 103 of the Constitution do possess the general authority to monitor the performance of the MDAs. In addition, Parliament itself has the general authority to oversee government expenditure.

At the District Assembly level, there are no obvious systems in place to monitor income and expenditure patterns and there is very limited community and civil society engagement or interaction on the use of such local resources, either due to the non-existence of or lack of capacity on the part of such groups.

## **Budget allocations for children**

Budgetary allocations covering children are made to relevant Ministries, especially the Ministries of Women and Children's Affairs, Manpower, Employment and Development, Education Youth and Sports, and Health. District Assemblies are also provided for under a Common Fund, out of which they are expected to address issues relevant to the protection and promotion of children's rights.<sup>137</sup>

Generally, however, it is clear that the level of expenditure on children is rather low, taking into account the rather low level of expenditure on health and education (which are put at 2.0 per cent and 2.8 per cent of GDP respectively); these are admitted as being much lower than African averages.<sup>138</sup>

## **Multi Donor Budget Support**

The Poverty Reduction Strategy is being financed largely through a novel process known as the Multi Donor Budget Support Programme, which seeks to allocate funding through a common framework. One of its advantages is the promotion of the Government of Ghana's accountability for service delivery. Development partners participating in the MDDBS programme are Canada, the United Kingdom, the Netherlands, Germany, Denmark, Switzerland, the European Union, and the African Development Bank.

For joint monitoring purposes, substantive discussions take place twice a year, through assessments and review missions. The following reports are produced to aid the policy dialogue:

- GPRS Annual Progress Report, covering the implementation of the GPRS (during the first policy dialogue in the year);

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<sup>137</sup> Information obtained from the Ministry of Finance. Examination of the various Ministries' Budget Allocation Statements will confirm that each relevant ministry is expected to spell out how its activities are expected to impact on the welfare of children, taking into account the overall national objective of poverty alleviation.

<sup>138</sup> See *Ghana Poverty Reduction Strategy 2003-2005*, op. cit., p. ii.

- Quarterly reports on expenditures against the budget and on a set of macro-economic indicators; and
- A report on progress on the policy matrix and triggers.

### **3. Law Review and Law Reform**

#### **3.1. Rationale for undertaking the legislative reform initiative**

When the Ghana National Commission on Children (GNCC) prepared the first State party report to the UN Committee on the Rights of the Child, various weaknesses inherent in the implementation of the CRC became obvious. One such weakness was that the laws affecting children, although enacted after independence, possess the imprints of the colonial period.<sup>139</sup> It was realized that the existing laws did not reflect international standards or take into account the country's ability to secure the resources for implementation. The report also observed that a lack of adequate resources, appropriate logistics, infrastructure, adequate training, and outdated legislation were the major factors militating against an efficient protection of children's rights.

The GNCC therefore put in place a Child Law Reform Advisory Committee, made up of representatives from the Ministry of Justice, National Youth Council, Department of Social Welfare, 31st December Women's Movement, Judiciary, Ghana Education Service, Commission on Human Rights and Administrative Justice (CHRAJ), legal practitioners and the Ghana Police Service. The objective of the advisory body was to "review and recommend changes to Ghana's Laws on child rights, justice, and welfare so as to better protect the best interests of children"<sup>140</sup> as required by international standards.

The Law Reform Committee proposed comprehensive reform through formulation of a set of composite laws on children rather than piecemeal amendment of existing legislation. As a consequence, the Children's Act; Criminal Code (Amendment) Act, 1998, Act 554; and Juvenile Justice Act 2003, Act 653 were enacted.

#### **Types of legislative reform undertaken**

As previously noted, Ghana ratified the CRC in 1990. As a follow-up to ratification, Ghana developed its first Decade Plan for Children for 1992 -2002.<sup>141</sup> Within this period, various local legislation and policies were reformulated with a view to ensuring that Ghana's vision for children becomes consistent with international law.

#### **The array of legislation affecting children in Ghana**

To give meaning to the constitutional provisions listed above, and by implication the country's obligations under the CRC, Parliament enacted the Children's Act in 1998. The full title of the Act explains that it was intended "to provide for the rights of the child, maintenance and

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<sup>139</sup> See Ghana National Commission on Children, *Reforming the Law for Children in Ghana: Proposals for A Children's Code* (unpublished report, July 1996), p. 5.

<sup>140</sup> Ibid.

<sup>141</sup> The draft of the Second Ten Year National Programme of Action for Children is ready for consideration.

adoption, regulate child labour and apprenticeship, for ancillary matters concerning children generally and to provide for related matters.”

Additionally, other pieces of legislation seek to affect some positive changes in the rights of children. These include the Criminal Code (Amendment) Act, 1998, Act 554, and the Juvenile Justice Act 2003, Act 653. These laws were passed with the ostensible object of incorporating the obligations of the CRC into Ghanaian law.

### **Some salient provisions guaranteed under the Children’s Act**

The Children’s Act set the upper age of a child at 18 years, in conformity with the CRC. The Juvenile Justice Act followed suit by also identifying a juvenile as anyone under the age of 18. As a follow-up, the permitted age at which a person could be admitted to employment in hazardous work is also set at 18 years.<sup>142</sup> The minimum legal age for marriage is further set at 18 years.<sup>143</sup>

The Act mentions also other child rights that are to be protected and states that the interests of the child shall be paramount in any matter concerning her or him. Generally, as is provided by the Act, the child is entitled to the following rights: not to be discriminated against; to a name and nationality; to grow up with parents; to parental property; to education and well-being; to social activity; to special care where disabled; to opinion; to protection from exploitative labour; to protection from torture and degrading treatment; and to refuse betrothal and marriage. Parents also have duties and responsibilities.

The Children’s Act also requires any person with information on child abuse or a child in need of care and protection to report the matter to the Department of Social Welfare.<sup>144</sup>

### **Juvenile Justice Act, 2003, Act 653**

Complementary to the Children’s Act is the Juvenile Justice Act, 2003, Act 653 which has as its purpose the provision of a juvenile justice system “to protect the rights of juveniles, ensure an appropriate and individual response to juvenile offenders, provide for young offenders and for other connected purposes.”<sup>145</sup> The Act emphasizes that the best interests of the juvenile shall be paramount in any matter concerning her or him.<sup>146</sup> In addition the right to privacy of the juvenile is guaranteed.<sup>147</sup>

The one difficulty affecting the juvenile courts is the lack of panel members’ enthusiasm to attend regularly for effective administration of justice. According to information from the Department of Social Welfare, the problem stems from the very meagre allowance paid to the panel members as a ‘sitting allowance’.<sup>148</sup> In addition, the recurring problem of a lack of adequately trained law enforcement officers on children’s issues still persists, even with the

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<sup>142</sup> Children’s Act 1998, Act 560/LI 1705 (Ghana), § 91.

<sup>143</sup> Ibid., § 14(2).

<sup>144</sup> Ibid., § 17.

<sup>145</sup> This is part of the full title of the Juvenile Justice Act 2003 (Act 653).

<sup>146</sup> Ibid., § 2.

<sup>147</sup> Ibid., § 3.

<sup>148</sup> It is stated that an amount of c18, 000.00 (approximately US\$2) is paid; this is not often enough to cover the fare of a hired taxi to and from the venue of the tribunal.

establishment of the Women and Juvenile Unit of the Police Service (WAJU). It is even alleged that the practice still persists of police officers advising child offenders to inflate their ages in order to avoid being sent to borstal homes.<sup>149</sup>

Extensive education, for law enforcement officers and other specialist agencies, on the rights of the child and the benefits of the borstal system to the child and the society at large is required.

### **The Criminal Code Amendment Law (Act 554) of 1998**

In addition to the Children's Act, which provides generally for the rights of the child, are some amendments to the Criminal Code specifically criminalizing some of the traditional cultural practices and other forms of child abuse. The Code increases the age of criminal<sup>150</sup> and sexual consent<sup>151</sup>, provides for the specific offence of indecent assault<sup>152</sup> revises previous sexual offences<sup>153</sup>, and abolishes customary or ritual servitude (e.g *trokosi*).<sup>154</sup> By virtue of this amendment, Section 109 of the Criminal Code criminalizes compulsory marriage, which is in fact practised in some parts of the country and in the *trokosi* shrines. Equally, Section 314(1) treats as a criminal act any transfer or taking of any person in order that that person may be held or treated as a slave. The recently added section 314A(1) of the Criminal Code prohibits placing a person at any place for the purpose of subjecting him or her to any form of ritual or customary servitude.

An earlier amendment to the Code, also criminalized FGM.<sup>155</sup>

### **The Domestic Violence Bill**

The proposed bill on Domestic Violence also contains far reaching implications for practically implementing provisions of the CRC. It is intended to curb, or at least minimize, the incidence of violence against women and children in domestic settings.

### **The Education Bill**

An Education Bill, which is still in draft form, has its conceptual basis in the CRC and other relevant international human rights instruments, such as the Universal Declaration on Human Rights. The Bill intends to re-emphasize the free and compulsory character of basic education and further seeks to make default by parents a punishable offence.

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<sup>149</sup> The understanding is that the child would prefer being sentenced to a term of months rather than being confined in a borstal home, which could take a longer period.

<sup>150</sup> Section 4 of the Criminal Code (Amendment) Act, Act 554.

<sup>151</sup> Ibid. Section 101.

<sup>152</sup> Ibid. Section 103.

<sup>153</sup> Ibid. Chapter Six in general.

<sup>154</sup> Ibid. Section 17.

## **3.2. Human rights and customary law**

### **Nature of customary law**

Customary law as it operates in the traditional communities evolves out of the common consciousness of the people of that community. The common consciousness is usually greatly influenced by the dominant economic group, which in traditional society, is men.

### **Human rights and traditional society**

Human rights are an integral part of life in traditional African societies. Care for children has been, by their own standards, taken seriously in traditional communities. The Legal Aid Board has noted for instance that the incidence of child neglect was greater in the cities and big commercial centres while it appeared to be very insignificant in a predominantly rural setting like the Upper West and Upper East Regions. The reason adduced was, “because the traditional notion of marriage and child birth/upbringing still holds sway”<sup>156</sup> in rural communities.

### **Constitutional mandate of Chiefs**

The Constitution specifically recognizes the institution of chieftaincy as the custodian of customs of the country’s people. At the same time the institution has the constitutional duty to “undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful.”<sup>157</sup> This function, if performed with seriousness, can achieve results impacting positively on the welfare of children. The Chiefs have not as yet effectively taken up this challenge. Sensitization and capacity building will be necessary to awaken them to their obligations under the constitutional provision.

### **Attitudes and cultural practices in traditional society affect the rights of children and women**

The major respects in which the rights of children are adversely affected, and for the remedy of which statutes have been formulated, include the following

#### *Forced and early marriages*

A further manifestation of the traditional perception of the role of women is the incidence of early and forced marriages. It is reported that in the northern parts of the country, these practices are prevalent, where girls often as young as 13 are forced to abandon school to take up marital responsibilities.<sup>158</sup> For example, as this paper was being prepared one of the weekly newspapers was reporting that a court at Fiapre near Sunyani in the Brong Ahafo Region of Ghana had convicted a 41 year old man of forcing a 13 year old girl into marriage and subjecting her to persistent sexual harassment.<sup>159</sup>

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<sup>156</sup> Legal Aid Board, *1998 Annual Report* (1999), p.15.

<sup>157</sup> Ghanaian Constitution, art. 272(c).

<sup>158</sup> See Quashigah, Kofi, ‘Report of the Study on the Constitutional and Legal Framework for the Right to Pre-Tertiary Education – GES’, November 2001 (study conducted for the GES, with assistance from UNICEF), p. 64. A classic example of the incidence of early marriage was reported in the CHRAJ, Fourth Annual Report, 1997, at p. 147 (as case No. CHRAJ/NR/WMD/008/3/97).

<sup>159</sup> *The Mirror*, 12 June 2004, p. 14.

### *Succession under customary law*

Intestate succession under customary law could be either patrilineal or matrilineal. The patrilineal system recognizes inheritance of the deceased by his or her own children. In many respects the oldest male child inherits and is expected to be responsible for the welfare of his brothers and sisters. This does not often work as is expected, especially for the interests of females. In some patrilineal systems, such as among the Anlo, however, women do share in their fathers' estates. Among the matrilineal groups, it is the nephew who inherits.

The two systems, especially the matrilineal system, often leads to unfavourable consequences for the widow(s) and children of the deceased, who are often dispossessed of even the matrimonial home upon the death of their spouse and father.<sup>160</sup>

The Intestate Succession Law was designed to remove the oppressive nature of the law that governed customary intestate succession. The law prescribes that certain portions of the deceased's property, particularly the matrimonial home, shall be reserved for the spouse and the children.<sup>161</sup>

The Law Reform Commission, a statutory body, was very instrumental in the review of customary laws on succession and the eventual formulation of the Intestate Succession Law.

### *Economic slavery*

Socio-economic circumstances in traditional society require children to commence socialization at an early age. The demands of modern economic pressure have compelled parents to push their children into socialization processes that have lent themselves to abuse. Children are often hired out by their own parents to people who use them as domestic labourers, hawkers, and even for very dangerous jobs such deep river diving for fishermen masters. This last occupation often results in death by drowning.<sup>162</sup> Trafficking is one of the processes used to advance this exchange.

### *Child fosterage*

Child fosterage is one of the many in-built mechanisms in traditional family systems that are meant to serve as "a safety net for children from poor families to receive support from relatively wealthier family members."<sup>163</sup> It is a practice that can be observed commonly in the family systems of the various tribes of Ghana, but it has been institutionalized among many tribes of Northern Ghana, especially the Dagomba.<sup>164</sup> According to the practice, a man's first daughter is to be adopted by his sister, who is traditionally mandated to provide her with both formal and informal education, in addition to the necessities of life. However, "the practice has assumed

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<sup>160</sup> See e.g., *In Re Kofi Antubam (Deceased), Quaicoo v. Fosu* [1965] GLR 138.

<sup>161</sup> Sections 4-8 of the Intestate Succession Law (PNDC Law III), 1985.

<sup>162</sup> A number of those children were recently removed from their masters in fishing villages along the Volta Lake and re-united with their parents.

<sup>163</sup> Duncan, Beatrice, Cultural Practice Affecting Child Maintenance in Ghana, (paper delivered at the West African Regional Conference on Legal and Judicial Reform to Promote Improved Women's Rights in Land, Access to Justice and Family Law Within Plural Legal Systems, Accra, Ghana, 10-12 Feb. 2004).

<sup>164</sup> *Ibid.* See generally, Centre for Social Policy Studies *A Study of Child Domestic Work in Northern and Upper East Regions of Ghana*, University of Ghana, Legon, October 2003.



abusive dimensions in recent times to the extent that recent studies have shown that there is now a thin line between child fosterage and domestic servitude.”<sup>165</sup>

### *Female genital mutilation (FGM)*

Irrespective of the medically proven dangers inherent in the practice of FGM, it still persists. This is especially true among the rural population of the Upper East Regions of Ghana, where it is estimated to have a prevalence of over 80 per cent, a testament to the fact that as a cultural practice, it would take more than just legislation to eradicate it.

### *Trokosi*

*Trokosi* or *fiasidi* is an aspect of a religious tradition that has, over the years, become corrupted and reduced to a rather heinous form of the original practice. The *trokosi* practice is a system under which young virgin girls were sent into fetish shrines to atone for the misdeeds of relatives. In its original conception, the young girls were sent there not because any of their relatives had committed transgressions, but for the same reasons other girls entered convents. From that perspective, the *trokosi* system was designed to create a class of traditional elite women, or *fiasidi*. These ‘marriageable king’s initiates’ were to become the mothers of the elite men and women of society: kings, philosophers, seers, and other men and women of virtue.<sup>166</sup>

In its debased form, the priesthood demands young girls as servants for the gods. While in the shrines, the girls are forced to marry the priests, and are sexually abused and denied basic care, including medical care. They are also not given the opportunity to attend school and are economically exploited. They live in virtual slavery, serving the needs and pleasures of the priests. In its present abused form it represents a system ridden with debauchery, immorality, and resulting in the denigration of the purity of womanhood; the exact opposite of what it was designed to achieve.<sup>167</sup>

Given the nature of the practice, especially as it pertains in the relatively new shrines, the abuses suffered by the inmates could be itemized as follows:

- Punishment for the crimes of others;
- Deprivation of education;
- Forced marriage;
- Child labour;
- Inhumane and degrading treatment;
- Slavery;
- Rape;
- Lack of paternal care for children of the union of *trokosi* and the priests;
- Deprivation of personal liberty; and

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<sup>165</sup> See Centre for Social Policy Studies, op. cit.

<sup>166</sup> See Kumodzi, Dartey, Report on the *Fiasidi* Institution (unpublished).

<sup>167</sup> See Quashigah, Kofi, ‘Religious Freedom and the Vestal Virgins: The *Trokosi* Practice in Ghana’, in *RADIC (The African Journal of International and Comparative Law)*10 (1998), pp. 193–215.

- Infringement of the right to freedom of religion.

These conditions constitute serious infractions of the rights of individuals and are in fact proscribed by both international law and the national laws of Ghana. For example, the practice as it is carried out in relatively new shrines runs counter to a whole range of provisions of the section of the 1992 Constitution on Fundamental Human Rights and Freedoms, including Article 14, which prohibits deprivation of personal liberty except in accordance with the Constitution itself. The *trokosi* system, under which the inmates are held against their will, infringes this right.

Article 15 is also very much infringed upon. This Article makes the dignity of all persons inviolable and it prohibits cruel, inhumane, and degrading treatment and any other condition that detracts or is likely to detract from one's dignity and worth as a human being. The physical and psychological conditions in the shrines are definitely far from humane and are therefore nothing short of slavery and forced labour, which are also prohibited by Article 16.

#### *Purported settlement of offences against children by traditional authorities*

The dominant role of the Chief in typical rural communities and the virtual absence of governmental presence in some of these communities allow much leeway for the traditional authorities to adjudicate in matters, including child abuse matters, that are essentially criminal in nature. Cases involving defilement of children, which is criminal and falls within the jurisdiction of the courts, is often handled by the traditional authorities and disposed of with cash or in kind fines and compensation (or both).

Only a wider expansion of central government authority, especially of WAJU, into all communities would reduce this practice to the barest minimum.

#### *Traditional socialization and the perceived role of women*

Traditional Ghanaian society is patriarchal in nature and therefore places the woman and the girl children at the nerve centre of domestic and reproductive activity, while it accords men and the boy child the lead agency in recreational and productive activity. This general perception has had adverse consequences on the level of opportunities open to the girl child, especially in the traditional social set up.

The practice appears to have been legally reinforced by the 1992 Constitution which, although title 'women's rights', has a focus on the maternal obligations of women. It provides as follows:

- 1) "Special care shall be accorded to mothers during a reasonable period before and after child-birth; and during those periods working mothers shall be accorded paid leave.
- 2) Facilities shall be provided for the care of children below school-going age to enable women, *who have the traditional care for children*, to realise their potential (emphasis added).
- 3) Women shall be guaranteed equal rights to training and promotion without any impediments from any person."<sup>168</sup>

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<sup>168</sup> Op. cit., art. 27.

The article has been criticized on the following grounds:<sup>169</sup>

- The designation ‘Women’s Rights’ to an article touching on only maternity leave, day care centres and promotion represents a missed opportunity for women. The article could have been replaced with an expanded version containing provisions covering other pertinent issues affecting women. Alternatively, the framers could have considered a tailored heading such as ‘Working Mothers’ to suit the themes running through the provisions.
- The provision seeks to reinforce the traditional idea that the care of children is the sole responsibility of the woman. This suggestion contradicts other provisions (see above) which promote the integration of women into mainstream development in addition to the outcomes of the Cairo Conference on Population and Development in 1994 which sought to advocate for equal contributions of men and women to child care. The provisions on the care of children should have thus been expressed as a joint parental responsibility.
- The generality of its provisions reflect some challenges facing educated women in both formal and informal employment and leaves out the position of rural women who do not have a sense of maternity leave, and who by reason of the nature of their employment have nothing to do with training and promotion.

This traditional perception of the role of women finds expression in the promotion of boys’ education over that of the girls, especially in rural areas. As long as this perception breeds differentiation with respect to the educational, social, and therefore economic opportunities open to the female child, a violation of Article 17 of the 1992 Constitution (which prohibits discrimination on the basis of sex) becomes apparent. The persistence of this violation will also constitute a failure of the State to ensure equal opportunities for all in the field of education, as required by Article 28 of the CRC.

### **The interface between practice and the provisions of the Constitution, the CRC, and CEDAW**

The reality remains, even in the face of all the constitutional provisions and the fine injunctions of the CRC and CEDAW, that in Ghana the practices proscribed by these provisions are integral to people’s way of life. These are people steeped in their traditional ways of life, who were not directly consulted before formulation of the laws or ratification of the treaties, and in any case are not even aware of the treaties’ existence. It will take a great deal of education to reverse the attitudes towards these customary practices, as shown in the example of FGM, which persists even after its proscription.

In certain cases, change in economic circumstances is required to have the desired impact on the rights of children. Experience at the CHRAJ in the handling of child maintenance cases, for instance, show that many men are not able to meet the basic needs of their children simply because they do not have the economic capacity to do so.

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<sup>169</sup>Duncan, Beatrice, *Women in Agriculture in Ghana*, p.11Accra; Federicht Erbert Foundation and the Federation of International Women Lawyers, 2004.

It is clear that laws by themselves alone will not lead to effective realization of the rights guaranteed.

## **4. The Current Institutional Framework and Law Enforcement**

### **4.1. Current institutional framework**

#### **The Ministry of Women and Children's Affairs (MOWAC)**

The Ministry of Women and Children's Affairs was established in 2001 with a mission to promote the welfare of women and children in Ghana, and is therefore designated by the Government to initiate, coordinate, and monitor the situation of women and children in the country. Its aims and objectives are set out as follows:

- Formulate gender and child specific development policies, guidelines, advocacy tools, strategies, and plans for implementation by MDAs, District Assemblies, private sector agencies, NGOs, civil society groups, and other development partners;
- Prepare national development plans and programmes for women and children, in which all the desired objectives and functions of the ministry are programmed for implementation; and
- Ensure that development programmes for women and children are effectively implemented, through continuous monitoring and evaluation of the implementation process, making sure stipulated objectives are fulfilled.

Prior to the establishment of the Ministry of Women and Children's Affairs, the GNCC was an independent commission of a multi-sectoral composition. Various members thereby brought their specialities to bear on the activities of the Commission. Under the present dispensation, the GNCC has been reduced to a Department of the Ministry of Women and Children's Affairs, coupled with an erosion of its independence.

#### **Ghana National Commission on Children**

The Ghana National Commission on Children (GNCC) was established in 1979. One of its objectives is to “see to the general welfare and development of children and the coordination of all essential services for children in the country that will promote the United Nations Rights of the Child.”<sup>170</sup> Another stated objective is “to work hand-in-hand with the various agencies concerned with the implementation of policies and programmes on children.”<sup>171</sup> It therefore falls within the mandate of the GNCC to oversee the implementation of the CRC in Ghana. With the establishment of the Ministry of Women and Children's Affairs, the latter now assumes that primary responsibility. Currently, its specific functions relate to:

- Developing programmes and projects out of policies and plans of the Ministry on child-related issues;

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<sup>170</sup> Armed Forces Revolutionary Council Decree No. 66.)

<sup>171</sup> Ibid.)

- Monitoring and evaluating programme implementation of MDAs, NGOs, and FBOs and prepare quarterly and annual reports;
- Gathering information through policy formulation by the Ministry; and
- Providing referral and on-the-spot counselling services at both the regional and district levels.

### **National Council on Women and Development**

Pursuant to the aims and objectives of the Nairobi Forward Looking Strategies,<sup>172</sup> the National Council on Women and Development (NCWD) was established in 1975.<sup>173</sup> Among its functions were:

- To advise the Government generally on all matters relating to the full integration of women in national development at all levels; and
- To study the effect of customary beliefs, prejudices, and practices on the advancement of women in the education, political, and economic fields.

These functions could have positive impact on children, especially the female child. However, like the GNCC, the NCWD has been reduced to a department of the Ministry of Women and Children's Affairs, with the consequent loss of the autonomy it previously enjoyed.

### **Women and Juvenile Unit**

In October 1998, WAJU was established in response to an increase in the number of cases of abuse and violence against women and children.<sup>174</sup> Its functions are itemized as follows:

- To investigate all female and child-related offences;
- To handle cases involving domestic violence;
- To handle cases of child abuse;
- To handle juvenile offences; and
- To prosecute all such cases, where necessary, and any other functions as may be directed by the Inspector General of Police.

In the course of executing these duties WAJU receives complaints on and handles the following types of cases:

- Defilement;
- Rape;
- Incest;
- Abduction;

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<sup>172</sup> 'The Nairobi Forward-looking Strategies for the Advancement of Women', *adopted by* the World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, Kenya, 15-26 July 1985.

<sup>173</sup> National Redemption Council Decree 322.

<sup>174</sup> See Republic of Ghana, Ghana Police service, <http://www.ghanapolice.org>, assessed 16 Aug. 2004.

- Criminal abortion;
- Forced marriage;
- Assault/wife battery;
- Threatening;
- Unnatural carnal knowledge;
- Indecent assault;
- Child trafficking;
- Causing harm;
- Causing damage; and
- Failing to provide the necessities of health and life, etc.<sup>175</sup>

The emergence of WAJU has improved significantly the response of the police force to issues involving the rights of women and children.

### **Department of Social Welfare**

The Department of Social Welfare is one of the constituent arms of the Ministry of Manpower Development. Its mission statement as stated is to “work with people in their communities to improve their social well-being through promoting development with equity for the disadvantaged and the vulnerable in society.”<sup>176</sup> Among its objectives for 2003 was “to provide professional social welfare services in all districts to ensure that, statutory responsibilities of the Department of Social Welfare are carried out in the field of Justice Administration, Community Care and Child Rights and Protection.”<sup>177</sup> The specific activities involved under the heading of ‘Child Rights and Protection’ are itemized as:

- Child survival and development;
- Supervision of day care centres;
- Maintenance of children;
- Child custody;
- Paternity;
- Family reconciliation, and
- Running of children’s homes.

In the performance of these and other functions, the Department receives support and collaboration from agencies and organizations, including District Assemblies, the Ghana Education Service, the Ghana Health Service, as well as some NGOs and international organizations, such as UNICEF.

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<sup>175</sup> For a statistical analysis of cases reported to WJU between 1999 and 2003, see Republic of Ghana, Ghana Police service, ‘Women and Juvenile’s Unit’, <http://ghanapolice.org/waju>, assessed 1. 2004.

<sup>176</sup> See Department of Social Welfare, *2003 Annual Report*, Accra: Government of Ghana, 2004, p. 1.

<sup>177</sup> Ibid.

## **The Legal Aid Board**

The Legal Aid Board is a public institution charged under the Constitution and an Act of Parliament<sup>178</sup> to render legal assistance to any person whose right is being infringed either under the Constitution or other civil or criminal enactment. Major categories of disputes that are often reported to the Board for assistance include maintenance of spouses and children; testate and intestate succession; and custody of children. All have significant bearings on the rights of children. CHRAJ and the Federation of Female Lawyers- Ghana (FIDA) work very closely with the Board in matters relating to women and children.<sup>179</sup> In addition to providing legal aid to indigent members of society, the Board also settles disputes out of court through alternative dispute resolution mechanisms.

## **Ministry of Health**

The Ministry of Health has responsibility for the implementation of all health-related matters affecting children.

## **Ministry of Education**

The Ministry of Education covers formal and non formal aspects of education including Early Childhood Care and Development (ECCD).

## **District Assemblies**

The Child Rights Regulation requires all District Assemblies to establish child panels.<sup>180</sup> A few child panels have been established in accordance with the regulations in the legislative instrument. The vast majority of District Assemblies, however, have yet to do so. There is a need for lobbying and sensitization of the District Assemblies to view this duty as essential.

Meanwhile UNICEF and Save the Children have been supporting Child Protection Teams in selected communities within their geographical areas of operation. These are informal structures charged with monitoring the rights of the child at the community level.<sup>181</sup>

### *A special focus on Save the Children-supported Child Panels*

Before the closure of its Ghana Programme, Save the Children operated in ten Districts, evenly located throughout the Northern and Ashanti Regions. The organization has collaborated with the District Assemblies to create Child Panels in the Districts. The terms of reference of these Panels are set out as follows:

- Educate community members and promote the rights of children;
- Mediate in matters related to the rights of children, including neglect, lack of proper guardianship, and maltreatment;
- Facilitate counselling support to child victims of emotional abuse where necessary;

<sup>178</sup> Legal Aid Scheme Act, Act 542, 1997.

<sup>179</sup> See Legal Aid Board, *Annual Report 1999*, Accra, 2000, p. viii.

<sup>180</sup> Child Rights Regulation 2002 (LI 1705).

<sup>181</sup> These include children, adults, social workers, and unit community leaders among their members who educate their peers on the rights of children.

- Facilitate reconciliation between the child and person offended by the action of the child;
- Suggest community guidance for a child (either by a social worker or a person of good standing within the community) with the consent of parties concerned in the matter;
- Request an apology or restitution to the offended person by the child;
- Promote the total well being of children;
- Monitor violations of rights of children through community child rights groups;
- Promote the existence of communities sensitive to rights of children;
- Intervene in matters of abuse before such cases become aggravated; and
- Promote the inclusion of disabled children in education and other aspect of community life.

Save the Children also provided training for panel members and followed up with monitoring of their performance. UNICEF-supported interventions follow the same framework.

## 4.2. Law enforcement

### Resolution through the formal court process

The Constitution guarantees due process for any person whose interests are or are about to be affected by the action or omission of an individual, group, the government, or its agencies. Under the Constitution, the judiciary consists of the Superior Courts of Judicature, which are the Supreme Court, the Court of Appeal, the High Court, and Regional Tribunals, in addition to such courts or tribunals as Parliament may by law establish.<sup>182</sup> The lower courts established include the circuit courts and the district courts (which sit as both Family Tribunals and Juvenile Courts) to deal with both criminal and civil matters affecting children. It is significant in this respect to note that both the Children and Juvenile Justice Acts have made provision for Family Tribunals and Juvenile Courts.

Juvenile Courts are established under the Courts (Amendment) Act 2002.<sup>183</sup> Under the Act, the Chief Justice can designate any District Court as a Juvenile Court.<sup>184</sup> Any such Juvenile Court is to be presided over by the Magistrate of the particular District Court. He shall act together with two other persons, one of whom shall be a Social Welfare Officer and the other person shall not be less than 25 years old. The jurisdiction of the Juvenile Court extends to all criminal matters involving a person below the age of 18 years.<sup>185</sup>

The District Courts therefore have the jurisdiction to double as the Family Court or the Juvenile Court as the circumstances of a case might demand. The jurisdiction of the Family Tribunal covers matters concerning parentage, custody, access, and maintenance of children.

The formal court system may be diagrammatically represented as follows:

<sup>182</sup> Ghanaian Constitution, *op. cit.*, art. 126.

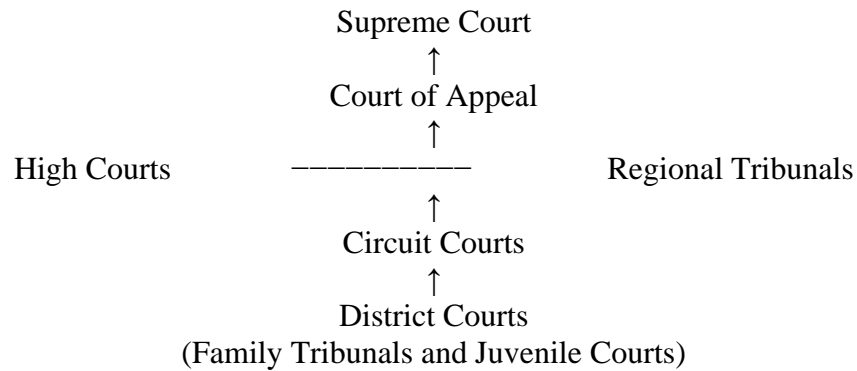
<sup>183</sup> Courts (Amendment) Act 2002, Act 620, § 39.

<sup>184</sup> *Ibid.*, § 49.

<sup>185</sup> Courts (Amendment) Act 2002, Act 620 (Ghana), § 49.



### *The court structure under the legal system of Ghana*



### **Human rights enforcement mechanisms**

The 1992 Constitution confers on every individual the right to apply to the High Court for redress if that individual alleges that any of his or her fundamental rights and freedoms have been, are being or are likely to be contravened.<sup>186</sup> The High Court may issue such an order or directions as would be necessary to enforce or secure the enforcement of the rights guaranteed. The said order could be in the form of *habeas corpus*, *certiorari*, *mandamus*, prohibition, and *quo warranto*.

### **The Judicial Committees of the Houses of Chiefs**

It is worth noting that chieftaincy disputes are disposed of through a different court system, at the apex of which is also the Supreme Court. Below the Supreme Court are the Judicial Committee of the National House of Chiefs and, at the Regional level, the Judicial Committees of the Regional Houses of Chiefs. At the lowest rung, are the Judicial Committees of Traditional Councils. All these have jurisdiction over only chieftaincy matters and rarely touch upon child-related matters.

### **The Principle of Diversion**

For the protection of the interests of the child who is in conflict with the law the Juvenile Justice Act 2003 permits the juvenile court, after considering a social enquiry report, to decide whether the juvenile charged with an offence should be diverted from the criminal justice system with or without conditions.<sup>187</sup> The objective of the diversion principle is that a juvenile in conflict with the law should be humanely treated and reformed rather than condemned and stigmatized through the criminal justice system.<sup>188</sup>

### **Access to the Courts by Children**

A child can by him or herself or acting through a 'next of friend' apply to the Family Tribunal for a declaration of parentage and maintenance. It is within the knowledge of this writer that children have been lodging complaints against their parents with CHRAJ, for instance.

<sup>186</sup> Ghanaian Constitution, op. cit., art. 33(1).

<sup>187</sup> Juvenile Justice Act, op. cit., § 25.

<sup>188</sup> See *ibid.*, § 26 on the objectives of the diversion principle.

## **Resolution through Alternative Dispute Resolution (ADR) Mechanisms**

The laws of Ghana recognize alternative dispute resolution as a mechanism for the resolution of disputes. A draft bill intended to regularize and promote the practice of ADR is under discussion by stakeholders. Meanwhile several pieces of legislation, discussed below, encourage the practice of ADR.

### *The Courts Act, 1993, Act 459*

The Courts Act 1993 provides the general ambit within which a court may permit resort to non-adjudicatory processes, such as negotiation and mediation, for the settlement of disputes in all civil and selected criminal cases. The Act provides as follows:

“Section 72. (1) Any court with civil jurisdiction shall promote reconciliation, encourage and facilitate the settlement of disputes in an amicable manner between and among persons over whom the court has jurisdiction. . . .

Section 73. Any court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not aggravated in degree, on payment of compensation of other terms approved by the court before which the case is tried.”<sup>189</sup>

As a general rule, therefore, courts have the authority to encourage amicable settlements, even in criminal cases that do not amount to very serious offences.

### *Matrimonial Causes Act, Act 367 (1970)*

The Matrimonial Causes Act permits the use of ADR mechanisms in the reconciliation of parties.<sup>190</sup> The Act, however, does not extend the use of ADR mechanisms to the settlement of some related matters, such as child custody, property settlement, and financial provision for children. The exclusion of these related matters from settlement through the ADR processes has been rightly described as an anomaly that needs to be re-examined.<sup>191</sup>

### *The Children’s Act 1998, Act 560*

The Children’s Act recognizes the use of ADR mechanisms for the resolution of certain classes of disputes involving children; these are minor criminal offences where the circumstances of the offence is not aggravated and also civil matters concerned with the rights of the child and parental duties.

The Act provides for the establishment of ‘Child Panels’ which have non-adjudicatory functions to mediate in criminal and civil matters affecting children.<sup>192</sup> A legislative instrument was

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<sup>189</sup> The Courts Act 1993, Art 459, §§ 72 and 73.

<sup>190</sup> Matrimonial Causes Act, Art 367 (1970)

<sup>191</sup> Nene Amegatcher , Kofi Quashigah, and G. Wood, *Study on Administrative Law Procedures/Arbitration and other Alternative Dispute Resolution Mechanisms* (1999) (A World Bank-supported consultancy work prepared for the Ministry of Justice), p. 50.

<sup>192</sup> Children’s Act, op. cit., §§ 27 & 28.

formulated with the objective of providing an administrative framework for the realization of the rights of the child and the working of the structures created under the Children's Act.<sup>193</sup>

### **4.3. The Commission on Human Rights and Administrative Justice (CHRAJ)**

Apart from the courts, the Constitution creates another institution that is also vested with the function of protecting the fundamental rights and freedoms of the individual. The agency CHRAJ is a constitutionally created body.<sup>194</sup> Its functions include the investigation of complaints for violations of fundamental rights, corruption, abuse of power, and unfair treatment.<sup>195</sup> By the nature of its procedure, the CHRAJ provides an easy and relatively cheaper and faster avenue for redress of the abuse of fundamental rights than the courts. Its *modus operandi* is informal as it is not constrained by very rigid rules of procedure and evidence.

A study of its annual reports indicates that a large portion of its time is devoted to the resolution of cases that relate to maintenance of children. The 2001 Annual Report, for instance, indicated that 51.5 per cent of all complaints received by the CHRAJ in the year were 'family-related issues', which covers matters such as maintenance of children, paternity disputes, child custody, deprivation of education, Medicare and intestate succession.<sup>196</sup>

The Commission is, however, bogged down by the usual problem of lack of resources.

The CHRAJ is not a court but a quasi judicial body that possesses the authority to compel attendance.<sup>197</sup> Where a party refuses to respect its decisions, the CHRAJ has the power to apply to the High Court to enforce its decisions.<sup>198</sup>

### **4.4. Multi-sectoral committees on the rights of the child: a major step towards achieving interdependency of rights**

At a national conference of agencies working in the field of child protection in 2001, it was agreed that inter-agency committees on child protection must be formed around the country, with the objective of securing the holistic development of the child. At the national and regional levels, the committees consist of an association of state and civil society groups working in the field of child protection in Ghana. Applying the principle of the interdependency of rights and the specific acknowledgement that the child 'must be treated as one piece and not pieces'. Membership includes the Ministry of Women and Children's Affairs, Judiciary, Ghana Education Service, Attorney General's Department, WAJU, Ghana NGO Coalition, Ark Foundation, Ghana Prisons Service, Department of Social Welfare, Child Labour Unit, Ghana Medical Association, and the Ghana Bar Association. It is currently under the chairmanship of the Chief Justice of the Republic of Ghana.

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<sup>193</sup> Child Rights Regulations, 2002 (LI 1705).

<sup>194</sup> See Ghanaian Constitution, op. cit., ch. 18.

<sup>195</sup> See *ibid.* art. 218.

<sup>196</sup> Commission on Human Rights and Administrative Justice, *Annual Report 2001*, Accra: CHRAJ, 2002, p. 27.

<sup>197</sup> See Ghanaian Constitution, op. cit., § 219.

<sup>198</sup> See *ibid.*, § 229.

Some of the achievements of the Committee include a redrafting of the forms issued by the police to victims of abuse and violence for medical examinations, a near conclusion on the creation of a State-sponsored victim support fund to absorb the medical bills of indigent victims of abuse and, a negotiation with the Ghana Education Service to review the current policy on the treatment of teachers who sexually abuse children.

## 4.5. Effectiveness of implementation

### The court as an enforcement mechanism

A review of progress in law enforcement shows a clear gap between practice and enforcement. A typical case in point is in the area of the prevention and punishment of harmful traditional practices. Experience has shown, for instance, that *trokosi* and FGM, as religious/culturally-based practices, are very difficult to wipe out merely through legislation. The same reason explains the obvious lack of the political will to confront them with the full force of the criminal law. To date, no criminal prosecution has been commenced against any one for practising *trokosi*. In an isolated instance, a conviction with respect to FGM took place in 2004 when a 70 year old woman was convicted of conducting FGM on a young girl.

The courts have however become very drastic in the level of punishment imposed on convicted persons for offences against young persons, especially for offences of sexual nature. Discussions with members of the lower courts, before whom the majority of the cases involving child abuse come, have indicated the general resolve among members of the judiciary to impose stiffer punishments on those found guilty. Newspapers are also replete with news items of convictions for the defilement of children.

Lack of available enforcement opportunities and education on their availability may be factors that inhibit the effective implementation of the legislation providing for the protection of the rights of children. A perusal of available statistics on the activities of the WAJU indicates that given the proper enforcement opportunity and public education successful enforcement is possible. The following table constitutes statistics for cases reported to the WAJU from 1999 to 2003:<sup>199</sup>

	1999	2000	2001	2002	2003
<b>Rape</b>	23	34	58	134	100
<b>Defilement</b>	154	181	204	533	509
<b>Assault</b>	95	86	232	1,456	1,559
<b>Threatening</b>	21	16	60	652	461
<b>Causing harm</b>	4	6	7	40	28
<b>Causing damage</b>	6	3	6	60	43
<b>Indecent assault</b>	11	17	28	69	49
<b>Incest</b>	5	6	5	16	8
<b>Offensive conduct</b>	4	1	2	175	165
<b>Unnatural carnal knowledge</b>	3	2	-	-	-
<b>Failing to supply basic necessities of health and life</b>	-	7	17	147	54

<sup>199</sup> Republic of Ghana, Ghana Police Service, 'Statistics of cases reported to Women and Juvenile Unit/WAJU Ghana Police Service, Accra, between 1999 and 2003', <http://www.ghanapolice.org/waju/statistics2.htm>, assessed 16 Aug. 2004.

<b>Abduction</b>	3	5	9	80	79
<b>Child trafficking</b>	-	-	-	4	4
<b>Child stealing</b>	1	-	-	16	4
<b>Exposing child to harm</b>	1	-	4	67	48
<b>Procuration</b>	1	1	-	-	-
<b>Attempted defilement</b>	-	-	1	1	-
<b>Attempted rape</b>	1	2	3	17	28
<b>Non-child maintenance</b>	523	1,383	1,047	1,899	3,024

These figures merely represent the number of cases reported. Nevertheless, one cannot fail to observe the dramatic leap in the figures from 1999 to 2002, in particular. It is the general belief among human rights activists in Ghana that the upsurge in reported cases may not necessarily be due to an increase in their occurrence, but more likely due to an increase in public knowledge about the existence of WAJU and the rights of the child.

## 5. Process Leading To Legislative Reforms

### 5.1. Actors and strategies

#### Law Reform Commission

One of the principal actors in the field of legislative reform is the Law Reform Commission, established by statute on 1 October 1968.<sup>200</sup> Its mandate may be summarized as the:

- Simplification and modernization of the law;
- Consolidation or review of the law;
- Repeal of obsolete or outmoded laws.

The Commission takes its lead in setting its agenda from the Attorney-General and Minister for Justice. An example of one initiative is a project under the heading 'Programme for Abolishing Dehumanizing Customary Practices'. Under this programme, the Commission investigates and researches selected customary practices with a view to abolishing them or bringing them into conformity with constitutional provisions. Under this programme the practice of *trokosi* was investigated and proposals were made, leading to its criminalization.

The Commission has also concerned itself with the issue of FGM and rape and, after much research, made recommendations resulting in amendments to the criminal law on the offences. It is also spearheading the Bill on Domestic Violence. The Commission develops justification for law reform primarily through primary and secondary research. Financial constraints, however, limit the extent to which it can be proactive in law reform.

<sup>200</sup> NLCD 288 (Replaced with NRCD 325, 1975)

## **Child and women rights focused NGOs – FIDA, the Ghana NGO Coalition on the Rights of the Child**

The role of specialized human rights NGOs in the promotion and monitoring of human rights needs to be mentioned. Specialized NGOs, such as the Federation of Female Lawyers (FIDA), Africa Legal Aid (AFLA), and the Ghana NGO Coalition on the Rights of the Child, among others, have been contributing immensely to the protection and promotion of women's and children's welfare. FIDA, for instance, specializes in the provision of legal assistance to indigent women and children. AFLA concentrates on labour rights, in addition to women and children's rights, while the Coalition addresses the broad mass of issues. These NGOs have been very instrumental in the public's sensitization to various forms of child rights abuses such as *trokosi* and child neglect.

### **International agencies**

International agencies, especially those operating from within the ambit of the UN and that have a focus on the interests of children, have been particularly instrumental in pushing forward the formulation and implementation of policies and legislation on the rights of children. UNICEF, UNFPA, UNESCO, and Save the Children should be particularly mentioned in this context. The role of UNICEF in the reform of legislation on children is well known.

Review research processes have also contributed to unearthing evidence on the state of laws and social practice. For instance, the process resulting in the End of Decade Report on the Follow-up to the World Summit on Children and the Situation Analysis of Women and Children in Ghana<sup>201</sup> provided an opportunity to evaluate Ghana's performance in implementing the CRC. These studies were conducted by the GNCC, with support from UNICEF and the Ghana Office of Save the Children (UK), together with input from Government agencies, the private sector, civil society, and NGOs. They do provide opportunity for the regular assessment of progress in the realization of the rights guaranteed.

## **5.2. Policy Measures and Training**

There is a general recognition of the need to formulate laws and policies to address the rights of children.

### **Girls' education**

To correct the imbalance in gender enrolment, special attention is being paid to the educational rights of girls. Efforts have therefore been intensified to achieve a balance in enrolment of girls and boys at all levels of education. The Government of Ghana has established the Girls' Education Unit within the Basic Education Unit of the Ghana Education Service, with a mandate to develop programmes to improve upon girls' education. In addition, public universities have been implementing an affirmative action policy in admissions in favour of female applicants.

### **People with disabilities**

The 1992 Constitution recognizes the rights of the disabled to equality in access to basic services and opportunities. Parliament must, however, legislate to give specific content to the rights

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<sup>201</sup> The Situation Analysis was supported by UNICEF.

guaranteed. A draft Bill on the Rights of the Disabled exists, but Parliament has not yet gathered the courage to transform it into law because of the possible financial implications that passage of the bill will involve. This law, when passed, will positively affect the many children that are physically challenged. It is important to note however that in 2000, Parliament approved a Policy on Disability to serve as a framework for holistic services to the disabled.

### **Street children**

There is an obvious problem with the number of street children. Increasing levels of poverty have rendered many families ineffective in providing for the care and protection needed in the homes. To address the street children phenomenon, the government drafted a policy on street children in 1999, which, among other things, seeks to equip these children with employable skills. Such training projects have already been initiated in Accra, Kumasi, Sekondi-Takoradi, and Tamale<sup>202</sup> with funding from the World Bank.

### **Combating child labour**

Akin to the problem of street children is child labour, which mostly appears in its worst forms. It is widely believed that the effective implementation of the policy on free and compulsory basic education would have a positive impact on efforts to reduce child labour. Issues of child labour have been reflected in the Ghana Poverty Reduction Strategy and have also emerged as a critical issue in the ongoing preparation of the National Social Protection Strategy. A specific policy on child labour, however, does not exist at present and may not become necessary given the visibility of the issue in major national policies.

### **Early childhood care and development**

The 2003 strategic plan of the Ministry of Education provides for the inclusion of Early Childhood Care and Development (ECCD) into the mainstream of basic education. Its objectives are stated as follows:

- Promote widespread acceptance and observation of the Children's Act;
- Expand ECCD programmes for the survival, growth, and development of children, especially those in rural and poor communities;
- Promote nutrition and household food security;
- Reduce high infant and under-five mortality rates;
- Promote pre-school education;
- Enforce existing laws to reduce all forms of child abuse and socio-cultural practices that are detrimental to the well being of the young child; and
- Strengthen the institutional capabilities of those delivering ECCD services at the national, regional, district, and sub district (Zonal, Urban, Town, and Area Council) levels to foster closer collaboration among all such institutions.

The general problem inhibiting the effective implementation of these goals is the general issue of lack of resources.

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<sup>202</sup> See National Economic Dialogue, 'Report on Proceedings', 2003, p. 55.

## **Economic empowerment of women**

The MOWAC is endeavouring to source and make available to women micro-credit facilities, so as to strengthen their capacity to adequately provide for their children. It should be noted, however, that micro-credit in itself will not solve the problem of child abuse and neglect unless it is coupled with other interventions such as state institutional reform and improvement.

### **5.3. Training and Dissemination of Laws**

In its Annual Report covering 1997, the Law Reform Commission mentions lack of publicity of some laws as the reason for their non-implementation. According to the Commission, a number of surveys conducted have revealed that laws passed have not had any real impact on the lives of most people in the country; especially those in the rural areas. The Report states that “a large majority of people including women and children are still subject to obnoxious customary practices and generally laws have achieved very little results because most people have little or no idea about the laws in operation.”<sup>203</sup> The Commission was particularly concerned about laws on FGM, child maintenance, succession, and various provisions of criminal law relating to crimes against women and children.

For its part, the GNCC admits that the integration of the CRC into the academic training programmes for professional groups has not yet been realized. However, sensitization workshops have been held for over 1,000 professionals, including teachers, doctors, lawyers, police and judges.<sup>204</sup> It is equally asserted that more than 3,000 members of school children’s clubs have been trained on methods for influencing policy at the local, national, and international levels,<sup>205</sup> however the impact of these trainings is yet to become obvious to the ordinary observer.

The Government of Ghana and UNICEF ‘Master Plan of Operations of 1996-2000’ contained a social mobilization programme that had the objective of building the capacity of the media, various institutions, other governmental institutions, and NGOs on the promotion of attitudinal change towards children among the general populace. This has been repeated with some modifications under the 2001-2005 cycle, specifically under the ‘Rights Promotion and Protection Programme’.

The CRC has been translated into six Ghanaian languages, namely Ga, Ewe, Twi, Dagbani, Dagare, and Nzema with 1,000 copies produced and distributed in each. The Children’s Act has also been translated into the major local languages.

The NGO Coalition on the Rights of the Child is devoted to working for the improvement of children’s rights. It is made up of over 150 NGOs who monitor implementation of the CRC and also supply information for documentation. The Coalition serves as an unofficial monitoring mechanism to keep government agencies constantly aware of their responsibilities.

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<sup>203</sup> Law Reform Commission, *Nineteenth Annual Report: 1<sup>st</sup> January 1997 – 31<sup>st</sup> December 1997*, Accra: Law Reform Commission, 1998, p.20.

<sup>204</sup> UN Committee on the Rights of the Child, ‘Second periodic reports of State parties due in 1997: Ghana’, U.N. Doc. CRC/C/65/Add.34 (14 July 2005), para. 97.

<sup>205</sup> *Ibid.*, para. 98.



The Law Reform Commission has recommended that there be decentralization and intensification of education on existing laws through structures with minimum capacity to do so. The proposed agencies include CHRAJ, Legal Aid Board, the media, Department of Social Welfare, Ministry of Communications, National Commission on Civic Education, GNCC, the Ministry of Women and Children's Affairs, and NGO's.

#### **5.4. Some indicators of success**

Irrespective of the deficiencies encountered in the implementation process, limited success can be identified in some areas. Statistical figures from the Ghana Health Service indicate improvements in the health and educational levels since ratification of the CRC. Infant mortality decreased from 103 per 10,000 in 1990 to 56.7 per 10,000 in 1998. During the same period, the under-five mortality rate decreased from 155 per 10,000 to 108 per 10,000.<sup>206</sup> These successes were attributed to the influence of the country's first National Programme to Action on the Follow-up to the World Summit for Children, which sought to focus governmental institutions' activities on child survival, protection, participation, and development. Media coverage and publicity on children's rights, together with the contributions of child-focused NGOs, also accounted for the success.

### **6. Conclusions: Lessons Learned and Recommendations**

Research has revealed a plethora of problems that have frustrated the effective implementation of the CRC and other relevant child-related instruments. At the same time, a number of important lessons can be gathered from an examination of the efforts to implement the CRC in Ghana. The most important include:

- Legislation, including constitutional provisions, can have some reformatory effect on customary practices that impinge upon the rights of children. The country has taken the necessary steps to put in place various legislation to bring municipal law into harmony with the country's obligations under various treaties. The 1992 Constitution recognizes the rights of children and requires Parliament and the State, generally, to work for the realization of children's rights.
- It is, nevertheless, a categorical understanding that legislation alone cannot secure an effective change in the fortunes of children without investments in the education of relevant stake holders, especially parents and professionals who are mandated to work towards the realization of the rights provided in the various laws.
- Particular attention needs to be given to the training of law enforcement officers to internalize the rights of the child as guaranteed by law. Inadequate training or the training of only a few of them would leave the majority of the vulnerable, especially those in the rural areas, unprotected. If the initial successes of WAJU are to be replicated, a larger number of officers of the Police Service must be trained to handle children's issues.
- Dissemination of laws on women and children through institutions that have more to do with the vulnerable groups would achieve the best results. Good examples of these

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<sup>206</sup> Ghana Health Service, 2003.

institutions are the District Assemblies and traditional rulers, especially the Queen Mothers. The chieftaincy institution, if properly sensitized and assisted, could carry forward the necessary reforms aimed at changing traditional customary practices and attitudes that adversely affect children. The chieftaincy institution has, for instance, been proactive in supporting the government of Ghana to implement legal reform in the area of land. The current composition of the Council of State is also replete with a respectable presence of traditional rulers, who are making positive inroads into Ghana's Constitutional Democracy.

- NGOs and civil society organizations are very important operatives in the protection and promotion of children's rights. They should be encouraged to continue their special function of monitoring not only general society but also government institutions' fulfilment of their obligations for the rights of the child.
- In the effort for law reform, a piecemeal approach might not have achieved effective change in the existing law reform process. The bold approach adopted by the Child Law Reform Advisory Committee enabled a complete and comprehensive perspective to be had of the situation of the rights of the child, and the general nature of the laws that needed to be put in place to address them.
- The creation of specialized institutions to deal with the special needs of children can accelerate progress in the protection of children. This has been seen through the experience of WAJU.

The creation of a forum for regular interaction between child protection agencies has the potential to promote inter-agency collaboration and making the principle of interdependency of rights, as required under the CRC, a reality.







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