

INTRODUCTION AND OVERVIEW

Protecting the World's Children

IMPACT OF THE CONVENTION ON THE RIGHTS OF
 THE CHILD IN DIVERSE LEGAL SYSTEMS

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The Convention on the Rights of the Child (CRC) was adopted by the United Nations in 1989. It was the only international human rights Convention that came into force (on 2 September 1990) just one year after adoption. It is also the only Convention whose entry into force was accompanied by a major world conference that focused on implementation of the rights guaranteed by the treaty. A World Summit for Children of Heads of State gathered in New York at the end of September 1990, and adopted a Summit Declaration with specific goals and targets on implementation. Children, up to then the most invisible segment of society in the area of international human rights law, now had a Convention that was actually combined with a 'World Plan of Action', with goals and targets on implementation to be achieved within the next decade. One commitment in the Summit Declaration was universal ratification of the Convention by the beginning of a new millennium in 2000.

The United Nations Children's Fund (UNICEF) played a major role in the Summit meeting, and initiated a process that helped to ensure that the CRC was ratified by all countries, except Somalia and the United States of America, by 2000. Both Somalia and the United States have signed the treaty and thus indicated their intention to ratify. However, to date Somalia does not have an established government, and the United States has, up to now, failed to ratify the Convention. This near-universal ratification within just a decade is unique in the history of a human rights treaty. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for instance, was adopted by the United Nations in 1979. It took a decade and a half, up to the time of the World Conference on Women (1995), for wide ratification of the treaty. It has almost achieved near universal ratification only as recently as in 2005.

The CRC is sometimes perceived in Asian and African countries, and even by some scholars in the West, as a Convention that originated in the West and articulated the legal norms and values on children that had evolved

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in the West.¹ This is a correct perception, as there was a noticeable absence of participation from other regions in the early stages of the drafting of the Convention, although participation was broadened later. Some articles such as those on adoption (Article 20) and on the role of the extended family (Article 5) thus reflect some of the concerns of the Asian and African regions. In addition, the Convention benefited from the developments that had taken place in international human rights law and integrated core concepts on the universality and indivisibility of human rights. The CRC therefore does not adopt a completely culturally relativist approach but sets out, in general, universal standards and norms of achievements. Civil and political rights and socio-economic rights are included as equally important rights. Significantly, the Convention focuses on implementation and monitoring of children's rights through adequate allocation of national resources and cooperation and solidarity among the State, families and communities, civil society, and the international community. The concept of 'evolving capacity' as a child grows from childhood to adolescence, and the definition of childhood in terms of an upper limit of 18 years, also focus on children's participation in implementing these norms and on monitoring performance.

The CRC describes a range of interventions to implement rights and sets out the core obligation "to take appropriate legislative, administrative and other measures" to implement the rights guaranteed by the Convention.² Using law and the legal systems is therefore basic to implementation.

Although UNICEF played a less significant role than many other child rights organizations in the actual drafting of the Convention, UNICEF is referred to specifically as a key agency in implementation and monitoring, in Article 43 of the CRC. UNICEF's traditional focus has been on those areas of the Convention that cover health, nutrition and education, or development rights. Even the Summit Declaration and World Plan of Action focused almost exclusively on the development rights of children in the Convention. Apart from contributing to the near-universal ratification of the Convention, UNICEF in the post-CRC period worked with new partners at the national and international levels on politically sensitive controversial issues. Child labour, sexual exploitation and abuse, female infanticide, genital mutilation, forced marriage and discrimination against the girl child became the focus of many programmes. Legislation and the legal system, the traditional strategies used to prevent violation of rights, received attention in campaigns on these

¹ P. Alston, ed., *The Best Interests of the Child* (Oxford: Clarendon Press, 1994); N. Lewis, 'Human Rights, Law and Democracy in an Unfree World', in *Human Rights Fifty Years On: A Re-appraisal*, ed. T. Evans (Manchester: Manchester University Press, 1998), p. 77.

² Convention on the Rights of the Child, G.A. res. 44/25, annex, adopted 20 Nov. 1989, 44 U.N. GAOR Supp. (No. 49) at 167, Article 4. U.N. Doc. A/44/49 (1989), entered into force 2 Sept. 1990.

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issues. Law reform came to be perceived as relevant to implementing protection rights or a child's right to protection from abuse and exploitation under the CRC. Yet, increasingly, both UNICEF and partner organizations have realized that a programme of legislative reform 'to put the law in place' on protection issues is inadequate to achieve effective implementation, without a more complex understanding of the interconnected nature of the rights guaranteed by the Convention. It seemed important to examine the country experience of harmonizing the CRC through legislative reform more closely and ascertain the connected measures referred to in Article 4 that are necessary to support effective implementation of the rights guaranteed by the CRC.

A Legislative Reform Initiative was thus launched by UNICEF as part of its continuing efforts to fulfil its mandate under the Convention, support CRC implementation within countries, and a human rights-based approach to development.

Legislative reform and the work of the courts, although relevant, were considered only limited dimensions of CRC implementation. Institutional reform and law enforcement through effective budget allocations, social policies, and wider partnerships among concerned actors were considered important aspects of a law reform initiative. Understanding the dynamics of legislative reform in a holistic sense was considered important to using law reform effectively in implementing children's rights and integrating them into development efforts. The Initiative thus initially focused on the need to understand both the scope and limitations of using law reform in implementing children's rights in developing countries. UNICEF is an agency that has programmes in these countries, which share similar social and economic conditions and face both specific and greater challenges in implementing the CRC. In addition, the largest proportions of children whose rights are guaranteed under the CRC come from developing countries that confront problems of poverty and low economic growth.

Rather than engage in a developing country-based review of law reform in the post-CRC decades, the project focused on analyzing the experience of developing countries linked to a particular legal tradition or system. The common law and civil law traditions of the Western world and Islamic law were identified as major traditions or systems that applied in these countries and could impact on the law reform process. All countries have plural sources of law such as the constitution, religious and/or customary law, and legislation. However, countries colonised by Western powers inherited legal systems that incorporated a variety of legal traditions. They evolved as countries with a dominant common law, civil law or Islamic law, or with plural or mixed legal systems. In the latter, both Western colonial law and indigenous customary or religious laws applied as distinct legal traditions but with the colonial law as the dominant system. One of the studies, therefore,

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considers law reform in harmonization with the CRC in countries with a mixed or plural legal system. Mauritania, Morocco, and Jordan, with plural sources, are discussed with the Islamic jurisdictions because the dominant system in these countries is Islamic law.

Choice of countries for each of these studies had necessarily to be limited in terms of the time frame and resources. UNICEF country offices identified for the project were asked to prepare desk studies on legal reform in their countries, using consultants and all available materials. These were shared with the authors of the studies on law reform in the different legal traditions. Certain countries were selected for inclusion in each of the legal tradition studies by UNICEF in consultation with the authors. The selection was based on an assessment of the interest and relevance of those country experiences for the particular legal tradition and the broad objectives of the project. These UNICEF country studies have been used by the authors, who also have used other materials including court cases and statutes wherever these sources were accessible. Because a broad rights-based development approach has been adopted, the studies do not focus primarily on statutes and case law in their analysis.

The selected country experiences are discussed in the studies in relation to a particular system, but comparative materials on a legal tradition also have been used. This means that some court cases of comparative interest have been discussed in several studies. This also reflects the potential for cross-fertilization of ideas in legal reforms. The significance of the same provisions of the CRC as well as some of the jurisprudence of the Committee on the Rights of the Child has inevitably been discussed in several of the studies.

The studies consider the challenges of implementing the CRC in different legal traditions or systems, identified in this overview as common law system, civil law system, Islamic law system, and plural legal systems. They have adopted somewhat different approaches. The studies on plural legal systems, common law, and Islamic law discuss in detail the background and experience on legislative reform and implementation in the selected countries. The study on plural legal systems draws on the country experiences to highlight the general issues of concern on child rights in plural legal systems. The studies on the common law, civil law, and Islamic law, by contrast, focus on key features of these particular legal systems, and draw on the experience of selected countries to describe some post-CRC legislative reforms and their implementation. The studies on the common law and plural legal systems both discuss jurisprudence in the courts, which is an important source in developing children's rights in these systems. The study on the civil law is an overview that comments on the special issues that arise in regard to law reform and implementation in this legal system. Country experiences and jurisprudence are not focused upon in detail in this study. The Islamic law study recognizes that comparative jurisprudence in Islamic law can be useful,

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but it does not deal with this aspect. Despite these contrasting approaches, the four studies offer comparative insights in regard to the problems and challenges, as well as spaces that can be created for strengthening a legal system's contribution to realizing children's rights.

I. INTEGRATING THE CRC AND INTERNATIONAL HUMAN RIGHTS LAW INTO NATIONAL LEGAL SYSTEMS: THE CHALLENGES

Because all the countries selected for the legal system studies as well as those that are cited for comparative analysis have ratified the CRC, law reform initiatives have been analyzed according to international treaty law and the CRC framework on the human rights of children. The studies also discuss dimensions of women's human rights under CEDAW and the interface with the human rights of children, including girl children. They have highlighted that all four legal systems have evolved from a context of discrimination against women and varying degrees of limitations on the legal status of children.

The study on civil law systems demonstrates how its evolution was based on common 'protective' approaches to women and children. The four studies indicate that, historically, both women and children were denied legal rights in all four systems because of this protective value system. Emilio García Méndez demonstrates how, in what he describes as an 'exclusion pact', the protection of women and children gave legitimacy to their legal incapacity. Protection of their persons was not interpreted as a protection of their rights. Realizing women's rights is thus highlighted in all the studies as an interlinked dimension of realizing children's rights. The plural legal systems study and the study on Islamic law address the interface in more specific terms, as religious and customary laws often reflect values that are different from generally applicable national laws, the CRC, and CEDAW.

The universality and indivisibility of human rights reflected in the CRC pose special challenges for law reform in all systems. All the studies indicate that the CRC's rights agenda is not simply about using internally consistent value-based laws to protect children from violations. What were perceived prior to the CRC as supportive social policies and measures on matters such as health and education now become an indivisible dimension of children's rights that must be incorporated into law. Yet all studies reflect the neglect of socio-economic rights, and the over-focus on using law in traditional areas that concern protecting children from exploitation and abuse. Socio-economic rights in regard to basic needs such as health, food, security, education and shelter continue to be perceived as discretionary and distinct administrative initiatives that fall into the realm of social policy rather than enforceable law. All studies highlight the fact that continued perceptions in

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this regard prevent legislative reform that is holistic, and ultimately result in the contravention of the core human rights norms of the CRC. Specific problems and challenges in this regard will be considered later.

The studies highlight the fact that civil law and common law systems adopt different approaches to reception of treaties in national law. Civil law countries in general adopt a monist approach, which means that a treaty once ratified by Parliament and promulgated by a public procedure becomes an intrinsic part of national law. The civil law study demonstrates that in this legal system, treaties have been ratified without reservations. The monist approach is occasionally followed in plural legal systems, which generally do not adopt this view on the application of treaties. Benin, with a French civil law influence, follows the monist approach on promulgation of treaties even though it has a plural system.

A dualist approach to treaties is usually adopted in common law systems. This means that treaties apply in a domestic legal system only if they have been incorporated and received by a national legal procedure. Constitutions and/or legislation or executive decisions or judicial interpretation facilitate the process of national reception within the Commonwealth Caribbean countries discussed in the common law study. Where common law is a strong influence in plural legal systems, as in Ghana and Zimbabwe, a dualist approach to treaties is followed.

A dualist approach to treaties seems to dictate the approach to reception of the CRC, even when constitutions and the national legal systems sometimes adopt the rhetoric of monism. An inevitable process of national law-making and policy formulation determine in practice the aspects of the CRC that are integrated into legal systems. Thus, in an Islamic jurisdiction such as Jordan or in a civil law jurisdiction such as Guatemala, a monist approach to treaties is reflected, and treaties become part of national law, even superseding domestic law. However, there is in fact no procedure for invoking treaty provisions in the courts, and harmonization of treaties is a slow and difficult process, both for the legislative and other organs of government. Often there is a failure of the judiciary to apply treaties as a result of a lack of information on treaties, or the low priority given to treaty law. This aspect is discussed in some depth in the civil law study, which describes the phenomenon of token or 'hypocritical monism' and demonstrates the different ways in which the legal system perceives treaties within the perspective of monism. Treaties are a supra-constitutional norm that ranks above domestic law, or are norms integrated through the constitution. The civil law study also shows how legislative assimilation or incorporation can be vital in integrating treaties in domestic law, even in civil law jurisdictions when monism is in reality not followed within the country, especially by courts of law. Implementing child rights after CRC ratification becomes problematic in all legal systems when the pre-existing laws continue until they are

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repealed by the legislature. Monist theory would suggest that these laws cease to apply, but the civil law study indicates that this does not happen in practice even in these legal systems.

It has been noted that the Committee on the Rights of the Child, which monitors the Convention, has in its General Comment No. 5 and Concluding Observations on States parties' reports stressed that incorporation of the treaty is the most suitable method to bring national law in harmony with the Convention. The Committee has constantly emphasized that, in any case, there must be a consistent effort to initiate law reform and harmonize domestic law with the CRC. All studies reveal that this is easier said than done.

The countries reviewed in all four legal traditions adopt processes of national incorporation that take the form of general children's acts and/or ad hoc legislation in regard to specified topics. Belize is the only country in the Caribbean that has incorporated the whole CRC into domestic law. Not even countries that follow the monist civil law tradition of direct application of treaties have incorporated the CRC wholesale. Children's acts or children's codes incorporate some of the main provisions of the treaty. The latter represents a practical response, as it is easier to set down the core norms in a general children's act and regulate specific topics through legislation. Experience from all four legal systems suggests that given the scope of the CRC, a wholesale incorporation is unrealistic and would create even more complex problems of implementation.

It is clear from all the studies that adoption of regional human rights instruments and standards represents an important method of incorporating children's rights. The plural legal systems study refers to the African Charters on Human Rights,³ and the untapped potential for using them in strengthening domestic law. The African Charters have introduced higher standards relating to law reform and interventions to repeal customary laws that deny child rights. They reinforce the CEDAW standards and also elaborate on them. Shaheen Ali describes regional standard setting in Islamic law-based legal systems, and suggests that regionalization is an assertion of identity in an environment where Islamic law systems must interact with the international human rights system through the reporting process of treaty bodies.

Regional standard setting in Africa and in Islamic jurisdictions reflects the desire to regionalize what are perceived as 'Western' human rights so

³ The African Charter on Human and People's Rights (*adopted* 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986) and the Protocol on the Establishment of an African Court on Human and Peoples' Rights, *adopted* 10 June 1998 and *entered into force* 2004. The African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49, Art. (1990), *entered into force* 29 Nov. 1999.) was followed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* 11 July 2003.

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that they resonate as meaningful norms in their own social, economic, and cultural contexts. Yet the studies on the Islamic and plural legal systems indicate that the regional standards have not significantly impacted on law reform initiatives within countries. The common law study, however, notes the impact of the European Convention on Human Rights in the United Kingdom, through the incorporation of that instrument by the Human Rights Act 1998. The common law study also shows how a complaints mechanism in a regional instrument can help to strengthen implementation of the CRC in domestic law. Rebeca Rios-Khon refers to a case in the Inter-American Court of Human Rights under the American Convention on Human Rights. The case considered the legality of judicially sanctioned corporal punishment in Trinidad and Tobago. A complaints mechanism in a regional instrument can foster the development of a regional consensus on child rights norms when countries respect the decisions of the regional court.

Constitutions may refer to the application of treaties or contain a Bill of Fundamental Rights that applies generally or specifically to children. Common law countries in the Caribbean, for example, Jamaica and Barbados, and the African countries considered in the plural legal systems study incorporated a general bill of rights, rather than children's rights, when they gained independence from colonial rule. These general rights are not as comprehensive as the CRC or CEDAW. Yet South Africa and Uganda, which have plural legal systems, have both incorporated specific children's rights derived from the CRC and its core principles, in their post-independence constitutions. Where such rights are articulated either as part of a bill of rights or as specific children's rights as in some common law countries and in plural legal systems, there is space for the courts to enforce those rights. However, a method of enforcement that is accessible must, as in South Africa or in Caribbean countries such as Barbados and Jamaica, be incorporated into the constitution. The absence of an effective enforcement procedure makes the rights declared in the constitution merely aspirations or declaratory statements that use the rhetoric of rights, without providing practical relief and remedies. We shall note later the impact of constitutional provisions on children's rights when remedies are incorporated as part of a bill of rights.

The study on the Islamic law jurisdictions discusses in depth the problems faced in incorporating the CRC into Islam-based legal systems. Shaheen Ali notes the origins of the CRC in a Western legal tradition, and the reality of a political environment that demands assertion of an Islamic identity. The balance appears to have been achieved in the early years of ratification of the CRC by the entry of reservations to the treaty at the time of ratification. Some reservations specifically refer to the need to conform to Islamic law. Others are broader and refer to the national legal environment in general terms. Reservations appear to be a precautionary measure to protect an Islamic legal tradition.

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Shaheen Ali demonstrates that in the rush to enter reservations, States parties ignored the fact that the reservations were in conflict rather than in harmony with Islam. She refers in this context to the reservation entered by Islamic countries to the article on nationality, despite the fact that the CRC provisions are in harmony with Islamic law. Her discussion of the sources of Islamic law and the varied interpretations of these sources, particularly in areas such as nationality adoption and fosterage and parental authority, indicates that there are opportunities for harmonization with the CRC. She suggests that these reservations can and should be reviewed and withdrawn. She demonstrates how these reservations inhibit the capacity of the State and the community to realize the core standards of the CRC in harmony with Islamic law. She notes that only a few countries such as Pakistan, Egypt, and Bangladesh have withdrawn reservations entered at the time of ratification.

Developing national legislation and jurisprudence in the courts that link the regional charters and the CRC and CEDAW do not, in general, pose a problem. Shaheen Ali's study indicates that initiatives on regionalization of human rights in the Muslim world through Islamic declarations, developed specifically for an Islamic context, can present a risk of diluting CRC and CEDAW standards ratified by countries. However, regional declarations on Muslim women's human rights⁴ show that, as in Africa, creative efforts can be made to strengthen and reinforce the commitment of Islamic countries that have ratified human rights treaties, in fulfilling their commitments under international law. Shaheen Ali points out that the norm of international human rights law *pacta sunt servanda* is recognized in Islamic law. She endorses the view that treaties, once ratified, bind Islamic States to respect, promote and fulfil those rights.

II. CATALYSTS FOR LEGISLATIVE REFORM

The studies of the four legal traditions indicate that different models of governance are adopted. The common law jurisdictions of the Caribbean countries in general have systems of parliamentary democracy, based on the British or Westminster model. Unlike in Britain, where a Human Rights Act was introduced in 1998, post-independence constitutions are written documents with bills of rights. These constitutions do not refer specifically to the broad sweep of children's rights in the CRC and recognize only civil and political rights. Rebeca Rios-Kohn describes in some detail the limitations in the constitutional guarantees on fundamental rights in Barbados and Jamaica. Countries with plural legal traditions are sometimes modelled on

⁴ Cairo Declaration on Human Rights in Islam, 5 Aug. 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993); Universal Islamic Declaration of Human Rights, 21 *Dhul Qaidah* 1401 (19 Sept. 1981).

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the Westminster system of parliamentary governance but with constitutional guarantees on fundamental rights. The plural legal systems study suggests that constitutions in some of these countries, too, have not addressed children's rights and are limited in scope. The Islamic jurisdictions discussed have different systems of parliamentary governance. The king or sovereign Head of State has wide executive powers. Nevertheless, Parliament or the legislative body has a major voice in law reform. These countries have not incorporated constitutional guarantees on fundamental rights.

In classic common law constitutional theory on parliamentary governance, there is a clear separation of powers between the three arms of government. The legislature is supreme and enacts laws and controls budgets. The executive branch of government is responsible for the administration, whereas the judiciary interprets the laws. However, the separation of powers does not in fact operate in this clear-cut manner. The Executive plays an important role in initiating policy and translating it into legislation. The Executive can therefore be either apathetic or a major force in pushing forward an agenda of law reform. The judiciary has always modified common law and legislation through a process of interpretation, and identifying the perceived legislative intent of the legislature. As Rebeca Rios-Kohn points out in the common law study on the Caribbean Commonwealth, the separation of powers is respected mostly through the concept of the independence of the judiciary from legislative and executive control. An effective legislative agenda therefore requires the cooperation of the legislative branch and the active involvement of the executive. The judiciary can make a contribution through its positive interpretations of the legislation.

In countries with plural legal systems, too, legislative reform requires the active interest of the Executive in proposing reform, and the support of the legislature to enact the laws. Courts have the same role in interpreting law, as the system of courts and judicial administration is derived from the common law legal tradition with its emphasis on case law and precedent. This is clarified in the studies on Zimbabwe and Ghana.

The study on the civil law jurisdictions indicates the same importance of cooperation between the legislative and executive branches of government in initiating law reform, even though the legislature ratifies treaties and is the supreme authority. The study addresses in particular the importance of legislation in sustaining social policies and financial allocation to support them. It notes the limited role of the judiciary both in terms of the exercise of judicial discretion and their approach to interpretation. Civil law systems emphasize the importance of legal rules, and interpretations by the judiciary, according to Emilio García Méndez, tend to be legalistic rather than focused on interpreting the law in the social context. The contribution of the judiciary is therefore seen as less creative in carrying through the legislative reform agenda.