

REALISING RIGHTS FOR CHILDREN



GOOD PRACTICE

Eastern and Southern Africa

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EXECUTIVE SUMMARY

It has been seventeen years since the Convention on the Rights of the Child (CRC), came into force internationally, enabling an opportunity for reflection on the impact and application of the convention so far.

A regional examination of the extent of harmonisation of laws relating to children under the umbrella of the CRC was first mooted in 2003, at the First International Policy Conference organized by The African Child Policy Forum in Addis Ababa, Ethiopia. It was recommended that a study be undertaken to examine harmonisation and implementation of laws, and to highlight good practice.

The provisions of the CRC are clear, but implementation methods are left to the discretion of each individual state. In order to fully realise the protective measures of the CRC, countries must fully implement and operationalise the provisions. The plurality and diversity of African legal systems could be seen to negate the idea of one 'best' practice, as it would be difficult for any single model to have universal application. Hence, this report aims to provide a useful service by sharing the different practices adopted by various states in implementing the CRC.

This report looks at different practices across seven countries in East and Southern Africa. The countries represent different legal systems, including one country undergoing post-conflict reconstruction, and highlight good practices, their impacts, key actors and lessons learnt. It aims to offer models for comparison and possible replication to other countries in the region and beyond. However, while it examines some examples of good practice in the region, it is not intended as a comprehensive or exhaustive review of practices in the region.

The report is designed for use by governments, non-governmental organisations (NGOs) and other interested actors in the field of children's rights to help inform implementation of the CRC in their own countries. We hope that countries can learn from the experiences of others, as well as increase awareness about the CRC and gaps in its implementation.

Chapter

1

CHILD LAW REFORM

LESOTHO

CRC Art. 4

‘ State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention... ’



BACKGROUND INFORMATION

Lesotho ratified the Convention on the Rights of the Child in 1992 and submitted its first country report in 1998.

QUICK FACTS

The child population comprises 49% of the total population of 2.2 million people.

Ratification of international treaties

- Ratified the African Charter on the Rights and Welfare of the Child (ACRWC) on 29 October 1999
- Ratified both the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict on 23 September 2003
- Ratified ILO Convention 138 concerning the Minimum Age of Employment and ILO Convention 182 concerning the Termination of the Worst Forms of Child Labour.

Children's rights activism

- Mrs Mamosebi T Pholo - a key player in the child law reform process - has recently been elected to serve on the African Committee of Experts on the Rights and Welfare of the Child.
- Lesotho has a vibrant NGO community and an NGO Coalition for Children's Rights, comprising 45 agencies and individuals.
- The text of the CRC has been distributed in Sesotho, the national language, throughout the country.

INTRODUCTION

Lesotho's experience of drafting CRC and ACRWC compliant children's law over the period 2001 to date is an example of good practice for a variety of reasons. A study of the Child Protection and Welfare Bill has just been completed by the Attorney General's office, prior to its introduction to the Parliamentary process. Key among the good practices are the following ten positive and commendable achievements.

1. Inclusive and consultative process of law reform. **It involved first and foremost**

Lesotho nationals, who worked under the chairpersonship of a member of the Lesotho Law Reform Commission. The process involved multi-sectoral teams and researchers, including government officials, parliamentarians, academics, ordinary citizens, including people from remote rural areas, traditional leaders, and the judiciary.

2. Themed working groups: there were five groups and a research report was completed in each thematic area.

3. Hearing children's voices

Children's views and inputs were sought by especially creative and unusual means, and became a permanent feature of the programme. From the beginning of the project, child participation was seen as critical and was emphasised throughout the process. To this end, a **Junior Committee of the Child Law Reform Project** was formed and constituted a very important structure in the project. It organised its own activities to contribute to the process of reviewing and reforming national laws pertaining to children and was important in ensuring the voices of children were high on the agenda of the child law reform process. The children on the committee got the opportunity to participate in national initiatives, such as the formulation of the Poverty Reduction Strategy Programme (PRSP), and attend other fora at international level.

This committee was very active and participated in a variety of ways including the following:

- Receiving child rights information, as well as training and subsequently disseminated relevant materials
- Participating in project workshops, dialogues and roundtable discussions
- A story approach workshop was organised, and the participants later wrote a drama which was presented on the national radio station
- An opportunity to attend regional and international fora
- Participation in other related activities and processes, such as the PRSP
- Regular committee meetings and participation in end of year review and planning meetings.

4. The **selection of specific areas upon which to concentrate** lent the drafting process coherence and focus. The issues chosen were country specific and based on identified needs. The thematic groups were divided to deliberate about protection and welfare issues pertaining to the following particularly vulnerable groups of children:

- Children without parental care (e.g. abandoned, neglected or orphaned)
- Children with disabilities
- Child victims of violence and other forms of abuse and exploitation, including sexually abused and child labourers
- Children in institutions
- Children infected or affected by HIV/ AIDS
- Children in conflict with the law.¹

This targeted approach, underpinned by hands-on research in those sectors, enabled

the development of a statute that ensures that the needs of the most vulnerable children are met, particularly in relation to the HIV/ AIDS pandemic, which has a disproportionate impact on children.

5. The law drafting process was explicitly used as a basis for **civic education on the rights of children** via radio programmes and lay publications. This was an important consideration in a country which is still largely traditional and where children are not perceived to have rights and are often invisible in society, in accordance with customary perspectives.

6. **Capacity building** opportunities were taken and capitalised upon. For example, numerous conference papers were presented at various stages of the drafting process (e.g. at the annual Miller Du Toit/ University of the Western Cape (UWC) Child and Family Law conference held in Cape Town; at an anthropology conference

¹ Dr I Kimane 'The Lesotho Child Protection and Welfare Bill 2005: Why the delays in enacting the children's law?' (paper presented at the Miller Du Toit/ University of the Western Cape (UWC) Child and Family Law conference, January 2006) at 3

in Port Elizabeth; at a Southern African Development Community (SADC) lawyers conference held in Maseru, Lesotho; and at the IVth World Congress on the Rights of the Child) and study visits were undertaken to Ghana and South Africa. The law drafting experience became both a learning and a sharing opportunity, and Lesotho's national profile was raised as a result.

7. There was an enabling environment created by **the specific modalities of donor support provided**, especially via UNICEF and Save the Children Sweden (Pretoria office) and Save the Children UK. This took the form of support, assistance and guidance, rather than management, control, interference or over reliance on outsiders. This **resulted in in-country capacity building**.
8. There was **commendable level of detail contained in the Child Protection and Welfare Bill**. For example, it **goes further so far than any other legislation in Africa in providing for children's duties and responsibilities**. The emphasis on children's responsibilities is a key aspect distinguishing the ACRWC from the CRC, setting out children's responsibilities with regards to:
 - Respect for parents, guardians, superiors and elders at all times, depending on age
 - The duty to assist parents, guardians and superiors in cases of need
 - The obligation towards preservation and strengthening of social and national solidarity
 - The need to uphold positive community values

For the first time too, **there is much clarity and direction in relation to child protection**. The police, social workers, chiefs and community members are all mandated to take children they believe to

be in need of care and protection to places of safety, as a measure of temporary care. **This is the first piece of legislation in Lesotho that empowers social workers to deal with cases involving vulnerable children** and is a great achievement to the advantage of all children in difficult circumstances.

9. The **Bill goes further than any other in Africa in entrenching a restorative justice approach to children in conflict with the law**. The Bill **institutionalises restorative justice** by empowering chiefs and families to take greater responsibility for the control and supervision of delinquency. It enables offending behaviour to be dealt with in the child's local environment through newly created 'village child justice committees' (a form of local courts),² These village committees can call family group conferences to make decisions, formulate plans to deal with delinquency, and to follow up on implementation of those plans.³

The Child Law Reform Committee, within the Lesotho Law Reform Commission and chaired by respected sociology professor Dr Itumeleng Kimane⁶, was the lead agency in the law reform process. The Child Law Reform Committee was appointed with a broad and long term mandate to revise and develop laws underpinned by the CRC and the ACRWC.

The Ministry of Justice, Human Rights and Rehabilitation partnered the Lesotho Law Reform Commission, with the latter taking charge of the law reform component and the former responsible for the capacity building and sensitisation components.

10. Finally, complementing the above points, **the Bill devolves authority as far as possible to the local level; a suitable and appropriate approach in the African context**. Whilst this is not novel, having been adopted in both the Ugandan and

² Lesotho Children's Protection and Welfare Bill, clause 125

³ www.sadclaawyers.com/pdfs/conferencereport.pdf (accessed 16 December 2005)

Ghanaian child law context,⁴ the Lesotho model is commendable in that it draws on traditional structures but incorporates them into the modern context. An **innovation lies in provisions for ‘open village healing circles’**, convened by the chairperson of the village child justice committee. The healing circles will make decisions in regard to delinquent acts,

where there have been two or more acts of anti-social behaviour perpetrated by a child; where the acts impact on all members of the community; where two or more children are involved; where there is group related conflict, such as that between two villages; or where there is a high probability that the offence will be repeated.⁵

KEY ACTORS AND INSTITUTIONS



PROCESS

Multi-sectoral members of the project committee undertook research and produced initial situational analyses. Inclusive processes, including workshops, sensitisation meetings and conferences, were convened with the aim of empowering various sectors of society to interact with the law reform process. Participants included members of parliament;

staff members from the Ministry of Justice, Ministry of Social Welfare and other ministries; judges; NGOs; and civil society. UNICEF, Save the Children Sweden and Save the Children UK provided financial support, and are keen to provide further funding for the actual costs of the Child Protection and Welfare Bill.

⁴ J Sloth-Nielsen and B van Heerden 'Towards a new child care act for South Africa: lessons from Africa' 1997 Stellenbosch Law Review

⁵ Lesotho Children's Protection and Welfare Bill, clause 128

⁶ Employed at the National University of Lesotho, she has prepared and presented numerous papers on topics relevant to the law reform process at a variety of fora. It may also be relevant to mention that she is not a lawyer, so lending a different perspective to the typical law reform processes, especially in promoting the value of advocacy and capacity- building in the child law reform process

IMPACT AND BENEFITS

- Lesotho has already **become a benchmark for best practice in law reform** in the region. For instance, law reform participants from south Sudan paid a study visit and Lesotho was recently requested by Save the Children Sweden to provide guidance to Swaziland on how to involve children in the law reform process.
- **Overall benefits for child protection in Lesotho** are evident in the development of the social services sector, following shortcomings and staffing deficits identified through research in the field. (see A. C Nyanguru 'The Strengths and Weaknesses of the Department of Social Welfare in Lesotho' unpublished research report commissioned by the Lesotho Law Reform Commission, 2002)
- The **Child Protection and Welfare Bill is being used internally to inform the development of policies in other related areas**; for example, the National Policy for Orphaned and Vulnerable Children, during the week of 11-15 November 2006. Guidelines and Standards for children and youth residential care facilities, the Orphaned and Vulnerable Children's Coordinating Committee, and district-level Child Protection Committees have all been developed in accordance with provisions of the Bill.
- **Restorative justice developments have been accorded international acclaim**, and the former chief probation officer, Ms Qhubu, was given an international award by Princess Anne of the United Kingdom in recognition of her contribution in this regard.
- **Lesotho has become a visible 'player' in the child rights arena**, with numerous papers of substance having been produced and presented regionally and internationally, and the country has recently been given a seat on the African Committee of Experts on the Rights of the Child.

KEY LESSONS

1. The law reform process was used as a springboard for mobilisation around children's rights in society generally.
2. Capacity building throughout the reform process, including workshops, dialogues, roundtable discussions, study tours, local, regional and international conferences, and research, has enriched and greatly informed the process.
3. The snowball impact of the reform process for furthering social consciousness of children's rights was equally as important as the end product of the reform process - the Children's Protection and Welfare Bill.

MECHANISMS FOR MONITORING AND REPORTING

The Child Protection and Welfare Bill proposed the establishment of its own monitoring mechanism; the Independent Children's Commission. The mandate of the commission would be to:

- Monitor the general well-being of children, as well as promoting and protecting their rights
- Investigate national and individual issues pertaining to violations of children's rights and make appropriate referrals, following investigations

- Monitor national compliance with international and regional obligations
- Coordinate awareness-raising activities in regard to children's rights

The Bill recommends that the Independent Children's Commission should be small, independent, report directly to Parliament and be empowered to solicit its own funding. It will ensure that the implementation of the CRC and other relevant instruments are well monitored, in accordance with the Paris Principles.⁷

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⁷ Dr I Kimane 'The Lesotho Child Protection and Welfare Bill 2005: why the delays in enacting the children's law? (unpublished paper presented at the University of the Western Cape/Miller Du Toit conference "The globalization of child and family law" 26th – 27th January, 2006)

Chapter

2

MAKING PRIMARY EDUCATION COMPULSORY AND FREELY AVAILABLE TO ALL

— KENYA —

CRC Art. 28

‘ State Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: make primary education compulsory and available free to all.... ‘



BACKGROUND INFORMATION

Free and compulsory education in Kenya was introduced in January 2003 in order to comply with the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC), both of which Kenya is a signatory to.

International commitments on education

Millennium Declaration and Millennium Development Goals

- **Goal 2** calls for every boy and girl to complete primary schooling
- **Goal 3** calls for gender parity at all levels of education

International Covenant on Economic, Social and Cultural Rights (ICESCR) which Kenya ratified in 1972, compels a state to recognise the right to education, and explicitly indicates that primary education should be compulsory and available at no cost.

Milestones

- Realising that free and compulsory education is key for the achievement of universal education, the **government of Kenya introduced free primary education in January 2003**
- **Sessional paper** - ‘A Policy Framework for Education, Training and Research’ – was approved by Parliament in April 2005, as an **implementation framework** for universal primary education

The Children’s Act⁸ enacted in 2001 also mandates that every child shall be entitled to free basic education. However, this right was not implemented until the introduction of free primary education in January 2003, via a Ministerial Directive.

While the initial Kenyan report to the United Nations Committee on the Rights of the Child portrayed an education system in which the right to education for every child was provided for but not guaranteed, during the second reporting period (1998-2004) improvements towards the realisation of the right to education for children were noted. These were largely attributable to the free primary education programme, made possible by the government with support from development partners. The programme has strengthened the education sector, including expanding existing facilities and employing more teachers.

MAKING FREE PRIMARY EDUCATION (FPE) WORK

Role of government

The government provides for:

1. **Direct costs and overheads**, including human resource costs (teacher’s salaries, national curriculum development and review, etc.) and construction costs

(school construction and maintenance, furniture, sanitary facilities, water, electricity, etc.)

2. **Undertaking costs** (teaching books, textbooks for pupils, learning equipment, stationery, activity fees, examination fees, etc.)

⁸ Section 7, Children’s Act

3. The government remits a maximum of 1,020 Kenyan Shillings (?US\$13.60 at current exchange rate) per year to each child, for teaching and learning materials, repairs and maintenance besides paying teachers' salaries.

2. Making provision for **indirect costs, including feeding their children** (Section 23 Children's Act), transportation of children to school, provision of school uniforms and sports equipment, and further equipment not provided by the school

Role of parents

Although the government bears the larger responsibility for ensuring free primary education, parents also have responsibilities including:

1. Ensuring that their children go to school regularly

Role of schools

Government schools which receive state funding, have school management committees (SMC). It is the role of the SMC to manage funds once they are wired into school accounts, including overseeing supplies of materials to the schools.

KEY ACTORS AND INSTITUTIONS

- Ministry of Education and other relevant ministries
- Local government and institutions, including provincial and district education boards
- International agencies
- Civil society organisations
- Religious groups
- The private sector
- Community level institutions, including parents' associations, that directly engage with the school management through school management committees, boards of governance and parent -teacher associations
- The National Education Stakeholder Forum, which includes Members of Parliament, Trade Union representatives, civil society organisations, and private sector representatives
- The National Education Advisory Council
- The Inter-Ministerial Committee on Education and Training
- The Consultative Government / Development Partners Committee
- Kenya Education Sector Support Programme (KESSP) Steering Committee, KESSP Reform Sector

FINANCING Free Primary Education

Funding for education has increased from US \$736.1 million in 2001/ 2002 to US\$1.37 billion in 2006/ 2007

The Government of Kenya meets recurrent expenditure, while external financing by development partners is mainly for capital or development expenditure.

	US \$ millions
UNICEF	2.5
UK Department for International Development	21.1
World Bank	50.0
The Fast Track Initiative and Catalytic Fund	24.2

Other initial contributors include Oxfam GB and Action Aid.

Other education sector partners include the African Development Bank (ADB); European Union (EU); UNESCO; World Food Programme (WFP); Canadian International Development Agency (CIDA); the governments of Belgium, Germany, Italy and the Netherlands; Japanese International Cooperation Agency (JICA) and USAID.

In addition to government and international support, a Universal Primary Education Fund Account was opened for all well wishers to channel their support to FPE. Furthermore, the

Kenya Education Sector Support Programme, which carries out comprehensive planning for FPE, is a major step in the education sector to improve sustainability of FPE.

IMPACT AND BENEFITS

1. Rapid expansion in enrolment at primary school level: The Free Primary Education (FPE) programme has significantly augmented access, retention and equity. **Enrolment in primary schools has increased from 5.9 million in 2002 to 7.6 million in 2005.** Before January 2003, there were over three million out-of-school children. An estimated 1.3 million of those children went back to school as a result of the new policy. Another 300,000 primary school-age children are enrolled in non-formal learning centres. The primary school Net Enrolment Rate (NER) continues to increase, with data for 2005 showing an additional 250,000 children in the 18,500 primary schools.

2. Enhanced gender parity: Gender parity appears to have been achieved across the country, particularly in lower primary classes. The national Gross Enrolment Rate (GER) for girls in Kenya is 102% compared with 97% for boys, with a corresponding NER of 83.2% for girls and 84% for boys. This compares with 44% of girls and 56% of boys enrolled in 1996. The net effect of these initiatives is that girls are staying in school longer and acquiring useful life skills.

3. Increased emphasis on non-formal education (NFE): In an attempt to develop alternative approaches to basic education in order to realise the FPE policy, the Kenyan government has developed an NFE policy and curriculum and supported mobile schools in arid and semi-arid districts for young children, and shepherd schools for adolescent and adult pastoralists.

4. Enhanced quality and relevance of primary education: The primary school curriculum has been revised and

implemented to reduce the cost burden, reduce the workload of pupils and improve quality. According to official estimates, textbook to pupil ratios have improved significantly, from 1:15 to 1:3 for core subjects in lower primary and 1:2 for core subjects in upper primary. Library programmes have also been established in some schools, which has improved the quantity and quality of reading materials for students.

5. Increased recruitment, deployment and capacity of teachers: Six thousand teachers were recruited in 2003/ 2004, to replace those who left through the natural attrition process. The pupil to teacher ratio in 2004 was 43:1. In addition, Kenya has prioritised and increased its support to teacher training and development through its school-based teacher development programme, which has successfully enrolled 49,272 key resource teachers and has a completion rate of 96%.

6. Increased social accountability and improved governance: This has been achieved through direct and efficient disbursement of funds to primary schools through the commercial banking system; strong involvement of local communities in the innovative instructional materials programme; strengthened monitoring and accounting systems; improved transparency and dissemination of information; a comprehensive consultation process with a wide range of stakeholders; and enhanced accountability, with an increase in disciplinary actions. The government has also embarked on training of head teachers on financial management and book-keeping, in order to improve accountability and transparency.

UNEXPECTED RESULTS

- 1. Reduction in post-primary transition rates:** The transition rate to secondary school stood at 47% in 2004, due to limited secondary school places to cater for the increasing number of students who complete primary education and poverty which renders many families incapable of paying fees for secondary education.
- 2. Emergence of parallel education systems:** A dual primary education class system emerged and is growing stronger; children from poor families mainly enrol in public schools offering FPE, while children from affluent family backgrounds mainly enrol in private primary schools.
- 3. Reduction in enrolment and completion rates in early childhood development (ECD) centres:** The UNESCO/ and OECD (Organisation for Economic Co-operation and Development) Early Childhood Policy Review Mission, in 2004, observed that the FPE programme was having a negative impact on ECD centres serving poor children. Declining enrolment appears to be so acute and widespread that there is serious concern about the collapse of ECD services.
- 4. High drop-out rates amongst poor and marginalised communities:** Poverty remains one of the most serious challenges to FPE. Despite the abolition of primary school fees, parents still have to pay for health care and basic domestic requirements, such as food and clothing, in addition to uniforms, shoes, transport and lunch for their children. They also have to contribute to the cost of infrastructure development in schools. As the opportunity costs of participating in universal primary education programmes increase, the chances of poor children remaining and completing school diminish. Higher dropout rates are consistently associated with the poorest and most, marginalised communities.

KEY LESSONS AND CHALLENGES

- 1. Regulations that define the extent and scope of state financial assistance** beyond support grants to schools need to be developed. For example, the state needs to support the poorest families in school-related expenditure, such as the purchase of school uniforms and school feeding programmes, as these costs are proving barriers to primary school enrolment and completion rates.
- 2. The Ministry of Education has the second largest national budgetary allocation** in order to support the FPE programme. However, **increased allocation to education is curtailed by repayments of the public debt**, which accounts for the majority of public expenditure. The Kenyan government's commitment to FPE is against policies laid out in the Structural Adjustment Programmes (SAPs), introduced by the World Bank/ International Monetary Fund in the 1990s, which called for tighter public fiscal spending. SAPs significantly curtail the capacity of governments to invest in important aspects of education, such as the hiring and adequate remuneration of teachers and equipping schools.
- 3. The uptake of free primary education puts a strain on existing facilities, which ultimately impacts on the quality of education** offered. For example, the teacher to pupil ratio in many schools is still very low and differs widely around the country. In some (mainly urban) schools, the ratio is 1:35, while in other (mainly rural) schools it is as low as 1:100.
- 4. There is low transition to secondary education.** The majority of children who benefit from FPE are unable to continue with their education, as they cannot afford fees levied in secondary schools. There is an urgent need for mechanisms to manage the transition from primary to secondary education.

5. The **effects of FPE on early childhood development programmes** should be mitigated through their inclusion into the FPE programme.

6. **Data collection, monitoring and evaluation of FPE must be streamlined and well co-ordinated.** This includes developing and supporting good record keeping and use of data at school level. The government should ensure that all schools keep accurate information on pupils based on a standardised format.

7. **Vulnerable and marginalised children, including disabled and orphaned children, must not be left out of FPE.** Mechanisms for their identification and enrolment in schools must be developed

and implemented. While a standard grant to all schools is easier to compute, this may not address the particular needs of the most needy children, so allocations should be tailored to each school, based on the specific needs of the students attending.

8. While there is near gender parity in enrolment, girls are not completing primary education at the same rate as boys. The government needs to **monitor and remove barriers specific to girls education**; for example, provision of adequate sanitary facilities, including separate toilets for girls, and tackling traditional harmful practices that may prevent girls from continuing in school, such as early marriage and Female Genital Mutilation (FGM)⁹.

INNOVATIONS

- **Curriculum review:** Significant changes have started to be made in the curriculum. The number of primary subjects has already been reduced, and further curriculum changes will be introduced in all primary school standards, from grades 1-8, over the next four years.
- **Multi-grade teachers:** The government has agreed to utilise multi-grade teachers in some schools to cater for the high number of children enrolling in public schools.
- **Redeployment of teachers in districts:** As part of an increasing decentralisation process, the selection of teachers for primary schools has now been moved down to district level.
- **Establishment of Learning Resource Centres (LRCs):** LRCs have been established to link clusters of four to seven primary schools in one area with a better resourced primary school.
- **Development of an In-service Education and Training (INSET) Unit:** Through the Kenya Education Sector Support Programme framework, the Ministry of Education has developed an INSET Unit as a model for teacher development, which brings together good practices gained from past programmes. In-service programmes will include alternative models, such as multi-grade teaching that targets teachers with small classes in arid and semi-arid. INSET programmes will also address multi-shift and new teaching methodologies, targeting large classes in urban slums.

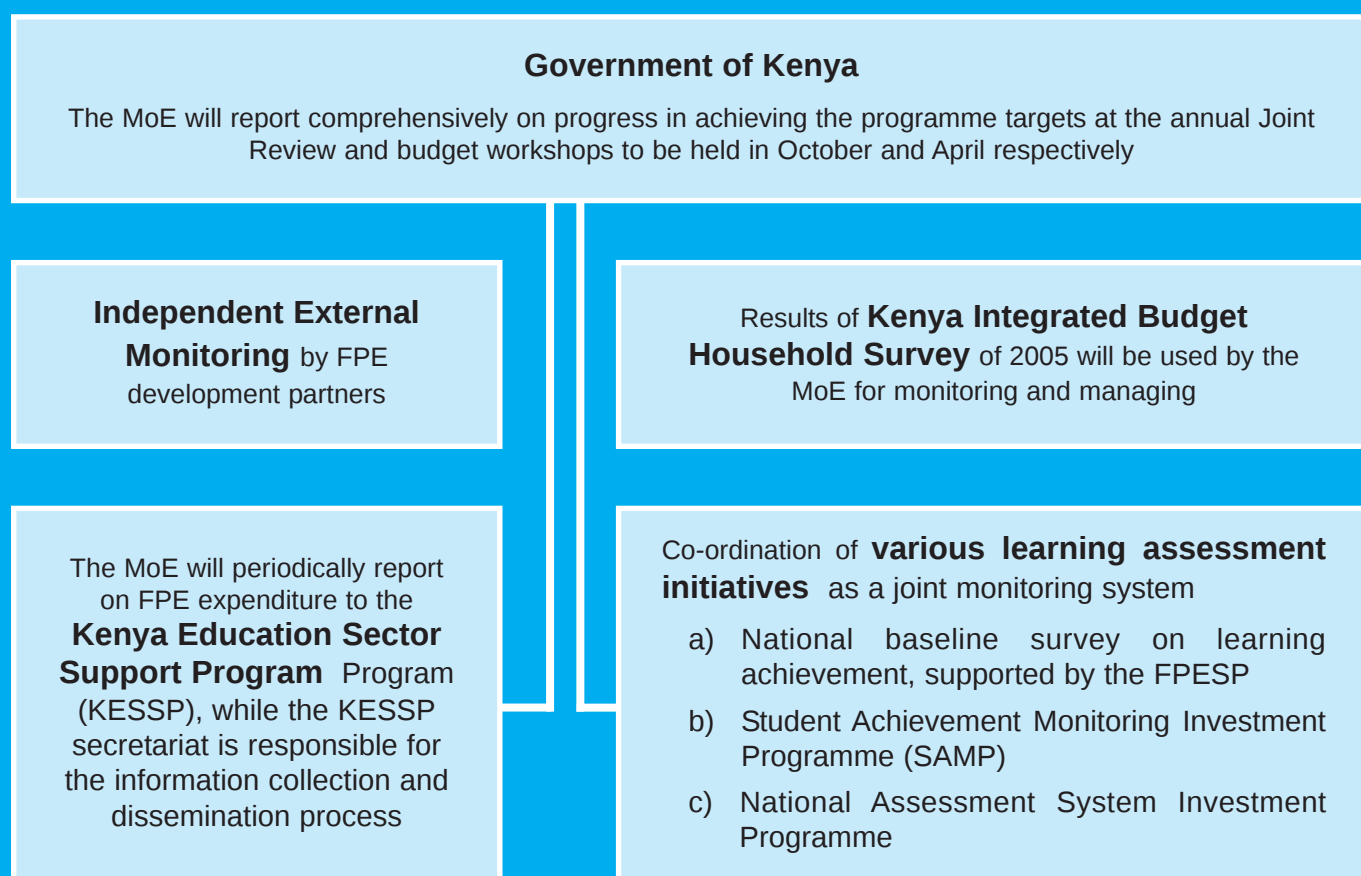
⁹ Both FGM and early marriage are prohibited under the Children's Act, but there is need to sensitise practicing communities on the detrimental impact of these practices on girls' health, education and life as a whole.

MONITORING AND REPORTING MECHANISMS

There are various structures and systems for monitoring the FPE programme, and the mandate lies with the Ministry of Education (MoE).

However, the monitoring system still urgently needs rationalisation, in order to address issues of duplication, introduce electronic formats, and coordinate data collection and entry. There is also a need for improved data sharing between the Ministry of Education and the Teachers' Service Commission.

Some critical is difficult to collect, such as numbers of students who drop out or repeat a year, and the reasons why. Data collection at school level must improve, with a broader emphasis than the current prominence given to financial record keeping. Teaching-learning transactions, quality and standards must also be monitored.



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Chapter

3

PROMOTING ADOPTION AND ALTERNATIVE CARE

— MADAGASCAR —

CRC Art. 21

‘ State Parties that recognise and / or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration ‘



INTRODUCTION

Madagascar recently adopted legislation on adoption that is in line with the CRC, ACRWC and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Convention). The legislation seeks to guarantee the protection of children in cases of adoption, whether national or international.

THE PROBLEM

1. Prior to the adoption of Act No. 14 of 2005, **adoption regulations only dealt with national adoption.**
2. Over 90% of all applications for adoption were **approved with the consent of only one parent**, in most cases the mother.
3. **Prior social assistance or counselling was not being provided** by the national authorities before consent of parents was requested. In some cases, applications for adoption were approved while the adopted child was still unborn.
4. **Adoption agencies were placing children for adoption before any preventive services** were provided offering support and alternatives for families at risk of giving up their children.
5. **International adoption was not considered as a measure of last resort**, but rather as the first and sometimes the only option.
6. The large sum of money that adoption agencies charge per child indicates that adoption was **not based on the best interests of the child.**
7. In 2004, the government identified around 40 applications for adoption that involved **the sale and trafficking of children** and hence suspended all applications for adoption.

Although the exact number of orphans and/ or abandoned children placed in institutional or foster care is not known, figures from the 2004 Demographic and Health Survey (DHS) show that 13% of Malagasy children under 14 live without their biological parents. UNAIDS estimates that 30,000 children have been orphaned due to AIDS. Data from the Ministry of Foreign Affairs indicates that 25,000 Malagasy children will be adopted in France in 2007 alone. The enactment of a law on adoption that takes the best interests of the child as the primary consideration is thus critical for the protection of children in general, and disadvantaged children in particular.

INTERNATIONAL AND REGIONAL STANDARDS ON ADOPTION

Madagascar ratified the CRC on 19 March 1991 and the ACRWC on 30 March 2005. Following the recommendations of the Committee on the Rights of the Child in its concluding observations on the second

periodic report, Madagascar ratified the Hague Convention in 2004. These international and regional standards provide that:

- The system of adoption should ensure that the best interests of the child are the paramount consideration.
- Parents or guardians should only be requested to give their consent to adoption after they have received appropriate counselling.
- International adoption should not be considered until all alternative measures to care for the child within the child's country of origin have been considered, explored and discounted.
- International adoption should enjoy safeguards and standards equivalent to national adoption, and should not result in trafficking or improper financial gain for those involved.
- Where the necessary requirements are fulfilled, adoption may be an appropriate child welfare measure, to rescue disadvantaged children from poverty and abuse.
- The adoption of a child should only be authorised by competent authorities.
- States are encouraged to sign bilateral and multilateral agreements to ensure that the placement of children in other countries is carried out by competent authorities. They should also establish mechanism to monitor the well-being of the adopted child.

WHAT THE CRC COMMITTEE SAID

Although the Committee on the Rights of the Child did not issue a specific general comment on adoption, during the consideration of the second periodic report of Madagascar,¹⁰ the Committee stated that it is concerned about the lack of interest in formal domestic adoption. This lack of interest has led to various types of informal adoption that are not conducive to the full respect of children's rights. The Committee welcomed the establishment of an inter-ministerial commission on inter-country adoption, but expressed concern that there remains no proper follow-up on inter-country adoptions. The Committee thus recommended that the Madagascan government take all necessary measures to:

- Raise awareness among society about the two existing forms of adoption procedures, namely informal domestic adoptions and formal legal adoptions
- Monitor informal adoption practices, such as 'god-parenting' to ensure that children's rights are fully respected
- Improve the regular periodic review of the placement of children in adoptive families.

The Committee further recommended that the government consider concluding bilateral agreements with the main countries of destination for adopted children, for better follow-up of adoptions, and that it take the necessary steps to ratify the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.

¹⁰ Submitted 12 February, 2001

THE PROCESS

Legislation on inter-country adoptions was precipitated by ratification of the Hague Convention in 2004, in conjunction with earlier ratifications of the CRC and the ACRWC. A local consultant, under the supervision of the Ministry of Population, Social Protection and Leisure and the Ministry of Justice, drafted the new law and various workshops and consultative meetings were organised by the government, in collaboration with UNICEF.

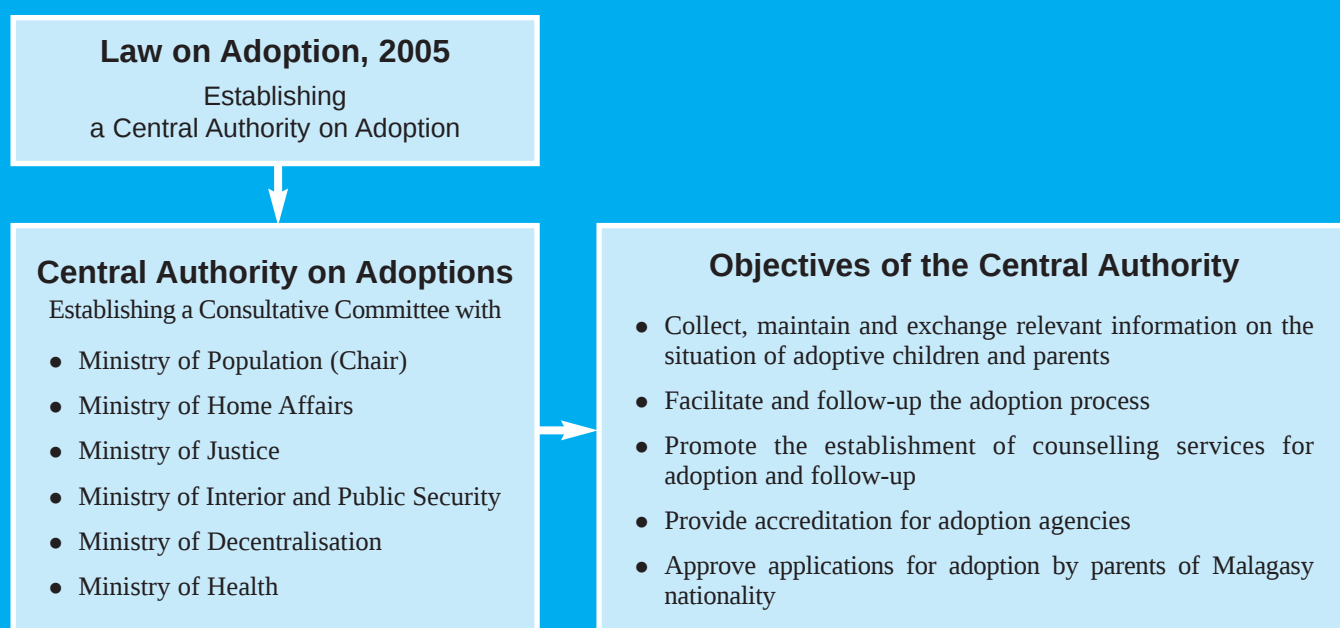
To harmonise the provisions of these international and regional instruments, the government of Madagascar adopted **the Law on Adoption, Act No.14 of 2005** which

amended Act No. 63-022 of 20 November 1963 on filiations, adoption, rejection and guardianship. The government then established an ad-hoc committee, by way of an inter-ministerial commission to consider adoption applications till the system and procedures detailed in the new legislation come into effect.

After the draft was thoroughly discussed by national and international experts and NGOs, it was adopted on 7 September 2005 and published in April 2006. A Decree was then promulgated on 10 August 2006 on the implementation modalities of the Law on Adoption.

KEY ACTORS AND INSTITUTIONS

1. Ministry of Population, Social Protection and Leisure
2. Ministry of Justice
3. A Central Authority under the new legislation, mandated to implement and monitor implementation of the Hague Convention. The Central Authority is chaired by the Ministry of Population and composed of a consultative committee and a permanent office.



The Central Authority on Adoptions is already operational in considering applications for adoption; in December 2006, it had decided on over 90 applications for adoption. It has also requested that adoption agencies renew their licenses according to the new legislation enforced from August 2006 and instructed agencies to stop placing children for adoption,

as the new legislation mandates that courts of law should place children. The Authority has also requested agencies to reimburse prospective adoptive parents any payment they received to process the adoption, as the new legislation sets a standard fee for all adoptions.

IMPACT

The projected impact of the new Law on Adoption, Act No. 14 of 2005, will be via the main provisions of the new law which include:

1. **Primacy of the best interests of the child** in all decisions affecting him or her
2. Due consideration of the **opinion of the child** capable of forming his or her own views
3. Respect of the principle of **non-discrimination**
4. **International adoption should be a measure of last resort**, only considered after all in-country alternatives have been explored and discounted
5. **A period of six months should be given to the parents or guardians to give their consent** for the adoption of the child, during which time they will be counselled, informed and prepared for the eventual consequences of their consent
6. Consent for the adoption of a child **can only be given after the birth of the child**
7. **Consent for adoption should be given in front of a judge**, who will ensure that the consent is not given upon the receipt of payment or as a result of deceitful practice
8. An **accreditation scheme for adoption agencies**
9. **Follow up procedures** for adopted children
10. Procedures to **license institutions that provide care for children**

The Decree of 10 August 2006 sets the fee for adoption at 800 Euros for international adoption and 1,500,000¹¹ Ariary for national adoption. To expand the range of solutions that allow children to remain with their parents, extended family, foster or adoptive family within Madagascar, the Government enacted another Decree to regulate foster care in December 2006. This legislation creates possibilities for families to receive social support that could alleviate the circumstances that forced them to consider placing their child in an institution or for giving them up for adoption.

¹¹ Equivalent to 577 Euros as of Jan 2007

KEY LESSONS AND CHALLENGES

- Multi-sectoral collaboration at ministerial level ensured a holistic approach to the issue of international adoptions.
- There is need for sufficient resources in terms of personnel and finances. More social workers are required, as well as judges trained specifically to handle adoption cases based on the new law.
- Awareness raising is critical, as some adoption agencies are still placing children and accepting payment from prospective adoptive parents despite the notice given by the Central Authority on Adoption. The Central Authority is organising meetings and training for adoption agencies to bring their work in line with the new legislation and to effectively protect children.

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THE TRIBUNALE DES MINORES
AND THE RECOGNITION
OF THE NEED FOR SEPARATE
COURTS FOR CHILDREN

————— MOZAMBIQUE —————

Chapter

4

CRC Art. 40 (3)

‘ State Parties shall seeks to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law... ‘



INTRODUCTION

Mozambique approved the ratification of the United Nations Convention on the Rights of the Child (CRC) in 1990 and the ratification instrument was deposited by the Government of Mozambique in 1994.

Article 40 of the CRC deals with the administration of juvenile justice and requires states to ensure a distinctive system of juvenile justice for children. The Committee on the Rights of the Child has consistently

proposed a distinct system of juvenile justice for all under-18 year olds.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), extending its scope to care and welfare proceedings, requires fair hearings with sufficient flexibility to respond to the varying special needs of the children concerned (Rule 2(3)).

QUICK FACT

In 1979, a decade prior to the enactment of the CRC, Mozambique adopted its own Declaration on the Rights of the Mozambican Child, which comprised a set of 12 basic rights for children.

ESTABLISHMENT OF THE *TRIBUNALE DES MINORES* (CHILDREN'S COURTS)

Mozambique acknowledged the need for separate courts to deal with matters relating to children as far back as 1971, under the **Statutes on Jurisdictional Assistance to Minors 417/ 71 (SJAM)**. This recognition has been reinforced by the new proposed laws currently under debate, namely the Draft Bill on the Organisational Jurisdiction of Minors and the Draft Bill on Child Protection.

The issue of separate courts for children was first dealt with by the SJAM.¹² Article 2 of the SJAM assigns jurisdiction over children to the ordinary courts, which, when deciding on matters relating to children, are called children's courts or *Tribunale des Minores*

(TDM).¹³ The article also states that where the ordinary courts are divided into courts with civil and criminal jurisdiction, it is the civil branch that should deal with children's matters. Importantly, **the article makes provision for children's courts of specialised competence to be established**. Such a court has been established in Maputo and sits separately from ordinary courts.

The legislative establishment of children's courts is good practice. In particular, the fact that the legislation also creates the possibility for specialised courts to be established apart from the ordinary courts is commendable.

¹² Sacramento, L.P. (1998) 'Report on the Main Legislation on Children', Ministry of the Coordination of Social Action, Maputo (hereinafter the Sacramento Report). It should be noted that the SJAM's compliance with the realisation of the rights contained in the UN Convention on the Rights of the Child is questionable. For example, in terms of the provision of article 16 of the statute, the *Tribunale des Minores* is granted the power to determine measures for children under 16 who are beggars, vagrants, prostitutes or promiscuous, or if their behaviour or tendencies reveals serious difficulties in adapting to normal social life. This offends against the rights of the child not to be subjected to punishment for status offences, i.e. acts that would not be considered offences for adults. In addition, the principle that measures should not be imposed unless there is proper proof of wrongdoing seems compromised by the second ground for imposition of measures (serious difficulty in adapting to normal social life). However, apart from these problems, the recognition of the need for separate courts to manage issues in relation to children is the identified good practice for Mozambique.

¹³ Sacramento Report, The Right to Protection, paragraph J.

FUNCTION AND PURPOSE

The purpose of the jurisdiction of children is to assist children in the field of criminal prevention, through application of measures of protection, assistance or education and, in the field of protection of their rights or interests, through the adoption of appropriate civil measures.

In comparison to regional neighbours, Mozambique must be commended for its efforts to ensure a separate court system for children as other countries have not yet fully

achieved this goal. For example, Swaziland has decreed separate courts for children but has not yet operationalised these provisions.

The *Tribunale des Mineurs* (TDM), as a legal forum, is a good vehicle for the delivery of children's rights and the enforcement of the new proposed children's legislation. It is a dedicated court dealing with a range of issues relating to children and provides an existing structure on which to expand the services available to children.

PROPOSED MEASURES ON APPROPRIATE JUSTICE MECHANISMS FOR CHILDREN IN MOZAMBIQUE

The 2005 Draft Bill on the Organisational Jurisdiction of Minors notes that the SJAM and its regulations have proved to be outdated and in need of revision.

- The Bill underpins the need for a separate court system for children in Chapter Two, which deals with the establishment of children's courts with civil and criminal jurisdiction over matters relating to children.
- As with the SJAM, the Draft Bill also makes provision for ordinary civil courts to exercise the powers of children's courts where no separate, specialised children's court exists.
- The powers of the courts, concerning the range of matters that they can adjudicate on, are also increased under Articles 26 and 44.
- The Bill also provides for various child-friendly measures, such as the appointment of attorneys as guardians for children, tasked with looking after their interests and defending their rights.
- There is provision for social welfare services at each court, tasked with, inter alia, assessing children and supervising them.

KEY ACTORS AND INSTITUTIONS

- Ministry of Justice
- The judiciary: the existing TDM in Maputo employs one judge and support personnel. The judge has been trained in children's issues and also conducts training herself.

IMPACT AND BENEFITS

1. **A designated court to specifically deal with children's issues**, such as guardianship, adoptions, social grants for children, paternity investigations and the placement of abused children with family members

2. The **TDM is empowered to request proof of earnings** in maintenance matters, unlike civil courts which cannot
3. The TDM **seeks to create an appropriate justice environment for children, in line with international standards**. Cases are often heard in the judges' offices instead of open court, a measure that reduces trauma to children. The TDM in Maputo is housed in a separate building, so children are removed from the localities of ordinary courts and the attendant stressful atmosphere.

KEY LESSONS AND CHALLENGES

Mozambique has initiated good practice through the establishment of the TDM under the SJAM and continues to recognise the need for a separate court system for children in the new proposed children's legislation. However, there are some challenges that need to be addressed before the courts can be fully functional:

1. If the jurisdiction of the **TDM is extended throughout Mozambique, this will have some cost implications**, although they should not be prohibitive. There will be no need for new court infrastructure to be built, as the TDM can be housed within existing court structures in each province.
2. More populated areas might require a continuous service to children, but in less urbanised areas the TDM might only be required to sit as a court at specific periods.
3. **Judges who have built up experience in dealing with children's matters, should be utilised** for the TDM wherever possible, even as training of more court personnel is planned and effected.
4. It is imperative that **any court dealing with children should involve a procedure that is less formal and adversarial** than in a standard court setting. It should be child-friendly and encourage greater participation by the child and family.
5. **There is need to roll out TDM services throughout the country** in order to ensure consistency of practice and the integrity of the national legal system. It is of concern that the reach of this court does not extend throughout the country.
6. Present legislation, as well as the new draft laws, makes provision for the ordinary courts to sit as children's courts. This should be enforced to ensure wider access and reach of separate legal fora for children. In the consultation process undertaken as part of the law reform process, it emerged that it is also important that a **specialised forum for children** exists apart from the standard court system¹⁴.
7. **Lack of interventions available in the country for child offenders** minimises the potential impact and benefit for children in trouble with the law who appear before the court.

CONTACT INFORMATION

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¹⁴ Consultations for the research undertaken for UNICEF and UTREL (Unidade Técnica da Reforma Legal) by the Children's Rights Project at the Community Law Centre, University of the Western Cape

DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM

—— UGANDA ——

Chapter

5

CRC Art. 40 (3)

‘ State Parties
shall....whenever
appropriate and
desirable (adopt)
measures for
dealing with
children without
resorting to judicial
proceeding...” ‘



INTRODUCTION

The ratification of the CRC and the ACRWC was preceded by steps towards a comprehensive review of child-related legislation. The review process resulted in the adoption of the Children's Act.¹⁵ Coinciding with this review process was adoption of the 1995 Constitution¹⁶

Both the Children's Act and the 1995 Constitution make provision for children's rights in a manner that is consistent with international standards.

A number of good practices have been ushered in by this new legal regime. These include:

1. **A consultative and participatory legislative reform process**
2. **A comprehensive incorporation of the provisions of the CRC and the ACRWC¹⁷**
3. **Adoption of single comprehensive legislation governing almost all children's matters**, from adoption, fostering, maintenance, juvenile justice and children's welfare, and community involvement in handling children's matters
4. **A separate juvenile justice system**; provisions of the Children's Act dealing with juvenile justice are the most comprehensive of all¹⁸, including diversion of juvenile offenders from the formal justice system with the aim of achieving their rehabilitation, reformation and reintegration, with detention as a measure of last resort

QUICK FACTS

- **Uganda was one of the first African Countries to adopt a comprehensive Children's Act** incorporating the provisions of the CRC, the ACRWC, and other international standards in the area of children's rights
- **Uganda ratified the CRC on 16 September 1990, less than a year after its adoption** and at the same time as the treaty entered into force.
- **The ACRWC was ratified** on 17 August 1994

DEFINITION OF DIVERSION

Diversion is a process through which child offenders are handled outside the formal justice system and instead redirected to the community for the purposes of their rehabilitation, reformation and reintegration.

¹⁵ Children's Act, Chapter 59, Laws of Uganda, 2000

¹⁶ Laws of Uganda, 2002, Vol. 1

¹⁷ In fact the Act expressly states that is not exhaustive of the rights of children, but should be read together with the CRC and the ACRWC. See paragraph 4(c) of the First Schedule. This means that in its interpretation, rather be guided by domestic norms, the Children's Act is guided by international norms and standards

¹⁸ See Ekirikubinza, L., 'Juvenile justice and the law in Uganda: Operationalisation of the Children's Act' in Bainham, A, and Rwezaura, B, (eds) *The international survey of family law* (2005) International Society of Family Law pp 511 – 528

OBJECTIVES OF DIVERSION

- The practice of diversion **serves to mitigate the negative effects of formal criminal justice processes** such as the stigmatisation of the trial, conviction and sentencing process.
- It is **especially ideal in cases where the offence is of a non-serious nature** and where the family, school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.¹⁹
- **Diversion is protected and encouraged by the CRC and ACRWC**, as well as other international instruments. Article 40(3) of the CRC obliges states to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law. According to this provision, whenever appropriate and desirable, children should be dealt with without resorting to judicial proceedings.
- Article 40(4) provides for a variety of ways through which to dispose of juvenile cases, including **care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes**; and other alternatives to institutional care. Article 17(3) of the ACRWC provides that the essential aim of treatment of every child, during a criminal trial and if found guilty of infringing the penal law, shall be his or her reformation, re-integration into the family and social rehabilitation.
- *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* is the most comprehensive instrument promoting the spirit of diversion. It provides that consideration shall be given, where appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.²⁰ The instrument requires states to allow the police, the prosecution or other agencies dealing with juvenile cases to dispose of such cases, at their discretion, without recourse to formal hearings.²¹

DIVERSION IN THE CHILDREN'S ACT, 1996

The **Child Law Review Committee (CLRC)**, which took charge of the process of reviewing child-related laws, placed emphasis on the need for informal settlement of child-related matters at local level with litigation in the formal courts as the last recourse.

Diversion under the Children's Act was formed at **three main levels**:

1. The local/ community level
2. At the police station and the Family and Children's Court (FCC)
3. Probation and Social Welfare Officers (PSWO) can also initiate diversion both within and outside the context of the FCC

¹⁹ See commentary to paragraph 11 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules), adopted by General Assembly resolution 40/ 33 of 29 November 1985, available at www.unhcr.ch/html/menu3/b/h_comp48.htm (accessed 17 December 2006)

²⁰ Para 11.1. T

²¹ Para 11.2

COMMUNITY LEVEL

Powers and jurisdiction of the local village councils (LC1)

1. **To try the following criminal offences:** affray, common assault, actual bodily harm, theft, criminal trespass and causing malicious damage to property
2. **The LC1 courts are designated as the courts of first instance** in respect of the above offences
3. Notwithstanding other penalties prescribed by the penal laws, LC1 are empowered to make any of the following orders: **reconciliation, compensation, restitution, apology or caution.**
4. The **courts may also impose a guidance order** by which a child is placed under the guidance, supervision, advice and assistance of a designated person.

Uganda has a decentralised system of governance; representative administrative units are established at all levels of society, from the village and parish levels to sub-county, county and to district.²²

- **The Village Local Council 1 (LC1), the lowest administrative unit,** enjoys some limited judicial powers as granted by the Resistance Committee (Judicial Powers) Act (RCJPS).²³
- The **Children's Act recognises and makes use of this very important administrative structure** and expressly grants the LC1 some form of criminal jurisdiction in cases involving children.²⁴
- **The LC1 courts are designated as the courts of first instance** in respect of the above offences.
- The **courts operate in an informal manner**, are convened any time and legal representation is prohibited.

Police station diversion level

1. Detention is considered a **measure of last resort.**
2. Police officers have **wide powers to release the child without a formal charge.**
3. Police can **dispose of the case without having recourse to formal court proceedings.**
4. Unless arrested with a warrant, the police are authorised to **release the child on bond on his or her own recognisance**, unless the interests of justice require otherwise.
5. The police **must inform the parent or guardian**, and the local council secretary in charge of children's affairs in the area where the child resides, **as soon as a child is arrested.**
6. **Interrogation of the child should be in the presence of either the parent or guardian**, unless it is not in the best interests of the child to do so.
7. The police have established a **Child and Family Protection Unit at every major police station, to help in the handling of juvenile offenders.** This unit plays a very important role promoting diversion by counselling and releasing children after a caution, in addition to counselling their parents if traceable.

²² See Chapter 11 of the Constitution and the Local Government Act, 1997

²³ Act No. 88 of 1988

²⁴ Section 93(2)

Diversion at the local/ community level and by the police is playing a very important role in reducing the workload of the FCCs regarding criminal cases. A perusal of the criminal register of Mwanga II Road Court, the leading FCC in the country, showed that only 42 cases had been registered between 1st January and 18 December 2006.²²

‘Fit and proper persons’

Some NGOs, such as Save the Children, have held **training sessions for ‘fit and proper persons’ to stand surety for children in police detention**. The trainees are familiarised **on the nature of the rights of children** in the Act and with police processes regarding bail. They are trained as **mediators equipped with skills to mediate and resolve cases involving children**, and are then able to assist in the establishment of **Juvenile Justice Committees at sub-county level**²³ and to offer **alternative accommodation instead of incarceration**.²⁴

IMPACT AND BENEFITS

1. This process **recognises that offences by children mainly occur within their own communities** and, unless the offence is of a serious nature, it is important that it be resolved within the community where both victim and perpetrator reside.
2. It **helps familiarise the local communities with the rights of children**.
3. Community resolution of criminal disputes **helps foster reconciliation between the victim and the perpetrator** and their respective families.
4. Helps **promote the principles of restorative and community justice**.²⁸
5. Allows **children to be tried outside the formal system** and makes justice easily accessible.²⁹
6. The courts are **advantageous, as they use local languages, are accessible and are less complicated**, as legal representation is prohibited.
7. The courts sit in **an informal setting which is not intimidating to children**.³⁰

²⁵ The Magistrate attributed these low figures to diversion at the police and local levels

²⁶ See Save the Children in Uganda ‘Some impacts of the Children’s Act in Uganda, 1996 – 2005: A comparative study and evaluation of the Children’s Act in relation to children in conflict with the law in eight districts in Uganda’ August 2005 (Unpublished report on file with author) [Hereinafter referred to as Save the Children 2005 Report], p17

²⁷ Save the Children 2005 Report, p19. It is reported that between 2001 and 2002 370 mediators were trained in Kampala alone. These people visit police stations on a regular basis to check whether there are any children in custody who may be in need of assistance to secure their release. They also make home visits and sensitise parents and the community about the rights of children.

²⁸ Matshego, B, ‘Best practices in the institutional and community-based treatment of young offenders’ in (2001) 3(3) *Article 40* available at www.communitylawcentre.org.za/children/2001art40/vol3_no3_best.php#best (accessed 23 June 2003)

²⁹ See Odongo, G *The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context* LLD dissertation submitted to the University of the Western Cape, October 2005 (Unpublished), p11

³⁰ Save the Children 2005 Report, p 26

DIVERSION BY THE FAMILY AND CHILDREN'S COURT: JURISDICTION, POWER AND PROCEDURES

JURISDICTION OF THE FCC

To hear and determine criminal charges against a child, other than offences punishable by death or any offence for which a child is jointly charged with a person over eighteen years of age.



POWERS OF THE FCC

Where the charge is proved or the child admits the offence, the FCC has powers to make the following orders:

- Absolute discharge
- Caution
- Conditional discharge for not more than 12 months
- Binding the child over to be of good behaviour for a maximum of twelve years
- To grant children bail either on a child's own cognisance or with sureties
- Compensation, restitution or fine, but where failure to pay does not lead to detention
- Making of a probation order, by which the child is monitored by a probation officer

PROCEDURE IN THE FCC

1. The Children's Act makes the procedures of the FCC **friendly and non-stigmatising to children**
2. The courts are supposed to **be held in camera**
3. **Informal** as possible and **non-adversarial** in nature
4. The child offender has **a right to legal representation**
5. Detention or **institutionalisation** should be considered by the FCC **as a matter of last resort**
6. **Trials of a child should not be prolonged**; the Act requires that they be handled expeditiously and without unnecessary delay. If cases are not completed in three months after the plea was taken, they have to be dismissed and the child shall not be liable to any further proceedings for the same offence
7. To **avoid stigmatisation during and after the trial**, the Act proscribes the use of such terms as 'conviction' or 'sentence'. Instead, such **terms as 'proof of an offence against a child' and 'order'** are to be used
8. **Prohibits unnecessary publicity of a child's trial**; it makes an offence of publication of a child's name or address, school address, photograph or other matter likely to lead to the identification of the child, without permission of the Court³¹
9. The FCCs have also been **assisted greatly in the diversion process by the Probation and Social Welfare Offices (PSWO) found in every district**. The offices were established by the Children's Act to ensure the welfare of children by following cases of abuse and recommending appropriate action to the FCCs, including diversion.³²
10. **Discretion to consider alternatives to remand** in the course of a trial. Such alternatives include close supervision or placement with a fit and proper person determined by the court on the recommendation of a PSWO.³³

³¹ Section 102(2)

³² A volunteer Probation and Social Welfare Officer at Muwanga II FCC, Mr. Engorit Victor, said that they try as much as possible to settle minor cases through arbitration and mediation. They only forward serious cases in appropriate circumstances to the FCC

³³ Section 91(9)

KEY ACTORS AND INSTITUTIONS

- The judiciary
- Directorate of Public Prosecutions
- The Ugandan Police Force
- Directorate of Youth & Children Affairs
- Ministry of Justice and Constitutional Affairs
- Ministry of Gender, Labour and Social Development
- Legal Aid Centre
- Secretariat of the Justice, Law and Order Sector
- A number of civil society organisations including the Refugee Law Project and Save the Children in Uganda.

KEY LESSONS AND CHALLENGES

1. Diversion is playing a **very important role in rehabilitating, reforming and reintegrating child offenders** into society, in addition to saving children from the stigma associated with being the subject of formal judicial proceedings.
2. The greatest challenge in implementation is **insufficient funding and capacity**. Generally, the functioning of the FCCs and structures surrounding the courts has been crippled by the government's failure to provide adequate funding and facilitation. For instance, the courts are not able to hold regular sessions and dispose of cases in time because of lack of funding to transport the accused children from remand homes. Mwanga II court has decided to hold sessions only on Friday due to this problem, but even so, there is no guarantee that the children will be produced in court on Friday.²⁸
3. **Insufficient comprehension and awareness of the provisions of the Children's Act** and their impact. The Committee on the Rights of the Child has observed that this is one of the impediments to the realisation of children's rights in Uganda.³⁵ Most magistrates are still not familiar with the provisions of the Children's Act even though the Act has been in force for ten years. A survey disclosed that some upcountry courts, which are supposed to be FCCs, did not even have a copy of the Act.³⁶ There is need for dissemination and training of magistrates on the Act.
4. **Reduction of the pressure on the formal justice programme** is helping address some of the concerns expressed by the Committee on the Rights of the Child regarding the administration of juvenile justice.
5. The FCCs are eager to implement diversion but are **challenged in regard to children in conflict with the law with no family** or alternative care, often living on the streets. The magistrates find it hard to release the children back into the streets and yet there are insufficient institutional set-ups through which their release can be channelled.
6. The need to **balance between the interests of the child and the victims of the crime** can sometimes be a challenging dilemma for magistrates, especially in serious cases.
7. NGO programmes that train 'fit and proper persons', who stand as surety for children in the community, are constrained by not being nationwide. Their efforts must be complemented through government support, both technical and material.

³⁴ Interview with Charles Yetise

³⁵ Committee on the Rights of the Child *Concluding observations of the Committee on the Rights of the Child: Uganda, 21/10/97. Concluding Observations CRC/C/15/Add.80*, (Hereinafter Concluding Observations: 1997), para 11.

³⁶ Interview with Peter Ekayu

Case study:

Diversion by the FCC at the instance of a fit and proper person

Mary, a member of Laroo Pece Women's Association in Gulu District is a trained as a fit and proper person. On 13 December 2003 she learnt about a 13 year old charged with murder before the FCC. She approached the Court and secured the release of the child with a caution. However, due to the anger from the victim's parents and the neighbourhood the child could not safely stay in his parents' house. Mary assumed custody of the child and took him to live in her house, working closely with the local council. He was handed over to his parents after six months of counselling and securing reconciliation between the parents of the victim and the juvenile offender, and he has now been rehabilitated and reintegrated into the local community.

Source: Save the Children 2005 Report, p 23

COMMENTS FROM THE CRC COMMITTEE

In its concluding observations to the second periodic report, the **Committee commended the country for the progress it has made in bringing its laws into accord with international standards in the area of juvenile justice.**³⁷

It also made a number of recommendations regarding improvements in the area of juvenile justice. If implemented, these recommendations would have a positive impact on the practice of diversion.

The Committee recommended:³⁸

- Continued increase in the availability and quality of specialised juvenile courts and judges, police officers and prosecutors, through systematic training of professionals
- Increased financial, human and technical resources to the juvenile courts at sub-county level
- A strengthened role of local authorities, especially with regard to minor offences
- Provision of legal assistance for children at an early stage of legal proceedings
- Improved training programmes on relevant international standards for all professionals involved with the system of juvenile justice
- Enhanced recruitment and training of probation and social welfare officers and facilitation of the fulfilment of their key role, as provided for in the Children's Act
- Seeking technical assistance and other cooperation from the United Nations Office on Drugs and Crime (UNODC), Office of the UN Commissioner for Human Rights (OHCHR) and UNICEF, among others

³⁷ Committee on the Rights of the Child *Concluding Observations of the Committee on the Rights of the Child, Uganda, U.N. Doc. CRC/C/UGA/CO/2 (2005)*, at para 12

³⁸ *Concluding Observations 2005*, para 80

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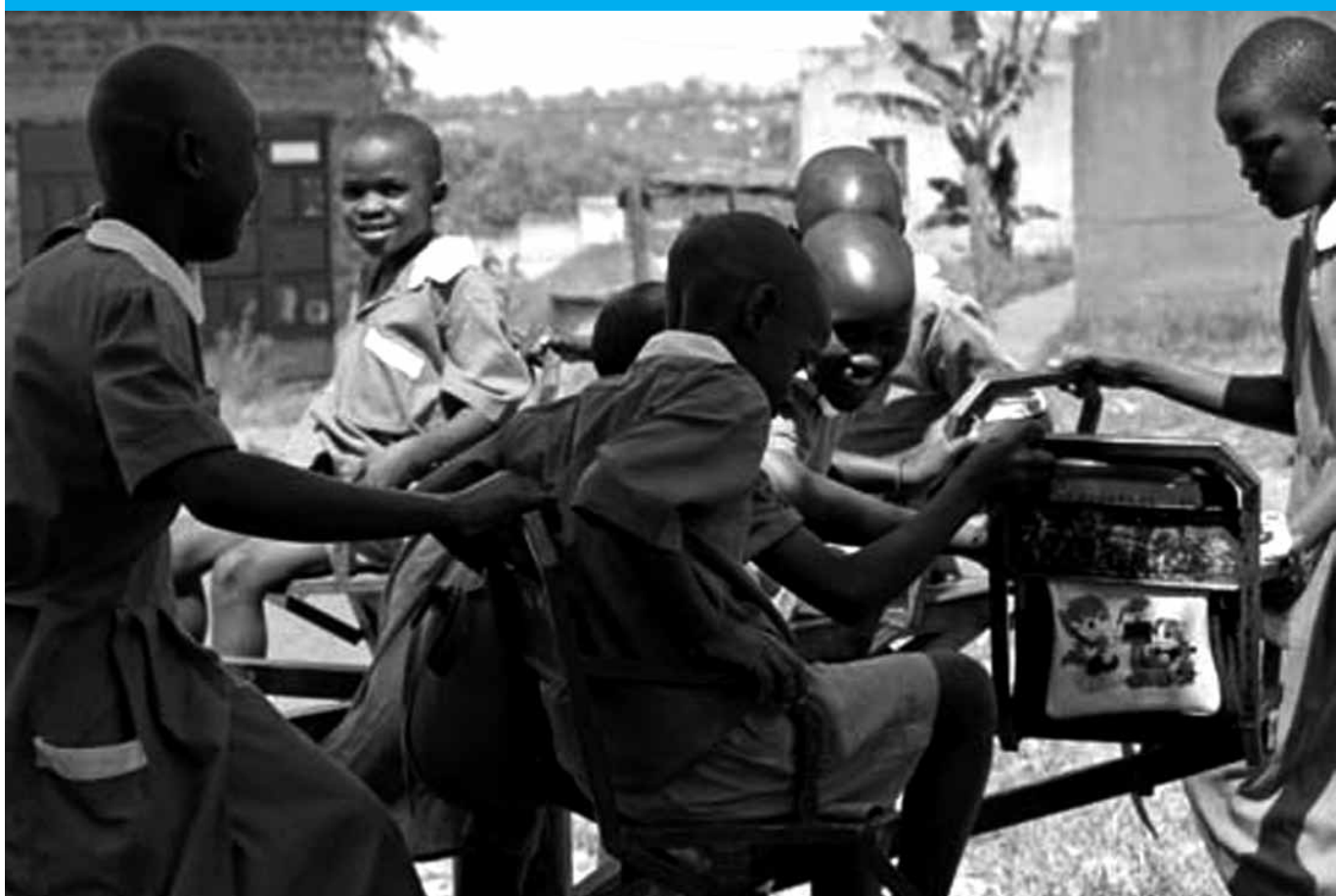
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JUDICIAL ROLE IN IMPLEMENTATION OF CHILDREN'S RIGHTS

— SOUTH AFRICA —

CRC Art. 4

‘ State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention.... ‘



INTRODUCTION

Upon transition from apartheid, South Africa included a justiciable Bill of Rights drawn from international human rights law within its Constitution. This Bill of Rights has been the framework for the development of constitutionalism in Africa generally, and the jurisprudence of the Constitutional Court in the ten years in the elaboration of human rights.

Joining the international community via ratification of significant treaties, among other means, was an important objective of the incoming government in 1994 following the end of apartheid.

In late 1994, the Ministry of Justice convened a conference to discuss potential ratification, and the CRC was one of the four treaties dealt with. **On 16 June 1995,³⁹ South African ratified its first international convention, the CRC.**

Article 4 of the CRC envisages a clear role for judicial decision makers in the implementation of the rights contained in it. Similarly, General Comment No 3 (General Measures of Implementation) of the Committee on the Rights of the Child, envisages judicial support for the interpretation of the provisions of the CRC in national legal systems.

CONSTITUTIONALISING CHILDREN'S RIGHTS

Process

An **interim Constitution was adopted in 1993** after multi-party negotiations following the release of Nelson Mandela in February

1990. A constitutional assembly was established and tasked with drafting the final constitution of 1996.

Children's rights were already featured in the interim Constitution, in a similar but not equivalent form to the present Section 28. Two notable additions in the 1996 Constitution are: limitations on deprivation of children's liberty, in accordance with article 37(b) of CRC, and provision for children's right to legal representation in civil proceedings if substantial injustice would otherwise result, based on article 12 of CRC. **Motivation for inclusion of children's rights in the interim Constitution** was based on the following considerations:

*"The drafters considered the rights of children- and more importantly the socio economic rights of children – to be an issue of absolute priority for the new South Africa. It can be argued that the inclusion of children's rights in the interim Constitution spoke to a particular South African reality, namely that children were actively involved in the struggle against apartheid and, as a result, their rights were continuously violated and abused."*⁴⁰

QUICK FACTS

- The CRC was the first international convention ratified by South Africa in 1995 following the end of apartheid and a return into the international system and the UN
- Section 28 of the Bill of Rights contains a dedicated children's rights clause, drawn from key provisions of the CRC and the ACRWC

³⁹ A significant day for South Africa, celebrated today as Youth Day, is a commemoration of the role of youth in the Soweto uprisings of 1977. It is also now the ACRWC's Day of the African Child

⁴⁰ Defining children's constitutional rights to social services, Children's Institute, University of Cape Town, p49

The genesis of children's rights in the interim Constitution of 1993

1. A conference which highlighted the plight of children living under apartheid, held in exile in Harare, Zimbabwe, in 1987, developed the children's rights agenda of South Africa.
2. The **National Children's Rights Committee (NCRC)**, an umbrella body to coordinate the non-governmental children's rights sector, was established at this conference.
3. Negotiators of the interim Constitution noted that numerous rights were being afforded to prisoners, whilst **only two lines were devoted to children's rights**.
4. The children's rights sector was invited to make specific submissions for a constitutional clause on children's rights, which lead to a submission **advocating for substantive rights based on the CRC**.

Constitution of South Africa - Clause 28: Principles of Children's Rights

The children's rights clause has harmonised some provisions of the CRC and ACRWC into South African law, including General Principles:

Prohibition against discrimination: when this is found to have occurred in relation to one of a series of listed grounds, such discrimination is presumed to be unfair, unless that presumption can be rebutted, although other discriminatory practices, laws or policies where the grounds for discrimination fall outside the list can nevertheless be proven to constitute unfair discrimination, provided that the person alleging this bears the burden of proof.

The right to dignity, which has been held by the Constitutional Court to be a foundational value upon which South African constitutional democracy is built.

Not only was the content of the children's rights clause drawn from international law, but international law acquired heightened significance in South African law, via provisions requiring courts to have regard to international law, especially to treaties which South Africa has acceded to or ratified.

THE CONSTITUTIONAL COURT AS AN IMPLEMENTER OF CHILDREN'S RIGHTS

1. Outlawing corporal punishment in schools

The Constitutional Court upheld legislation outlawing corporal punishment in schools. Children's rights, specifically the obligation incurred under article 19 of the CRC, and the national interest in furthering the development

of a non-violent society, were seen to override the parents' religious rights; some parents argued that Christianity believes in the necessity of using corporal punishment on boys, as a form of chastisement and discipline.⁴¹

⁴¹ 2000 (10) BCLR 1951 (CC) *Christian Education South Africa v Minister of Education*

2. Right to protection under section 28 of the Bill of Rights and the state's responsibility to provide basic health care

The case of the *Minister of Health and others v Treatment Action Campaign (TAC)* arose from a government programme of providing Nevirapine, a drug believed to reduce the chances of transmission of HIV/AIDS from mother to child during birth. The programme was only available at certain pilot sites, and the government refused to roll out the programme beyond these sites. The pilot programme was challenged by HIV/AIDS activists as unreasonable in its restriction to selected hospitals, thereby excluding HIV positive mothers and children without access to these hospitals. Relying on an earlier precedent, the state argued that the primary obligation to provide for the basic health care of (unborn) children lay with the parents.⁴² The Constitutional Court rejected this submission, holding that the primary obligation to provide children with basic health care does rest on parents who can afford to pay for the services; however, **the state is obliged to ensure that children are accorded the measure of protection arising from the children's rights clause contained in section 28 of the Bill of Rights, and the state bears the primary responsibility for children's basic health care when 'the implementation of parental or family care is lacking.'**⁴³ The court said that:

*"Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment, which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them."*⁴⁴

The court ruled that the restrictions on rolling out the drug programme were unreasonable and ordered that the

restrictions on dispensing the drug at public hospitals be removed. **The state was ordered to take reasonable measures to extend testing and counselling facilities at hospitals and clinics throughout the public health system, and to expedite the use of drugs for reducing the risk of mother- to-child transmission of HIV/AIDS,** as the benefit to children born of HIV positive mothers is undeniable.

3. Upholding the socio-economic rights of children

*The Centre for Child Law and Others vs. MEC for Education and Others (Luckhoff case)*⁴⁵ concerned the JW Luckhoff High School, a school of industry where children are placed if a children's court inquiry finds them to be in need of care within the ambit of section 15(1)(d) of the Child Care Act 74 of 1983. The hostels in which the children were housed were in a state of deterioration; the floors were in poor condition and most dormitories had no windows, heating or, in some cases, electricity, so children were exposed to freezing weather conditions. There was also a complete absence of proper psychological support or therapeutic services at the school.

The applicants requested that the children, approximately 150, be provided with a sleeping bag each and proper therapeutic services, and that the conditions in the building be improved. The MEC for education in the province argued that the problems were due to budget constraints. The state further contended that providing sleeping bags for the children would be violating constitutional principles of equality, as others in similar circumstances could seek the same remedy at a very significant cost to the state. The relevant department undertook to seek donor or NGO funding, in order to fulfil its responsibilities towards the children.

After considering the relevant provisions of the Constitution and Child Care Act, the court recorded that:

⁴² Para 76, 2002 (10) BCLR 1033 (CC), at p 1056

⁴³ Para 79, 2002 (10) BCLR 1033 (CC), at 1056

⁴⁴ Ibid

⁴⁵ Case No. 19559/06 (30 June 2006)

*“ What is notable about children’s rights in comparison to other socio-economic rights is that section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate. ”*⁴⁶

recorded that some of the children had become disturbed, depressed and even suicidal, yet had been denied access to therapy or family support. **The Court characterised this as a lack of access to basic health care.**

- d) **Would retain a supervisory role to ensure progress**, in particular pertaining to undertaking the DQA, as it noted that six years of correspondence from the school principal to the relevant department in an attempt to redress the problems had been met with bureaucratic inertia.

The court:

- a) **Gave an order compelling the authorities** to provide each child with a sleeping bag, and to put in place proper access control and psychological support structures
- b) **Ordered the MEC for Education** to make immediate arrangements for the school to be subjected to a developmental quality assurance (DQA) process to address the poor functioning of the institution
- c) **Noted that psychological and social support is a critical ingredient of state care** in the absence of parental support, and found that the lack of such a service is unacceptable. Documentation

The decision of the court to retain a supervisory role in monitoring progress, although not unique in the children’s rights sphere, forms part of a broader discussion in South Africa about judicial remedies and the role of courts in relation to the separation of powers doctrine which maintains that the Executive, Legislative, and Judicial branches of government are to be independent and not infringe upon each other’s rights and duties. The emerging remedy of a structural sanction in which the court retains supervisory jurisdiction to ensure efficient and timely implementation of the court order, has featured prominently in recent children’s rights judgments (*S v Zuba* (2) (2004), *Centre for Child Law v MEC Education* (2006), *Centre for Child Law v Minister of Home Affairs* (2005)

KEY ACTORS AND INSTITUTIONS

Progress on children's rights via the courts in South Africa has been supported by an independent judiciary, selected on merit.

- South African Constitutional Court
- Supreme Court of Appeal (the highest court for non-constitutional issues)
- High Court
- Department of Justice; Justice College has developed a Child Law Training Manual, which forms the basis for considerable magisterial training in children's rights.
- A training academy for superior court judges under the Chief Justice at the Constitutional Court is under establishment
- Lawyers advancing children's rights arguments in their cases enable judiciaries to rule on them

⁴⁶ P7, lines 13–20, of the judgment. Acknowledging the budgetary implications of the decision, the court noted that ‘our Constitution recognises, particularly in relation to children’s rights and the right to a fair trial, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children’s interests in accordance with our constitutional values’ (pp7-8)

IMPACT AND BENEFITS

- a) **Judicial recognition of international obligations** on children's rights that South Africa has ratified and the duty to enforce them is high, which has the potential to impact on every aspect of child rights in the country.
- b) Since 2001, there is **an increasing array of remedies to give effect to the principles of the CRC and ACRWC** in specific cases, with respect to the particularities of each context.
- c) **Heightened judicial concern for the wellbeing of children** whose interests are litigated before them.
- d) **Undeniable benefit to children born of HIV positive mothers**, following the judgement in favour of the Treatment Action Campaign.
- e) Specific impact on the lives of children in the care of Luckhoff High School following their successful case, as well as **a wider bearing on children in the alternative care system**, as the nature and scope of the state obligation towards them was established in no uncertain terms.
- f) **Established precedents that can be cited and duplicated by judiciaries regionally** in the promotion of children's rights.
- g) **Increasing public interest litigation** to further human rights.

KEY LESSONS

1. **Constitutional litigation has fleshed out the principles of international law in domestic law, which is a valuable way of ensuring implementation of the CRC and ACRWC** as the constitutional children's rights clauses are drawn from those treaties.

to follow the example of the Canadian Supreme Court,⁴⁷ which has served as a model since the inception of the South African Constitutional Court, there is a real risk that the court might uphold the constitutionality of parental chastisement, or decline to rule it unconstitutional.
2. **Constitutional litigation is not an exact science and outcomes may be unpredictable.** Therefore, cases have to be carefully selected and pursued, as an adverse finding would bind future judgments. An example here pertains to corporal punishment in the home. It might be thought that the favourable Constitutional Court decision in relation to corporal punishment in schools would provide an ideal launching pad for a constitutional challenge to the provisions of common law which permit parents to use reasonable chastisement, but this outcome cannot be guaranteed. If the Court decided
3. **In the first five years after the constitution was adopted, constitutional jurisprudence pertaining to children's rights was a varied assortment of cases involving the rights or interests of children, but these were frequently predicated on adult interests**, with children's rights being harnessed in support of adult claims⁴⁸. Examples to support this conclusion were drawn from the fields of adoption, inter-country adoption, inter-country child abduction, and access and custody upon divorce, all illustrating the interests of parents or potential parents, rather than children's claims.

⁴⁷ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R.

⁴⁸ J Sloth-Nielsen 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137

4. Since 2001 **there has been a growing body of public interest litigation on behalf of children.** There is donor and NGO support for children's rights litigation, and other litigators such as university legal aid clinics have prioritised litigation concerning children, amongst other vulnerable groups. There is now a plethora of decisions benefiting marginalised and vulnerable children, such as migrant and imprisoned children, children in alternative care, and babies being born to HIV positive mothers.

5. **Lawyers have explicitly advanced children's rights arguments** in their cases thus **enabling judicial responses and development** of jurisprudence.

6. **Non-governmental organisations (NGOs),** especially legal aid advocates, should play a

critical role in championing the rights of children.⁴⁹

MECHANISMS FOR MONITORING AND REPORTING

The High Court, Supreme Court of Appeal and Constitutional Court judgments are reported in a variety of media, and are therefore widely available to scholars and litigators. There is a well established system of precedent, which means that, depending on the geographical area of jurisdiction of the court, judgments are binding in subsequent cases. An impressive array of judgments furthering children's rights has been built up over the decade since the advent of constitutionalism.

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⁴⁹ As evidenced by the involvement of the Centre for Child Law in the Luckhoff case - ⁵⁰ Case No. 19559/06 (30 June 2006)



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