

# HARMONISATION

## OF CHILDREN'S LAWS IN EASTERN AND SOUTHERN AFRICA

### COUNTRY BRIEFS



# HARMONISATION

OF CHILDREN'S LAWS IN EASTERN AND SOUTHERN AFRICA

C O U N T R Y   B R I E F S

## THE AFRICAN CHILD POLICY FORUM (ACPF)

ACPF is an independent, pan-African institution of policy research and dialogue on the African child.

ACPF was established with the conviction that putting children first on the public agenda is fundamental for the realisation of their rights and wellbeing and for bringing about lasting social and economic progress in Africa.

ACPF's work is rights based, inspired by universal values and informed by global experiences and knowledge. Its work is guided by the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and other relevant regional and international human rights instruments. ACPF aims to specifically contribute to improved knowledge on children in Africa; monitor and report progress; identify policy options; provide a platform for dialogue; collaborate with governments, inter-governmental organisations and civil society in the development and implementation of effective pro-child policies and programmes and also promote a common voice for children in and out of Africa.



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# PREFACE

Laws are the foundation of social policies and are central to the promotion and defense of child rights and wellbeing. The African Charter on the Rights and Welfare of the Child (ACRWC) and the UN Convention on the Rights of the Child (CRC), are important instruments for advancing children's rights. They not only fully articulate a society's vision, but also the nature and limits of a State's action. The ratification by most African countries of the ACRWC and CRC has marked a significant milestone towards the protection and promotion of the rights of children across the region. By ratifying these treaties, African governments have acknowledged their obligations and responsibilities for children.

The harmonisation of laws research seeks to audit and review the level of alignment of national laws with international and regional standards, carried by ACPF. This publication is a compilation of country briefs which is an update of preceding harmonisation research done in 19 countries in Eastern and Southern Africa. As the briefs indicate, there have been some key positive developments in the domestication of children's rights in Africa even though most countries face significant implementation challenges. The research establishes that a number of gaps remain between ratification, domestication into national legislation and practical implementation of the laws and policies adopted upon ratification.

Advancing children's rights starts with ensuring that adequate laws and policies are established. If African children are to thrive, in an African society, if the wellbeing of the African child is to be improved and protected, it is paramount that States create an environment suitable for positive child development. African governments must play an important role in bringing added value to the lives and wellbeing of children by implementing their laws and policies relating to children.

It is our hope that these country briefs will not only expand the knowledge base of the current legal and policy provisions relating to children, but will also inform child rights research by identifying current gaps and challenges in laws and policies and therefore contribute to law and policy reform at country level. African governments and other stakeholders must prioritise fully harmonising laws on children and developing effective policies that will ensure that "the best interests of the child" are continuously realised both in policy and practice. With this publication, ACPF hopes to nobly deepen the understanding of children's rights in Africa.

**David Mugawe**



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# HARMONISATION OF CHILDREN'S LAWS IN ANGOLA

## COUNTRY BRIEF

### ABSTRACT

The legal system of Angola is a combination of Portuguese civil law and customary law. The Civil Code, inherited from the colonial era still continues to operate in Angola. This law predates the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) and other international instruments relevant to children's rights. However, there are also positive developments in relation to children's rights in the country. The 2010 Constitution has provided for a number of rights for children. In addition, with support from UNICEF and other NGOs and INGOs, there is a process of drafting a comprehensive children's law in the country. The need to expedite the drafting of this law and applying it across the country should be seen as one of the priorities of Government in the field of children's rights.

### 1. INTRODUCTION

The Republic of Angola is based on a system of direct election of the President of the Republic and members of the parliament. The president and members of the National Assembly are elected for a period of five year terms of offices.

As at 2004 the country had a population estimate of 16 million people. This number has increased to almost 20 million in 2010.<sup>1</sup> Children, defined

internationally, as persons below the age of 18 years, make up about 50% of the population of Angola.

Angola adopted a new Constitution in 2010. This Constitution has a section on fundamental rights and freedoms. A number of provisions within the Constitution have direct and at times indirect relevance for children's rights in the country. Like other Portuguese speaking African countries, Angola inherited the civil system from the Portuguese colonial administration. The country's lower courts are not bound to the decisions of higher courts and ratified international instruments international law norms form part of the domestic legal system once they have been officially published.<sup>2</sup>

Angola has ratified and is bound by a number of international documents which protect the interests of children, including, for example, the African Charter on the Rights and Welfare of the Child (ACRWC) and the Convention on the Rights of the Child (CRC). Angola has also ratified the ILO Convention 182 on the Elimination of Worst Forms of Child Labour, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. These instruments have important provisions which can be applicable to advance the interests of children. However, Angola has not ratified other relevant instruments like the Hague Convention on Inter-country Adoption.

The rights that are protected under the Constitution are applicable to children. The Constitution also has a specific provision

<sup>1</sup> See para 3 of Angola State Party Report submitted to the African Commission on Human and People's Rights, 2010

<sup>2</sup> See Article 18 of the Constitution.

Consideration of reports submitted by State Parties under Article 40

regulating children's rights. Thus, Article 80 provides that:

1. Children shall have the right to receive special attention from the family society and the state which, by working closely together, must ensure that they are fully protected against all forms of neglect, discrimination, oppression, exploitation and abuse of authority, within the family and their institutions.
2. Public policies regarding the family, education and health must safeguard the principle of the higher interest of the child, as a means of guaranteeing their full physical, mental and cultural development.
3. The state shall ensure special protection to children who are orphaned, disabled abandoned or in any way deprived from a family environment.
4. The state shall regulate the adoption of children, promoting their integration into a family environment and striving to ensure their full development.
5. Minors of school age are forbidden to work, under the terms of the law.'

Angola is still operating with old legislation regulating children's rights. The antiquated 1966 Civil Code and Law No. 68/76, dated 5 October 1976 which regulates the age of majority are among the laws governing important aspects of children's rights. Many standards of these instruments fall short of complying with the CRC and the ACRWC.

## 2. GENERAL MEASURES OF IMPLEMENTATION

In recognition of the archaic laws regulating children's rights in Angola, government is undertaking efforts to remedy the situation. A draft of the country's future Children's Act (now still a Bill) is being prepared with the assistance of UNICEF and other civil society organisations working in the field of children's rights. As noted above, the Angolan child law reform process which is underway has opened new opportunities for the future children's rights. There is overwhelming expectation that the draft will incorporate principles from the CRC and the ACRCWC as well as standards contained in other important instruments regulating children's rights.

The government has created the Conselho Nacional da Criança (CNCA) responsible to coordinate the implementation of children's rights in collaboration with other government departments and civil society organisations. This body is the main focal point for children's rights coordination. However, CNAC lacks efficiency as it is not placed strategically in order for it to be able to push children's rights matters through government departments.

There are many government plans and policies impacting on the lives of children in Angola directly or indirectly. Examples include the Public Program for the Improvement of Basic Social Services (PPMSSB) the Internal Strategy for the Reduction of Poverty (EIRP), the National Strategy for Food and Nutritional Safety the Rural Development Program (PDR), and the National Strategy for the Protection of Children who are Victims of Violence 2009.

Perhaps, most importantly, the government and its social partners adopted eleven commitments concerning children's socio-economic situation, participation, and provision of assistance and protection.<sup>3</sup> The Government is also implementing the National Strategic Plan on HIV/AIDS 2003-2008 as the lives of many children are affected by HIV/AIDS in Angola and the subsequent plan for the years 2012-2016 was on its draft stage in August 2011.

Angola established a State Department for Human Rights (Secretaria do Estado paraos Direitos Humanos) responsible to monitor the implementation of human rights in general, which includes children's rights as well. At this stage, there are concerns about the capacity and qualification of personnel of the Secretaria do Estado paraos Direitos Humanos to undertake their tasks effectively.

### 3. DEFINITION OF THE CHILD

The Constitution generally provides that Angolan citizens attain majority at the age of 18 years.<sup>4</sup> In most cases, subordinate legislation adopts this age of majority. The law does not expressly provide for a definition of a child.

The Family Law Code approved under Act No. 1/88, dated 29 February 1988 sets the minimum age of marriage at 18 years. However, exceptionally, with the authorisation of their parent's or when after a review of the circumstances and taking into account the minor's interests, the marriage appears to be the best solution, boys can get married at 16 and girls at 15. As can be seen, the exceptional minimum age of marriage for boys and girls is different. This conflicts with the non-discrimination standard

found in the CRC and the ACRCWC which requires equal treatment of children. The minimum age of employment is 14 years, but for adolescents aged 14 to 16 to be employed, written authorisation from the father, guardian or legal representative is required.<sup>5</sup>

Table showing the definition of a child in Angola

Category	Age
Definition of a child	-
Age of majority	18
Minimum age of employment	14
Minimum age of sexual consent	16 for girls and 17 for boys
Minimum age of marriage	18
Minimum age of criminal responsibility	16
Minimum age of recruitment into the army	18

### 4. THE FOUR GENERAL PRINCIPLES

**The best interests on the child:** Article 80(2) of the Constitutions provides that:

Public policies regarding the family, education and health must safeguard the principle of the higher interest of the child, as a means of guaranteeing their full physical, mental and cultural development.<sup>6</sup>

<sup>3</sup> Consideration of reports submitted by State Parties under Article 40 of the International Covenant on Civil and Political Rights, p 20.

<sup>4</sup> See Article 24.

<sup>5</sup> See Article 282 of the General Labour Act No. 2/00.

<sup>6</sup> See Article 80(2).

This provision reflects constitutional entrenchment of 'the best interests' standard found in the ACRWC and the CRC. It seems that this provision only protects the best interest of the child when it comes to designing public policies in the areas of family, education and health. Consequently, other areas are not included. Furthermore, this principle as is incorporated in the Constitution does not bind private institutions as is a requirement in the corresponding provision in the CRC.<sup>7</sup> On the other hand the Family Code and the Civil Code contain concepts which are closely related to the principle of the best interests of the child. Article 160 of the Family Code provides that in handing down their decisions courts must consider the benefits and interests of the minor. Furthermore, provisions in the Civil Code and the Penal Code provide that decisions concerning children, whether taken by parents or the authorities, must serve the interests of children.

**Non-discrimination:** Article 23(1) of the Constitution establishes the principle of equality of all citizens before the law. The Family Code also has a provision requiring equal treatment for children. However further reform and adoption of a specific instrument regulating children's rights and their interests must also take into account the possibilities of incorporating the non-discrimination standard.

**The right to life, survival and development:** The right to life is protected in Article 30 of the Constitution providing that "the State must respect and protect peoples' lives, which are inviolable." Further, Article 59 of the Constitution prohibits the imposition of the death penalty.<sup>8</sup> The Penal Code prohibits abortion.<sup>9</sup> There are a number of laws that protect and promote survival and development. This is so despite the fact that these laws might not use the words

"survival and development". These laws relate to education, health, children's family environment and the right to protection.

**Respect for the views of the child:** Article 47 of the Constitution regulates the freedom of association. Article 127 of the Civil Code inherited from the Portuguese colonial administration attributes minors (persons up to 18 years old), the capacity to undertake administrative acts that are consistent with the development of their autonomy including disposal of assets which they have acquired through their own work and making small amounts of expenditure.

There are many provisions in the Civil Code and the Civil Procedural Code as well as the penal Code which protect the principle on the child's right to be heard. Some of these provisions speak to the child's right to be consulted in proceedings relating to their social protection and criminal preventive measures to be applied to them, while others speak to their right to be consulted in guardianship proceedings and even to their right to testify in civil or criminal matters when they are above the age of 7 years.<sup>10</sup>

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

In Angola, children between the age of 0-5 years shall be registered free of charge.<sup>11</sup> The Government is also making efforts to ensure the establishment of birth registration systems closer to the communities.<sup>12</sup> Currently, there are minimal conditions to undertake birth registration at hospitals, care centres, maternity homes as well as at municipal and communal and municipal administration offices.

<sup>7</sup> See Article 3 of the CRC.

<sup>8</sup> See Article 59 of the Constitution.

<sup>9</sup> Article 358.

<sup>10</sup> See Angola initial State Party Report submitted to the UN Committee on the Rights and Welfare of the Child, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/431/70/PDF/G0443170.pdf?OpenElement>, accessed on 3 March 2012.

<sup>11</sup> See Decree No. 31/07, of 14 May 2007.

<sup>12</sup> Republic of Angola's State Party Report on the implementation of the African Charter on the rights and Welfare of the Child, available at [http://www.achpr.org/english/state\\_reports/Angola/Angola\\_report.pdf](http://www.achpr.org/english/state_reports/Angola/Angola_report.pdf), accessed on 2 March 2012.

The right to a name is also a right regulated by law in Angola. Everyone has a right to be given a name and to have such name registered.<sup>13</sup> Besides being entitled to a right to have a personal name every individual is entitled to use the surname of his or her own family.<sup>14</sup>

Like in other countries, the Angolan Constitution contains detailed provisions regulating the acquisition of the Angolan nationality. Generally, all children born in Angola are entitled to enjoy the Angolan nationality. However, the possibilities that children might be left stateless exist, and this aspect of nationality is not clearly regulated by law in order to ensure that no child is left stateless.

The Family Code enshrines the principle that everyone has the right to know his or her mother and father. The establishment of maternity and acknowledgment of paternity are acts regulated in the Family Code allowing the child and his or her parents to preserve their identity. In order to preserve identity, and where the birth register has been destroyed, the law in Angola makes provision for the possibility of being re-registered.

The law in Angola does not clearly provide for the right to freedom of expression, freedom of association, and the right to freedom of religion in the context of children. The same is true in relation to the right to privacy. However, the general provisions of the Constitution on these rights apply to children.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Constitution and other subsidiary laws promote parental responsibilities in Angola. There is also emphasis on children's family

environment as being generally the best environment for children's upbringing. However, in the event that children are deprived of their family environment, there are efforts by Government to provide children with alternative care measures.

Despite the fact that the majority of Angolan population follows a matrilineal tradition, legally both parents have a shared responsibility and equal rights over their children.<sup>15</sup> Both parents are required to ensure that the child has a place to stay and they are responsible to provide for the child's education and the basics necessary for the child's development. These duties reflect what is termed parental responsibilities of parents over their children. There are no specific laws regulating family reunification. However, the government is implementing the National Family Tracing and Reunification Programme to ensure that children that were affected by the civil war are linked with their families.

The Angolan Family Code has provisions regulating alternative care for children deprived of a family environment. The Code provides that children separated from parents shall be cared for in alternative community based programmes, with placement in an institution being the last resort. Non-institutional arrangements involve the following the tracing of biological parents or other close relatives; family reunification; placement, family adoption; the provision of social services for the family itself; temporary foster care arrangements (foster mothers or placement in a nearby family).<sup>16</sup>

Adoption and tutorship are among the measures of alternative care given to children in this situation.<sup>17</sup> The Family Code is, however, outdated and needs immediate amendment. For instance, it does not include provisions of intercountry adoption which has become an

<sup>13</sup> See Article 1 of Law No. 10/85, of 19 October 1985.

<sup>14</sup> As above.

<sup>15</sup> Article 130 Family Code.

<sup>16</sup> Committee on the Rights of the Child, Initial report of the Republic of Angola, CRC/C/3/Add.66, June 2004, Par.248

<sup>17</sup> See Angolan Family Law Code approved under Act No. 1/88, dated 29 February 1988.

important aspect of children's rights matters within the country.

The Family Code approved under Act No. 1/88, dated 29 February 1988 has provisions regulating domestic adoption. However, the practice of formal domestic adoption in the country is very minimal. The need to update this law and also raise awareness about the importance of adoption in order to offer children a family environment should be considered as priorities in offering children a family environment domestically.

In relation to intercountry adoption, despite the lack of clear regulations governing the practice, the Parliament has the power to authorise adoption requested by foreign nationals.<sup>18</sup> This power would be more meaningful if the country ratified instruments such as the Hague Convention on Intercountry adoption. It is expected that the draft Children's Act will incorporate provisions that govern the practice of intercountry adoptions.

The review of the placement of children in alternative care is very weak. There are no legal norms which impose review of placement. The only review that exists is the six month placement review which may be done through the National Family Tracing and Reunification Programme of the Government once a child placement is undertaken. But, again, this procedure is not mandatory as there is no legal obligation on the review of placement of children.

It seems that the Angolan Government is aware that children are faced with illicit transfer and non-return, or that children are incarcerated with their parents/caregivers. However, there is no evidence to prove that any concrete

measures are being taken to address the problems. The countries laws, its policies and plans do not pay attention to these aspects of children's rights. Thus, the government is again urged to take steps to tackle these problems in order to advance children's rights.

## 7. HEALTH AND DISABILITY

The right to health is provided for in the Constitution for everyone, including children. Act No. 21-B/92, further strengthens the National Health System by providing for the mechanisms and structures involved in the dispensation of medical and health care. There are eleven commitments between the Government and the UN system and partners, regarding Angolan children, which speak to a variety of child-rights and children's health related issues. Beside food and nutritional security, these commitments speak to the pledge to prevent and reduce the impact of HIV/AIDS on families and children, and to improve the life expectancy of the population by reducing mother and child mortality. However, these commitments do not take the form of legislation and are therefore non-binding on the Government.

Decree No. 43/03, dated 4 July 2003 has important provisions regulating the situation of people living with HIV/AIDS. This law is also applicable to children infected with and affected by HIV/AIDS. As noted above, efforts to address the HIV/AIDS pandemic are also included in the eleven commitments of Government and its social partners. Moreover, the Government of Angola has committed itself to the Millennium Development Goals (MDG's) and other international frameworks envisaging protection to the right of health.

<sup>18</sup> See See Act No. 7/80, dated 27 August 1980 (Angolan Regulations on Adoption).

The Constitution of the Republic of Angola affords children with disabilities with a right to special protection from the State.<sup>19</sup> Mostly children living in the rural and remote areas are affected with disabilities caused by illness, congenital reasons or the civil war which devastated the country. Despite the Government's awareness of the matter, subordinate legislation lacks the necessary precepts to resolve this problem. It is hoped that the Child Law currently being drafted will take this issue into account.

## 8. EDUCATION

The Constitution recognises education as a right to be enjoyed by everyone, including children. The Education Reform Act of 2003 makes education compulsory between grades 1 and 6. In terms of the Act the minimum age of entry into school is 6 years.

However, there are a number of challenges that children face in accessing education generally and primary education in particular. Primary education is not genuinely free. There are a number of associated direct costs that orphans and vulnerable children cannot afford to cover, and as a result are excluded from education. While Government has established programmes and schemes in order to facilitate the access to education of orphans and vulnerable children, girls and other marginalised groups of children such as children with disabilities, these efforts are neither legislatively backed nor have the adequate resources necessary.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

The Government of Angola has enacted a number of laws that address violence against children related issues. Such legislation starts with the Constitutions, the provisions of which cover a number of protection issues for children. As far as the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment is concerned, the Constitution prohibits it. Other subsidiary laws, including the Family Code proscribe such violations of children's rights.

The Refuge Status Act No 8/90, of 26 May 1990 contains provisions governing the procedures and requirements for attribution of refugee status for persons seeking asylum in Angola. The Act is also applicable to children. Angola is recovering from a period of violent conflict which had negative impacts in the lives of many children. Angola has ratified and became a party to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The law set the minimum age of recruitment into the military services at 18 years and prohibits the recruitment of persons less than 18 years.

While the Constitution under Article 24 and the Executive Decree No. 68/76, Article. 1 and 2 defines a minor to be a person under the age of 18. The Penal Code punishes the abandonment

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<sup>19</sup> See Article 80(3).

of children, rape of minors and other acts which work against the integrity of children.<sup>20</sup>In addition, under the Code, minors can bring complaints of sexual abuse, rape and abduction. Sexual relationship with children is not punishable if the child is a boy older than 17 years or a girl older than 16 years who is not a virgin and has given consent.<sup>21</sup> Again, this constitutes different treatment given to male and female children and needs to be tackled through law reform processes envisaging aligning the country's legislation with international law standards.

Although Angola is committed to many international and regional instruments addressing trafficking,<sup>22</sup> the Government still remains to comprehensively regulate and implement laws addressing this problem. Such a comprehensive response also needs to take into account the fact that Angola is a source, transit and destination country in the context of child trafficking. Moreover, domestic norms must incorporate international standards on protection and prevention of

trafficking and adopt stiff measures to punish perpetrators of this crime.

Law No. 18/88 and Law No. 9, dated 19 April 1996 regulates the system of administration of justice for children. Special sections for administering justice for children in conflict with the law were created within the Provincial Court structure. These sections are mandated to apply social protection measures for persons below the age of 12 years and to apply criminal prevention measures for children between 12 and 16 years. Attribution of criminal responsibility begins at age 16, according to the statute of legal aid for minors (Decree No. 417/71, which replaces the former criminal norms on the attribution of criminal responsibility to minors. The challenge, however, is the fact that the only operational juvenile courts are situated in Luanda Province, leaving the rest of the country without any such specialised courts for children.<sup>23</sup>

<sup>20</sup> See Articles 345-348, and 394.

<sup>21</sup> Articles 391-398 of the Penal Code.

<sup>22</sup> For example the Joint ECOWAS Action Plan Against Trafficking in Persons, notably Women and Children.

<sup>23</sup> Consideration of reports submitted by State Parties under Article 40 of the International Covenant on Civil and Political Rights, p 14.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 11/04/1992
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 30/08/2007
Convention on the Rights of the Child (CRC), 1989	Ratification, 5/12/1990
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Accession, 11/10/2007
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 24/03/2005
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	-
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 13/06/2001
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 13/06/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second, third and fourth
ACERWC	-	-
UN Committee	4 Jun 2004	2 Jul 2008

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Angola**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Child Helpline international	April,2010	None
The Coalition to Stop the Use of Child Soldiers ( <b>report on OPAC</b> )	June 2004	
Global Initiative to end All Corporal Punishment of Children	May/June 2010	
Child Network – Rede Criança Inter-Ecclesiastic Committee For Peace in Angola, COIEPA	February 2004	
Human Rights Watch	April 2003	

**4. UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC) African Committee of Experts on the Rights and Welfare of the Child**

ACERWC	UN Committee
None	None

### Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN BOTSWANA

## COUNTRY BRIEF

### ABSTRACT

After a comprehensive review of the Children's Act of 1981 with a view to harmonising it with the provisions of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), the Botswana Children's Act 2009 was promulgated on 8 June 2009. According to Botswana custom, which is patriarchal in nature, children were not seen as subjects of rights in their own right. The setting up of the institutions required to implement the Act, as well as reviewing other legislation which will need to be revised in light of the Act needs to be finalised in order to contribute meaningfully to the realisation of children's rights in the country.

where it is reasonably necessary in a democratic society. However, the Constitution of Botswana contains no provision relating to families or children.

Similar to its neighbouring countries, Botswana has a dual legal system. It is composed of customary law and common law (also known as "received law"). The latter is composed of English law and Roman Dutch law. These two systems operate in a parallel manner despite the existence of differences in the law and its application. Botswana is a dualist country when it comes to international instruments ratified by the country. As a result, international instruments are not self-executing and require a domestic legislative measure to be effective as law and for the courts to take judicial notice of it. However, there are few examples of "judicial activism" where the courts took notice of international instruments which Botswana has ratified even though they have not been domesticated through national legislation.

### 1. INTRODUCTION

Botswana currently has an estimated population of 2.1 million people. A 2001 census indicated that 44 % of the population was under the age of 18 years. Botswana adopted its Constitution at independence. The Constitution establishes a democratic form of government through a system of free elections held every five years. The Constitution contains a number of human rights clauses. In particular, Chapter II of the Constitution entrenches a Bill of Rights, despite the fact that most of these rights may be limited in the public interest, public health and safety, and

Botswana has ratified a number of international human rights instruments including the Convention on the Rights of the Child (CRC),<sup>1</sup> and its two Optional Protocols, as well as the African Charter on the Rights and Welfare of the Child.<sup>2</sup> Botswana has also ratified ILO Conventions No. 138 concerning the Minimum Age for Admission to Employment in 5 June 1997 and No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labour in 3 January 2000.

<sup>1</sup> Ratified on 14 March 1995.

<sup>2</sup> Ratified on 10 July 2001.

The Children's Act of 1981 was the main child rights legislation in the country until recently. However, after a comprehensive review of the Children's Act of 1981 with a view to harmonising it with the provisions of the CRC and the ACRWC, the Botswana Children's Act 2009 was promulgated on 8 June 2009. The Act covers a number of themes pertaining to children's rights and forms a concrete attempt by Government to domesticate the CRC, the ACRWC, and other international law obligations relevant for children's rights.

## 2. GENERAL MEASURES OF IMPLEMENTATION

There are some general measures of implementation that the Government of Botswana has put in place. For instance, the independence of the judiciary is enshrined in the Constitution of Botswana.

An Office of the Ombudsman was established in 1995 through the Ombudsman Act. The Ombudsman is mandated in terms of the Ombudsman Act to investigate complaints of injustice or maladministration in the Public Service. The Office contributes towards the domestic enforcement of human rights. Concerns have been raised that the Office of the Ombudsman lacked the necessary human and financial resources for its proper functioning.

It is unfortunate that Botswana does not have a national human rights commission. This situation continues despite the repeated call by various treaty bodies that Botswana should establish an independent national human rights commission in accordance with the Paris Principles. In 2008,

Government expressed its willingness to consider establishing a national human rights institution.

In the past, a National Child Welfare Committee was established to coordinate Government's efforts on children's rights. However, this Committee, according to the UN Committee on the Rights of the Child (The UN Committee), apparently remained inactive mainly due to lack of human and financial resources.<sup>3</sup> This affected its capacity to effectively play its fundamental role as the main implementing and coordinating body for children's rights.

The Children's Act establishes a National Children's Council.<sup>4</sup>The Council's objective is to support the implementation of the Act. The Council was inaugurated in 2010 to coordinate, guide and advocate for the implementation of the Act. The Act indicates that "[t]he composition, functions and powers of the Council shall be asset out in the Third Schedule".<sup>5</sup>

In 2002, it was reported that an inter-ministerial committee was established to facilitate treaty implementation, particularly reporting as required by the various international treaties. This committee was established at the initiative of the Ministry of Foreign Affairs and International Cooperation, with the support of the other ministries, including the Attorney General's Office.

Botswana has also adopted a number of national plans of action that have implications for children's rights. For instance, the National Plan of Action (NPA) for Children 2006-2016 has been adopted to promote children's rights such as the right to health, the right to education and child protection.

<sup>3</sup> Committee on the Rights of the Child, Concluding Observation on the First State Party Report CRC/C/15/Add.242 3 November 2004, Par.12

<sup>4</sup> Section 35 of the Children's Act.

<sup>5</sup> Section 35(2) of the Act.

### 3. DEFINITION OF THE CHILD

In the past, the Children's Act of 1981 defined a "child" as any person who is under the age of 14 years. According to the Children's Act of 2009 a "child" means any person who is below the age of 18 years.<sup>6</sup> During the consideration of the Initial Report of Botswana of 2003, the UN Committee on the Rights of the Child, noted with regret the reservation that Botswana has made to Article 1 of the Convention. Not withdrawn

According to Section 67(b) of the Constitution, the voting age is 18 years. In the past, the voting age was 21; this was changed through Constitution (Amendment) Act No. 18 of 1997. According to Section 14 of the Marriage Act 2001 "no insane person who is incapable of giving consent to a marriage and no person below the age of 18 years may marry" moreover, under Section 15 "no minor or person below the age of 21 years not being a widower or widow may marry without the consent in writing of his or her parents or guardian".

For purposes of the Employment Act (Cap 47:01), which deals with regulation of the employment of children, a distinction is made between a child and young person. A "child" is defined as a person under 14 years of age and as such the employment of children is prohibited. A "young person" is a person between 15 and 18. The Botswana Defence Force Act provides that "a recruiting officer shall not enlist a person under the apparent age of 18 years".<sup>7</sup> Order 7, rule 2(1), of the High Court Rules stipulates that a person under the age of 21 years may not bring or make a claim in any proceedings except by his guardian and may not defend, make a counterclaim or intervene in any proceedings except through his guardian.

According to the Children's Act, "[a] child under the age of 14 years shall not be presumed to have the capacity to commit a criminal offence unless it can be proved that at the time of committing the offence the child had capacity to know what he or she ought not to do".<sup>8</sup> On the other hand in terms of Section 13(1) of the Penal Code, persons below the age of 8 years are not criminally responsible for any act or omission. The Citizenship Act defines a "child" as including a child born out of wedlock.

In 2004, the UN Committee had indicated that "the various ages defined in the current legislation are not in conformity with the Convention". While the Children's Act has provided an overarching definition of a child that complies with the CRC and the ACRWC, there is still a need to address minimum ages, especially those influenced by customary law.

**Table showing the definition of a child in Botswana**

Category	Age
Definition of a child	18
Age of majority	21
Minimum age of employment	14
Minimum age of sexual consent	16
Minimum age of marriage	18
Minimum age of criminal responsibility	14
Minimum age of recruitment into the army	18

<sup>6</sup> Section 2 of the Children's Act.

<sup>7</sup> Section 17 (2).

<sup>8</sup> Section 82(1) of the Children's Act.

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** It is possible to say that the principle of the best interests of the child is duly integrated into Botswana's legislation. Section 5 of the Children's Act stipulates that "[a] person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration". Moreover, under Section 6(1) of the Act, a non-exhaustive<sup>9</sup> list of factors that shall be taken into account in determining the best interests of a child is provided.

**Non-discrimination:** Section 15 of the Constitution provides for freedom from discrimination. However, Section 15(4)(b), (c) and (d) of the Constitution provide for exceptions to the application of this rule. These exceptions that relate to non-citizens; adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; and the application of customary law have the potential to discriminate against children. In the Children's Act, Section 32(1) stipulates that "Every service provider, including Government, shall discharge its duties to children ... without discrimination or being swayed by personal interest". Still *de facto* discrimination persists against vulnerable groups of children, including children with disabilities, children born out of wedlock, and children affected or infected by HIV/AIDS.

**The right to life, survival and development:** The right to life is recognised under Section 4 of the Constitution, which confers the right to life on all individuals. However, Botswana retains the death penalty. Section 26 of the Penal Code states that, the death sentence shall not be pronounced against any person who is under the age of 18

years or pregnant women under any circumstances. The death penalty in relation to pregnant women is also addressed by Section 298 of the Criminal Procedure and Evidence Act. The Children's Act further strengthens the right to life, survival and development. It states that "[e]very child has an inherent right to life"<sup>10</sup> and "[i]n order to ensure the enjoyment of this right, no person shall take any action or make any decision the effect of which will be to deprive a child of survival and development to the child's full potential".<sup>11</sup>

**Respect for the views of the child:** The Children's Act contains a dedicated provision entitled "child participation". Section 9(1) of the Act provides that "[e]very child who is of such age, maturity and level of understanding as to be able to participate in decisions which have a significant impact on that child's life shall have a right to do so". Unlike other laws, the Children's Act does not provide for a cut-off age by which children should be allowed to participate. The need for adequate information, as well as the importance of ensuring the opportunity to express the child's wishes and views freely, according to the child's age, maturity and level of understanding, is also provided for in the Act.<sup>12</sup> The Children's Consultative Forum, also established under the Children's Act,<sup>13</sup> is expected to facilitate children's participation in decision making at national, district and community level.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

In Botswana, not only is there an explicit right to a name from birth, but such a name should be one that "neither stigmatises nor demeans the dignity of that child".<sup>14</sup> Every child also has a right to a nationality from birth<sup>15</sup> in an effort to comply with Articles 6 and 7 of the ACRWC and CRC respectively.

<sup>9</sup> Section 6(2) of the Act.

<sup>10</sup> Section 10(1) of the Children's Act.

<sup>11</sup> Section 10(2) of the Children's Act.

<sup>12</sup> Section 8(2) of the Children's Act.

<sup>13</sup> Section 34 of the Act.

<sup>14</sup> Section 11 of the Children's Act.

<sup>15</sup> Section 12 of the Children's Act.

The Births and Deaths Registration Act continues to be the main legislation dealing with birth registration, although the Children's Act has included some complementary provisions. In Section 12(2) of the Children's Act, it is provided that "[i]n order to ensure the enjoyment of nationality, the parent or other person specified in the Births and Deaths Registration Act shall give notice of the child's birth to the Registrar of Births in such manner as is prescribed under that Act". Such a birth certificate also serves as proof of nationality.<sup>16</sup> Amendments to the Birth and Death Registration Act of 1998 were made to ensure the compulsory registration of both parents. Despite these laws, there are challenges with regard to birth registration such as the significant number of children who are not yet registered at birth, particularly in remote areas.

Citizenship law in Botswana has had its challenges in the past which led to discrimination of women and children. The *Unity Dow v. Attorney-General* (1992 BLR 112) case is an example of an application for relief to the High Court where a female Motswana married to an alien was not allowed to pass her Botswana citizenship to her children by reason of her being female under the Citizenship Act. Ms. Dow challenged the Citizenship Act as prejudicing her and being against the Constitution and the High Court declared sections 4 and 5 of the Citizenship Act unconstitutional.

A child's right to know and be cared for by both of his or her biological parents is also provided for in Section 13 of the Children's Act. This right is subject to the child's best interests.

The right to freedom of privacy of home and other property is guaranteed in Section 9 of the

Constitution. Sections 11, 12 and 13 of the Constitution guarantee the right to freedom of conscience, the right to freedom of expression, and the right to freedom of assembly and association respectively. Sections 20, 22, and 23 of the Children's Act guarantee children's right to freedom of expression, the right to freedom of association and the right of the child to have his or her privacy protected respectively.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Expectedly, according to the Act, "[t]he primary duty to care for and maintain a child shall rest upon the biological parents of the child".<sup>17</sup> In instances where the biological parents do not live together, parental responsibilities are to be carried out jointly by them unless it would not be in the best interests of the child.<sup>18</sup>

Children have the explicit right to know and be cared for by both of their biological parents, and to appropriate alternative care where the child is removed from the family environment.<sup>19</sup> Only the best interests of the child can dictate an exception to this rule.

Section 13(2) of the Act provides that "[a] child who is born out of wedlock and does not live with both of his or her biological parents has a right to access the absent parent, and to be nurtured, supported and maintained by such absent parent ...". This right seems to usher in some level of equality between married and unmarried parents. Unfortunately, there is still an increasing number of children without adequate parental support due to various reasons, inter alia, the lack of child support by fathers.

<sup>16</sup> Section 12(3) of the Children's Act.

<sup>17</sup> Section 27(1).

<sup>18</sup> Section 27(2).

<sup>19</sup> Section 13(1).

In December 2004, Parliament passed a law abolishing the structure of marital power under common law. The Marital Power Act, as amended, provides for equality between men and women in marriage in community of property. It is expected that this is currently promoting equality of parental responsibilities between men and women.

The Children's Act also gives recognition to the role of the extended family in the care of children. In this regard, Section 27(3) provides that "[w]here both or one of the biological parents is deceased, or the biological parents do not live together as a nuclear family and the absent parent plays no role in the child's life, the other relatives, guardian, adoptive parent, step parent or foster parent of the child shall be deemed to have assumed the parental duties associated with the biological parents of the child".

In the past, concerns have been raised about the lack of legislation governing alternative care in Botswana and the long delays in adopting such legislation. With the coming into force of the Children's Act, this concern has been addressed. The Act covers a number of alternative care related issues. These include foster care, institutions, and adoption. For instance, "PART XV" of the Act is strictly dedicated to "Homes, Schools and Institutions for the Reception of Children". "PART XII" focuses on foster care. The Adoption Act (Cap 28:01) continues to operate. In the past concern has been raised that the provisions of the Adoption Act are not applicable under customary law, which still continues to date. However, with the coming into force of the Children's Act, every magistrate's court shall be a children's court, and a "children's court shall adjudicate any matter involving —... (c) an application for foster care or adoption".<sup>20</sup>

## 7. HEALTH AND DISABILITY

The Children's Act explicitly recognises children's right to health care services. Section 15(1) of the Act explicitly states that "[e]very child has a right to the highest attainable standard of health and medical care". The provision of this right is not cost neutral. As a result the Act caters for instances where parents, other relatives or guardians of the child are unable to provide for the realisation of the right in Section 15(1). In those instances, "...the Minister shall cause to be taken such steps as are necessary to ensure the child's enjoyment of those rights".<sup>21</sup>

Other rights that also promote children's right to the highest attainable standard of health are also provided for in the Act. For instance, under Section 16, children have the right to an adequate and safe housing while under Section 17 they have the right to be provided with adequate clothing by their parents.

The Government of Botswana continues to undertake in order to realise the right to the highest attainable standard of health. For instance, as noted by the UN Committee in the consideration of Botswana's Initial State Party Report, the developments in the primary health care strategy, notably the decentralisation and mobile units as well as the dialogue conducted with traditional leaders to ensure that health care strategies are complementary.<sup>22</sup>

The HIV/AIDS pandemic poses one of the greatest challenges to the realisation of children's right to health in Botswana. The establishment of the National AIDS Council, the National Policy on HIV/AIDS, the National AIDS Coordinating Council, the Prevention of Mother to Child Transmission

<sup>20</sup> Sections 36(1) and (2)(c) of the Children's Act.

<sup>21</sup> Section 15(2).

<sup>22</sup> Committee on the Rights of the Child, concluding observation on the first state party report CRC/C/15/Add.242 3 November 2004, Par.48

Programme and the programme for AIDS orphans and the National AIDS Coordinating Agency (NACA) which is mandated with the overall response to the epidemic are contributing to the realisation of the right to health.

The Children's Act provides, in Section 42(d) that, for the purposes of the Act, a child in need of protection includes a child "who has a disability and is subjected to discrimination or is deprived of proper parental care as a result of that disability". The Act however fails to provide for other directly applicable provisions for children with disabilities. The Mental Disorder Act (Cap 63:02 in section 5) does not sufficiently take into account children's special needs in dealing with mental disabilities; this is evident from the absence of a provision concerning children under the section. Government has established a Department of Disability Coordination in the Office of the President to care for persons with disabilities. In practice however, children with disabilities are still discriminated against and often considered "an embarrassment" by their parents.

## 8. EDUCATION

By law, under the Children's Act, [e]very child has a right to free basic education". But, beginning from 2005, Government introduced school fees on a cost-sharing basis. The cost sharing was revised in 2008 to introduce an income threshold by which households in need of assistance will be exempted from paying school fees. There are also indications that primary education is not free for non-nationals.

There is no clear legislation in Botswana that makes primary education compulsory. However, under Section 18(2) of the Children's Act, a

penalty is provided for "[a] parent, other relative or guardian who, without reasonable excuse, denies a child the opportunity of going to school."

The Education Regulations were reviewed with the intention, amongst others, to facilitate the retention rate of girls, by allowing the return of the girl child to school after pregnancy thus addressing the issue of girls being kept out of school due to pregnancy. While corporal punishment in schools is allowed by the Education Act, and the regulations to the Act that govern its administration. Under the Customary Courts Act, Customary Courts are empowered to administer corporal punishment. Government continues to allocate the largest portion of its budget to the Ministry of Education.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Some provisions of the Constitution directly address violence against children related issues. For instance, Section 6 of the Constitution guarantees freedom from slavery and forced labour. Moreover, Section 7 of the 1966 Constitution guarantees protection from torture, other cruel, inhuman or degrading treatment or punishment but recognises the infliction of lawful punishment.

According to the Botswana Defence Force Act, "a recruiting officer shall not enlist a person under the apparent age of 18 years".<sup>23</sup> This is further consolidated by the Children's Act which provides that "[e]very child has a right to be protected from involvement in armed conflict and other forms of violent conflict".<sup>24</sup>

<sup>23</sup> Section 17(2).

<sup>24</sup> Section 26(1).

Despite the absence of a comprehensive legislation that criminalises all forms of trafficking in persons; provisions in the Penal Code of 1998, such as those in Sections 155-158 (forced prostitution) and Sections 260-262 (slavery), prohibit some forms of trafficking, and Section 57 on child trafficking, respectively. Unfortunately, the Children's Act fails to define child trafficking. Nonetheless, Section 114 of the Act provides that any person, who abducts or sells any child, traffics in children or uses any child to beg, shall be guilty of an offence. Further, Section 256 of the Penal Code provides that, "any person who kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, is guilty of an offence and is liable to imprisonment for a term not exceeding 10 years".

Section 146 of the Penal Code states that any person who indecently assaults a girl below the age of 16 years is guilty of an offence and is liable to imprisonment for a term not exceeding 7 years, with or without corporal punishment, even if consent was obtained from the victim. Any person who indecently assaults a boy under the age of 14 years is guilty of an offence and is liable for a prison term of a maximum of 7 years.<sup>25</sup> The Criminal Procedure and Evidence Act was amended in 1997 to provide for the mandatory hearing in camera of sexual offences such as rape.

Sexual abuse and exploitation, including prostitution and pornography is also prohibited by the Children's Act.<sup>26</sup> According to Section 25(2) of the Children's Act, failure to report, without a reasonable excuse constitutes an offence. In addition, according to Section 25(3), any person, including a parent, who collides with another person who sexually abuses

or exploits a child shall be guilty of an offence. According to Section 25(4), in a view to prevent children's sexual abuse and exploitation, the Minister is required to devise or cause to be devised programmes. Sections 56-62 of the Children's Act also prohibit neglect or ill-treatment of children, corruption of children, exposing children to pornography, cohabitation with children, exposing children to narcotics, cruel treatment or punishment, and harmful social, cultural and religious practices.

Section 24(1) of the Children's Act governs children's right to be protected against work and other labour practices which are inappropriate for a person of the child's age or which place at risk the child's education, physical or mental health, or spiritual moral or social development or wellbeing. It is also provided that "[a]ny employment of a child as permitted by the Employment Act shall be for purposes of apprenticeship".<sup>27</sup>

In the penal system, corporal punishment is lawful as a sentence for crime under the Penal Code, the Criminal Procedure and Evidence Act (Article 305), the Customary Courts Act, and the Customary Courts Amendment Act. The Children's Act (Section 20) and the Prisons Act (Sections 108 and 109) allow for corporal punishment as a disciplinary measure in penal and other institutions accommodating children in conflict with the law. The practice is not prohibited in the school and home environments.

In the past, concern has been raised that the child justice system is not yet compatible with the provisions and principles of the CRC and the ACRWC. Concern has especially been raised at the fact that the age of criminal responsibility, which is 8 years, is too low, compared to the internationally recommended age of 12.<sup>28</sup> However, Part XIV of the Children's Act is fully dedicated to regulating issues related to children in conflict with the law.

<sup>25</sup> Section 166 of the Penal Code.

<sup>26</sup> Section 25(1).

<sup>27</sup> Section 24(2).

<sup>28</sup> Committee on the Rights of the Child: General Comment No. 10, 'Children's rights in juvenile justice' UN Doc. CRC/C/GC/10 (2007), para 16.

Section 82(1) sets the minimum age of criminal responsibility at 14 years of age. Sections 81-96 provide for a relatively comprehensive list of issues governing children in conflict with the law such as on issues of institution of proceedings against a child, trial of children, protection of child

victims and witnesses, manner of dealing with children charged with offences, discharge, probation officers, access to court, and legal representation. If fully implemented, these and other provisions of the Children's Act will significantly elevate Botswana's standards on children in conflict with the law.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 10/07/2001
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	-
Convention on the Rights of the Child (CRC), 1989	Ratification, 14/03/1995
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 4/10/2004
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 24/09/2003
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	-
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 05/06/1997
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 03/01/2000
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second, Third and Fourth
ACERWC	-	-
UN Committee	10 Jan 2003	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Botswana**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
The Coalition to Stop the Use of Child Soldiers (report on the OPAC)	June 2004	None
3D - Trade - Human Rights - Equitable Economy	September 2004	
Botswana Council of Non-Government Organisation (BOCONGO)	March 2004	

**4. UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC) African Committee of Experts on the Rights and Welfare of the Child**

ACERWC		UN Committee
Name	Term of office	
Ms Boipelo Lucia Seithamo (Deputy Rapporteur)	July 2005- July 2010	None

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN BURUNDI

## COUNTRY BRIEF

### ABSTRACT

During the 10 years of war in Burundi children and woman suffered disproportionately and were targets of violence and degrading treatment as a result of their vulnerability. However, the year of 2005 marked the end of the transitional government with the new Constitution adopted in March 2005 and the election of the President in August 2005 that was followed by a post transitional government in September 2005. that was followed by a post transitional government in September 2005. Efforts to harmonise children's laws with international standards in the country are ongoing and some positive results are noticeable.

### 1. INTRODUCTION

The Republic of Burundi is an east African nation, the population of which is 8,575,000 (2011) from which children between 0-14 years constitute 47%. Burundi follows a civil law legal system mixed with customary law.

The Constitution of the Republic was approved by a referendum on 28 February 2005 and it was promulgated on 18 March of the same year. Title II, Section I, of the Constitution of 18 March 2005, which affirms the fundamental rights of individuals and citizens, is relevant for children's rights.

The Constitution of 18 March 2005 recognises the Convention on the Rights of the Child (CRC) as its integral part (Article 19). Article 19(2) of the Constitution specifies that fundamental rights may not be the subject of any restriction or derogation, except when justified by the public

interest or the need to safeguard a fundamental right. In addition to this recognition, a number of national laws related to the rights of the child have already been adopted; some Bills are at the Parliament and Cabinet levels and still others are being drafted.

Burundi has ratified a number of treaties relevant for children's rights. To start with, Burundi is a State Party to the Convention on the Rights of the Child (CRC) by means of Decree-Law No. 1/032 of 16 August 1990, the African Charter on the Rights and Welfare of the Child (ACRWC) and ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour was ratified by Law No. 1/121 of 20 June 2001. Burundi has also ratified the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (ratified by Law No. 1/15 of 18 January 2005), the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (ratified by Law No. 115 of 18 January 2005) and the International Convention on the Protection of Children and the Cooperation in Case of International Adoption (in 1998).

There are some national laws that attempt to domesticate these and other relevant international instruments of significance to children's rights. One that stands out is the Code of Personal and Family Affairs (DL No. 1/024 of 28 April 1993) which devotes a number of Articles to children's rights. In addition, the enactment of three separate Bills that initially were within a Draft Code on the Rights of the Child is under consideration in Parliament as of March 2012. These in particular are the Bill on the Protection of Children in Difficulty, the Bill on the Protection of Delinquent Children and the Bill to Amend Certain Provisions of the Code of Personal and Family Affairs. The Bill to Amend Certain Provisions of the Code of Personal

and Family Affairs promises to significantly bring Burundi close to complying with its international law obligations related to children's rights. The Draft Child Rights Code is divided into three separate texts so as to have specific provisions for all possible cases and thus ensure a better protection of children.

## 2. GENERAL MEASURES OF IMPLEMENTATION

The Government has undertaken a number of general measures for the implementation of the CRC and the ACRWC. These measures, while not complete, have contributed and continue to contribute to the realisation of children's rights in the country.

After the June 1993 elections, a Ministry for Social Action, Human Rights and the Advancement of Women was set up in July 1993 and a woman was appointed as its Head. Since then, a Ministry with responsibility for Human Rights has existed within the various ministerial departments - from 1993 until the present time. This Ministry has also addressed issues pertaining to children especially regarding the girl child.

Recently, there has been a decision by the government to streamline existing institutions and create a Ministry of National Solidarity, Human Rights and Gender and within it the Directorate for the Protection of the Rights of Children. The new Ministry is charged with the responsibility of elaborating and implementing a "National Policy for the Protection of Children".

Concerns have been raised that the Directorate for the Protection of the Rights of Children lacks human, technical and financial resources. In addition, another shortcoming has been that at local level, the Centres of Family Development, which are charged with the coordination and implementation of the policies regarding children, women and the family, are not extended to all provinces and communes.

Decree No. 120/VP1/002/2000 of 11 May 2000 provided for a Governmental Commission on Human Rights, which will become the Independent

National Commission on Human Rights. In May 2011, the appointment of the 7 members of the newly established National Independent Human Rights Commission took place, and the Commission began working in June 2011.

## 3. DEFINITION OF THE CHILD

There is no harmonised and overarching definition of a child in Burundian law. However, a number of laws provide for minimum ages for various activities.

With regard to the Burundian legislation there is distinction between the civil majority and the nuptial majority. The Civil majority is fixed at the age of 21 years while the nuptial majority is fixed at the age of 18 years for girls and 21 years for boys. But because of some reasons such as poverty, promiscuity and non-respect for social values being certainly the results of the civil war for the last 10 years, children are having sexual relations and marriages before this age. However, in the new process of harmonisation of national laws with the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, a Bill to Amend Certain Provisions of the Persons and Family Code (Code des Personnes et de la Famille) is proposing 18 years of age as nuptial majority for both sexes.

There is also a lack of harmony on the age of marriage. This is because the age of marriage is 18 years for girls and 21 years for boys. Fortunately, the Bill to Amend Certain Provisions of the Code of Personal and Family Affairs sets the age of marriage at 18 years for both sexes thereby complying with the CRC and the ACRWC.

The adoption of the new Burundian Penal Code in 2009 increased the minimum age of criminal responsibility from 13 to 15 years old. The right to vote is acquired at the age of 18 years.

In compliance with the CRC and the ACRWC, under school regulations, education is compulsory from the age of 7 to 12, although this is very relative for a number of reasons. As per the Ministerial Order No. 630/01 of 5<sup>th</sup> January (1981) the minimum age of admission to employment is 16 years,

apart from exceptional cases provided for by law and explained in the initial report. However, due to the particular situation of the civil war and the poverty that has followed, many children have joined the labour world to provide for their families.

Article 45 of the Constitution protects children against participation in armed hostilities, as it explicitly provides that no child may be used directly in armed conflict and that the protection of children must be ensured in periods of armed conflict. The Constitution has raised the age of involvement in armed conflict from 16 to 18 years.

For children to be able to file a case before the courts, they need to be declared as being of full age and capacity, which, according to Burundian law cannot be acquired until the age of 16 years.

**Table showing the definition of a child in Burundi**

Category	Age
Definition of a child	-
Age of majority	21
Minimum age of employment	16
Minimum age of sexual consent	18
Minimum age of marriage	18 for girls and 21 for boys.
Minimum age of criminal responsibility	15
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** Article 44 of the Constitution of Burundi recognises the principle of the best interests of the child. The Family Code also recognises the best interests of the child principle in relation to parental responsibility. However, as the UN Committee on the Rights of the Child has noted, the principle of the best interests of the child 'is neither incorporated into all current legislation concerning children, nor sufficiently applied in practice, in particular in judicial and administrative decisions'.<sup>1</sup>

**Non-discrimination:** Article 22 of the Constitution contains the most direct provision on discrimination. This provision provides that all citizens are equal before the law, which ensures them equal protection, and that no one may be discriminated against on grounds of origin, race, ethnic group, sex, colour, language, social situation, religious beliefs, philosophical or political views or for being a carrier of HIV/AIDS or any other incurable illness. Some customary laws and practices pose a challenge to upholding non-discrimination of children and unfortunately, the Persons Family Code contains some restrictions to succession rights for girls. Girls in the context of access to education and succession rights as well as children born out of wedlock, albino children, children belonging to the Batwa minority and those placed into *kafala* families suffer from *de facto* discrimination.

**The right to life, survival and development:** The right to life is protected from the time of conception and not from birth, since the Criminal Code makes abortion an offence under Articles 353-356. The Government has committed itself,

<sup>1</sup> Committee on the Rights of the Child Concluding observations on the second periodic report of Burundi, CRC/C/BDI/CO 19, October 2010,Par.31

under Articles 24 and 25 of the Constitution, to safeguard the physical and emotional integrity, personal liberty and freedom of movement of every man and woman. Article 25 stipulates that no one may be subjected to torture or cruel, inhuman or degrading punishment or treatment. In addition, the Government recently adopted a national policy in favour of orphans and other vulnerable children, including street children, children with disabilities, traumatized children, child soldiers, children in conflict with the law and refugee and displaced children.<sup>2</sup>

**Respect for the views of the child:** Article 31 of the Constitution guarantees freedom of expression and provides that the State must respect freedom of religion, thought, conscience and opinion. The views of the child on the question of custody are taken into account both during and after divorce proceedings.<sup>3</sup>

There are efforts, through the Bill to amend certain provisions of the Code of Personal and Family Affairs to clearly provide for children's participation rights.<sup>4</sup> This includes the need that children must be consulted and that the judge must take their views concerning custody into account during and after divorce proceedings.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Code of Personal and Family Affairs (DL No. 1/024 of 28 April 1993) devotes a number of Articles to names and mandates the administration to inform all Burundian citizens about what steps to take when a child is born. There is also a Presidential Decree of 2006 that guarantees free birth registration for all children up to the age of 5 years as well as the project to promote universal

birth registration. The Constitution also has some provisions on the matter.

In accordance with the Code of Personal and Family Affairs, any birth should be declared within 15 days at the nearest city of the mother of the child. With regard to parental responsibility, in ensuring registration of the child, the law imposes the primary duty on the father while the mother's obligation arises in his default. Thus, if the father of an "illegitimate child" is unknown, it is generally the mother who has the obligation to make the declaration of the child's birth. If the parent fails to do so within this period, he/she shall be penalised. The amount of the penalty shall vary according to the delay. It is also provided that a written report may be made to the communal authority regarding a person who fails to register a birth.

Some challenges on birth registration exist. Different human rights actors and the administration have noted that there is less registration of births because of ignorance of the law by parents and the community, the weakness of the government structures or the administration, and the communal tax collections for birth registration which makes the registration expensive for some families.

The right to nationality is provided for in many provisions of the constitution of 18 March 2005, in its Articles 12, 34 and of the law number 1/013 of 18 July 2000 on the Reform of the Code of Nationality. Article 12 of the Constitution specifies that Burundian citizenship is acquired, retained and lost in accordance with conditions prescribed by law. Children born of Burundian men or women have the same rights under the law of nationality. Law No. 1/013 of 18 July 2000 on the reform of the Code of Nationality enshrines a number of liberal provisions, including the possibility of dual

<sup>2</sup> Committee on the Rights of the Child, Second Periodic Report, CRC/C/BDI/2, July 2008.

<sup>3</sup> Code of Personal and Family Affairs, Articles 335 and 337.

<sup>4</sup> See Articles 175, 184 and 192 of the Bill.

nationality (unlike DL No. 1/93 of 10 August 1971).

Articles 234 to 242 of the Code of Personal and Family Affairs provide for a procedure to establish paternity for an illegitimate child. The illegitimate child is generally recognised by the mother.

The right to privacy is also protected in Burundi. Article 28 of the Constitution provides that all men and women are entitled to respect of their privacy, their family, their home and their personal communications. Article 43 of the Constitution states that no one may be subjected to arbitrary interference with their privacy, their family, their home or their correspondence or to attacks on their honour or reputation. Freedom of expression is guaranteed under Article 31 of the Constitution.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Constitution enshrines some provisions that emphasise and protect parental rights and responsibilities. It is considered to be the duty of parents to educate and raise their children, while the State plays a supportive role. Title X of the Code of Personal and Family Affairs also emphasises parental rights and responsibilities. Not only the families but also the State, through the local authorities has the duty to assist and extend support for the family in order for the later to discharge their responsibility towards their children.

Separation of children from their parents is used as a measure of last resort when dictated by their best interests. This rule is entrenched by the Code of Personal and Family Affairs which also grants custody of the child to the parents (title XI, sect. I), and underscores the need to decide separation only by the competent authority or court. In particular, Title X, chapter II, of the Code of Personal and Family Affairs, on the attributes of parental authority, indicates in Article 298 that the

competent court may decide the temporary or permanent withdrawal of parental authority of the father, the mother or both in the event of abuse of their authority or of ill-treatment of the child.

The Code of Personal and Family Affairs is silent on measures to be taken in the event of failure to pay maintenance for the child. As a result a number of children fail to secure maintenance from their parents.

The Bill to amend certain provisions of the Code of Personal and Family Affairs introduces a number of progressive provisions that include the role of the voice of the child during and after divorce proceedings, the introduction of a new form of guardianship (the surrogate guardian), who replaces the guardian if the latter is unable to perform that duty. There is also a proposal to strengthen the protection of children in relation to material loss or damage.

Burundi does not have clear policy on children deprived of their family environment; it however is stated that there are four types of alternative care, namely, placement in a foster family, placement in an extended family, placement in a reception centre and adoption. However Placement in any of the alternative care arrangements except adoption is yet to be regulated by law. As for the procedure of adoption, including intercountry adoption, Law No. 1/004 of 30 April 1999 amending the provisions of the Code of Personal and Family Affairs relating to the adoption of children is the main law. This law regulates international adoption in conformity with the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. In accordance with this law, the Ministry of Welfare and the Advancement of Women is the central authority, in conjunction with the Ministry of Foreign Affairs.

The Government has adopted a National Plan of Action for Orphans and Vulnerable Children in 2008. Despite this progress, the UN Committee has raised concerns “at the lack of a comprehensive

children's policy in the State party and at the absence of an up-to-date national strategy, related plan of action and an appropriate budget for the implementation of a children's rights policy in priority areas".<sup>5</sup>

## 7. HEALTH AND DISABILITY

The right to health is provided for by the Burundian Constitution in its Article 55 which reads as follows: "Everybody has the right to healthcare (Toute personne a le droit d'accéder aux soins de santé)." The Arusha agreement has also provided quite a number of health care access measures to the child. However, the consequences of the civil war have caused the child a number of physical and psychological repercussions. The child has been the theatre of all kinds of diseases, HIV/AIDS, tuberculosis, malaria, diseases due to malnutrition and promiscuity in the refugees and IDP's camps.

The routine vaccination programme for children is going on throughout the territory and the whole community is involved to identify the needs and the targeted population at national as well as provincial levels. Additional vaccinations are done during the mother and child health week and when it deems necessary, and this is done by UNICEF together with the Ministry of Health and Fight against HIV/AIDS

At national level, the ministry of health in collaboration with its partners has elaborated a national action plan for the feeding and nutrition (Plan National d'Action pour l'Alimentation et la Nutrition - PNAN) and a public account has been opened to assist these provinces (mostly northern region) affected by the famine and any person or organisation can assist through this account. In

addition, all pregnant women get prenatal healthcare and most of them are sensitised to consult doctors or professionals for the pregnancy period.

The HIV/AIDS Strategic Plan for 2007-2011 has made the Prevention of Mother to Child transmission a priority. The Government also has a programme which provides free health care for pregnant mothers and children under 5 years of age. The National Council to Combat AIDS has a project aimed at caring for AIDS orphans and other vulnerable children.

Despite these efforts, there are a number of challenges that remain in the area of health care for children in Burundi. These include low immunization rates, high levels of malnutrition and micro-nutrition deficiencies, extremely poor health conditions among children in general and in particular children over 5 who have no access to adequate health care. There are also challenges in relation to "high mortality rates among children, high maternal mortality rates, the limited number of hospitals and health centres that are operational, the limited drug supply and relatively high cost of medicines, including generic drugs, and the concentration of health care professionals only in Bujumbura city".<sup>6</sup>

There is no clear legislation that protects children with disabilities. As a result children with disabilities continue to be discriminated with no or limited access to social services. This is the main reason why the UN Committee on the Rights of the Child recommended to Government to "[r]evise and adopt legislation in order to fully protect all children with disabilities, and establish a monitoring system, which carefully records progress made and identifies shortcomings in implementation".<sup>7</sup>

<sup>5</sup> Supra note 1 (Concluding observation to the second State party report 2010), Par.14

<sup>6</sup> Supra note 1 (Concluding observation to the second State party report 2010), Par.52

<sup>7</sup> Supra note 1 (Concluding observation to the second State party report 2010) Par.51

## 8. EDUCATION

Article 53 of the Constitution stipulates that all citizens have a right to equal access to instruction, education and culture. The State has a duty to organize and promote access to public school education.

In 2005, Government announced a waiver of school fees as a first step towards a free and compulsory primary education framework in Burundi. Government also established measures to cater for orphans and vulnerable children including girls in facilitating their access to education. This announcement, which was coupled with an absence of proper planning including financial planning, contributed to the high demand for places and the lack of the necessary structure to cater for children in schools.

The national legislation fixes the minimum age to go to primary school between 7 and 12 years.<sup>8</sup> Due to realities on the ground, children beyond this age are accepted to go to school because the government is trying to give a chance to every child including returnees, ex-combatants and girls. A programme namely “back to school” is intended to facilitate access to school for children affected by the civil war and who could not attend school because of this situation.

One area where there has been significant progress is in pre-school contexts. Decree No. 100/054 of 19 April 1998 set up a department of preschool education to coordinate activities relating to the integrated development of young children. Decree No. 100/025 of 24 March 2004 on the organisation of preschool education in Burundi, which sets preschool age at 3 to 6 years, further consolidated the implementation of pre-school in the country.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

National legislation contains a number of provisions which in principle protect the child from all forms of violence. Article 44 of the Constitution stipulates that all children have the right to special measures to ensure or improve the care needed for their well-being, their health, their physical safety and their protection against ill-treatment, abuse or exploitation.

The Constitution provides that no child may be used directly in armed conflict and that the protection of children must be ensured in periods of armed conflict.<sup>9</sup> It is in this regard that concerning the recruitment of children in the army, the minimum age required has been increased from 16 to 18 years.<sup>10</sup> It is Article 45 of the Constitution which stipulates that no child can be used in armed conflict and that every child will be protected during armed conflict. Burundi has also ratified the Optional Protocol of the CRC on the Involvement of Children in Armed Conflict.

Articles 242 and 243 of Burundi's Criminal Code prohibit human trafficking and smuggling and prescribe sentences of 5 to 20 years' imprisonment.<sup>11</sup> However, the absence of a definition of “human trafficking” in the Code is a limitation. Moreover, there is also a possibility of prosecuting trafficking and child prostitution related offences by using the Code's provisions.

The 1993 Labour Code sets the minimum age of admission to employment at 16 years. A 1981 ministerial order still continues to regulate child labour. Forced labor is also prohibited by the Labor Code.<sup>12</sup> The National Plan of Action for the

<sup>8</sup> Supra note 2 (Second State Party Report to the CRC Committee 2008), Par.87

<sup>9</sup> LOI N° 1/ 010 DU 18 Mars 2005 Portant Promulgation de la Constitution de la Republique du Burundi, Art 45

<sup>10</sup> Supra note 2 (Second State Party Report to the CRC Committee 2008 )Par.91

<sup>11</sup> See Articles 242 and 243.

<sup>12</sup> See Article 2.

Elimination of the Worst Forms of Child Labour 2010-2015 has been a positive development, although child trafficking, and child labour exist widely in the country. Concerns have also been raised at the lack of a labour inspectorate to ensure effective implementation of child labour laws both in the formal and informal sectors.

Title IV, chapter II, of the Code on offences against accepted moral standards, criminalises immoral behaviour, corruption or the prostitution of persons where one of the persons concerned is, or appears to be, younger than 21 years of age. More strict sentences are provided for cases the person concerned is below 18 years of age. As a member of the International Conference of the Great Lakes Region (ICGLR), Burundi has also adopted the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children.

The new Penal Code of 2009 has increased penalties for cruel, inhuman and degrading treatment against children.<sup>13</sup> The 2003 Prison Act prohibits torture and inhuman and degrading treatment, including of children. It also provides that juvenile detainees of school age are entitled to education and vocational training.<sup>14</sup>

Regarding children in conflict with the law, Burundi has drafted The Bill on the Protection of Delinquent Children (2008).<sup>15</sup> The 1999 Code of Criminal Procedure does not contain any specific provisions regarding children in conflict with the law, but recommends strict respect for legal norms, including those set out in the Constitution and international instruments ratified by Burundi.

The Constitution provides that no child may be imprisoned unless as a last resort, in which case the duration of imprisonment must be as short as possible.<sup>16</sup> Article 46 of the Constitution also stipulates that every child has the right to be detained separately from detainees over 16 years of age and is the subject of treatment and conditions of detention in keeping with his or her age.

The Criminal Code contains specific provisions regarding minors in conflict with the law. The age of criminal responsibility is 15 years, according to the Amended Penal Code 2009 which increased the age from 13.<sup>17</sup> Children in conflict with the law may not be sentenced to death or life imprisonment. In fact, the maximum prison sentence that can be imposed on a child shall not exceed 10 years.<sup>18</sup> Burundi developed a National Plan of Action for Juvenile Justice for the years 2009-2010 which envisaged the establishment of a Special Unit for Minors which to deal with children that come in contact with the justice system as perpetrators, witnesses or victims.

However, the criminal justice system for children is not in place in the whole country, since juvenile courts have not yet been established in all provinces, and those established face serious problems of corruption and lack of capacity to effectively prosecute cases. The National Commission for the Rehabilitation of Disaster Victims set up by Law No. 1/17 of 13/12/2002 is responsible for reunifying separated families and rehabilitating children who were victims of the Burundian conflict, in particular by providing medical care and schooling.

<sup>12</sup> See Article 2.

<sup>13</sup> Burundi Loi N°1/05 [Law No. 1/05] Portant Revision du Code Penal [Penal Code Revision] of April 22, 2009.

<sup>14</sup> See Article 49.

<sup>15</sup> Global Initiative to end all Corporal Punishment of children , Country Report Burundi, January 2012, As at January 2012, these bill appear not to have been enacted

<sup>16</sup> Article 46.

<sup>17</sup> The issue of criminal responsibility of minors is addressed in Articles 14 and 16 of the Criminal Code.

<sup>18</sup> Supra note 2(Second State Party Report to the CRC Committee 2008),Par. 308

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 28/06/2004
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Signature, 03/12/2003(S)
Convention on the Rights of the Child (CRC), 1989	Ratification, 19/10/1995
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 24/06/2008
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 06/11/2007
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Signature, 26/04/2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Signature, 26/04/2007
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 19/07/2000
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 11/06/2002
Hague Convention on International Child Abduction, 1980	No
Hague Convention on Inter country Adoption, 1993	Accession, 15/10/1998
Hague Convention on Parental Responsibility and Protection of Children, 1996	No
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	No

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

Committee	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	19 Mar 1998	17 Jul 2008	-

**3. Shadow Reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Burundi**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Ligue Iteka, ACAT Burundi, Observatoire Ineza des Droits de l'Enfant au Burundi and Association des Femmes Juristes du Burundi	2010	None
Consortium for Street Children	2010	
UCEDD and UNIPROBA	2010	
Défense des Enfant-International (DEI-BURUNDI)		

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and to the UN Committee on the Rights of the Child**

African Committee of Experts on the Rights and Welfare of the Child	UN Committee
-	-

### Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN COMOROS

## COUNTRY BRIEF

### ABSTRACT

The process of harmonisation of children's laws in Comoros has proved to be long and complex, and is at times challenged by some religious and cultural heritages, which allow discriminatory practices against women and children. The complexity of Comoros' judicial system and the double competencies of Islamic and civil jurisdictions create a serious challenge and this in certain instances curtails the realisation of children's rights. However, there is progress in the area of harmonisation of children's laws, which include Act No. 05-008/AU on the Family Code adopted on 3 June 2005; Act No. 05-021/AU on the protection of children and suppression of juvenile delinquency adopted on 31 December 2005.

### 1. INTRODUCTION

The Union of the Comoros has an estimated population of more than seven hundred thousand (700,000). It is estimated that almost half of its population are persons below the age of 18 years of age.

Comoros is a federal republic. It has a presidential system of government. The country consists of three islands - Grande Comore, Anjouan, and Moheli. According to the Constitution of 2001 that recognises this new grouping, the country is known as the 'Union of Comoros' and constitutes a republic, in which each island enjoys a great degree of autonomy and have their own Constitution.

The Union has the exclusive power to enact law in relation to the following matters: religion; nationality;

ratification of international treaties; criminal law and criminal procedure law; civil rights; social rights; labour rights and public law. Treaties or Conventions ratified or approved by virtue of an Act, are, once they are published, higher in hierarchy than all other laws of the Union and islands.

The Constitution of the Union of Comoros, as well as those of the autonomous islands, provide for the application of the CRC. It is to be noted that the law of the Union overrides the laws of the islands according to Article 8 of the Constitution of the Union of Comoros and it is applicable throughout the territory of Comoros.

Comoros has ratified some instruments directly relevant for children's rights, including the Convention on the Rights of the Child (CRC) on 22 June 1993 and the African Charter on the Rights and Welfare of the Child (ACRWC) on 18 March 2004. These conventions have allowed the review of some domestic laws on family and children to bring them in conformity with international standards.

There are a number of laws adopted by Comoros that address issues related to children's rights. Some of these laws pre-date the ratification of the CRC and the ACRWC, while others are recent. The laws that fall within the latter category include Act No. 05-008/AU on the Family Code adopted on 3 June 2005; Act No. 05-021/AU on the protection of children and suppression of juvenile delinquency adopted on 31 December 2005; Act No. 05-020/AU on the transitional organisation of the juvenile jurisdictions adopted on 31 December 2005; Organic law No. 05-016/AU on the organisation of the judiciary of the Union and islands adopted on 20 December 2005.

## 2. GENERAL MEASURES OF IMPLEMENTATION

In 2005, the Ministry of Justice and Human Rights in consultation with civil society and cooperation agencies, in particular UNDP drafted the Bills to establish the National Commission of Human Rights and Freedoms, and on the Protection of Human Rights Advocates. However, during the consideration of Comoros report at the first Universal Periodic Report, it was highlighted that Comoros does not have a national human rights institution accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. There was no evidence to date that the Commission has been established.

After the ratification of the Convention, a national multi-sectoral commission charged to follow-up the implementation of the CRC was established in 1999. However the Commission could not function due to lack of resources and availability of its members. According to the periodic report on the CRC of April 2005, the coordination of actions on the application of child rights is in general low, because the inter-sectoral approach is not applied at all levels. In addition, in some islands, coordination mechanisms to follow-up on the application of rights were established among public authorities and associations.

One can also cite the National Multi-sectoral Commission charged to follow-up on the implementation of the CRC established on 27 March 1999, the National Committee to follow-up on the Family Code, of the CEDEF and the National Policy to Promote Women and the CRC.

Comoros takes part in Observatory on the Rights of Children in the Indian Ocean Region (ODEROI). This international organization was formed to monitor and enforce children's rights in participatory countries. The organization was established and operates with the assistance of UNICEF.

## 3. DEFINITION OF THE CHILD

The Comoran law sets different ages for different rights, and sometimes applies the term 'minor' and in other instances the term "child". The Act No. 05-008/AU on the Family Code adopted on 3 June 2005 stipulates that the age of marriage is 18 years for both sexes.<sup>1</sup> Nevertheless, the judge has the discretion to allow a marriage of a person below that age on serious and legal grounds where both parties have consented to the marriage.<sup>2</sup> The Code does not however set the minimum age below which this exception does not apply while on the other hand, it sets the age of consent to be the age of 7.<sup>3</sup>

The Code allows conclusion of marriage by proxy of the matrimonial tutor of the young girl and the future husband or his representative in front of the competent court of law.<sup>4</sup> The right of the matrimonial tutor of the young girl belongs to the father, the paternal grand-father, the brother from same mother and father, the brother from same father, the paternal uncles, the paternal cousins, the close paternal family members, the competent judge and in their default to the highest authority of the State or its representative. The mother of the bride and her family are not consulted in any case.<sup>5</sup> In the case of first marriage, the father of the woman cannot oblige her to conclude the marriage without her consent.<sup>6</sup>

<sup>1</sup> Article 14.

<sup>2</sup> Article 15 of the Code.

<sup>3</sup> Article 92(2) of the Code.

<sup>4</sup> Article 21 of the Code.

<sup>5</sup> Article 22 of the Code.

<sup>6</sup> Article 23 of the Code.

The Labour Code was adopted in 1995 and it prohibits the employment in any establishment, even as apprentice, of children below the age of 15.<sup>7</sup> A Ministerial Directive enumerates the nature of work and categories of enterprises prohibited for young children. However, this Directive has never been published. The Code does not regulate the work of children who help their family, which represents a high majority of children. The informal sector is also excluded.

The Act No. 05-021/AU on the protection of the child and suppression of the juvenile delinquency adopted on 31 December 2005 sets the age of criminal liability at 13. Article 92 of the Family Code sets the age of discernment at 7.

There is no specific provision that deals with the minimum age for consensual sexual relations. However, the age of 13 is generally considered as the minimum age for consensual sexual relations. According to the Penal Code, the fact that the victim is 18 years (procuring, abduction and indecent assault) or 15 (rape) may be used to aggravate the punishment.

**Table showing the definition of a child in Comoros**

Category	Age
Definition of a child	-
Age of majority	14-15: Muslim Law 21: Nationality Code 18: Family Code
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	18
Minimum age of criminal responsibility	13
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** In certain areas, Comorian law does not comprehensively ensure the application of the best interest of the child. Legal provisions are not clearly provided to protect the civil rights of the child: the father has parental duty to take care of the child but not the mother. In default of the father, the legislature has provided for judicial mechanism to take care of the child: legal administration, tutor, adoption. This, however, is not in line with the social reality in Comoros. In case of divorce, the guardianship of the child is granted not to the parent that potentially guarantees the best interest of the child, but to the mother, except in certain conditions.

**Non-discrimination:** Both the Preambular and operative parts of the Constitution prohibit discrimination. The Government affirms “the equality of all citizens concerning rights and duties without regard to sex, origin, race, religion, creed or ideological conviction”. The Constitution of 23 December 2001 recognises the equality of sexes although many legal texts do not recognise this principle. In matters related to inheritance, a boy benefits twice more than a girl child. For children born outside of wedlock, there are no provisions in the Family Code to ensure that they enjoy the same rights as children born in wedlock.

**The right to life, survival and development:** While the right to life is protected by law in Comoros, the Penal Code does not specifically provide that the death penalty should not be imposed on persons below the age of 18. The Code still provides where a child of 18 years is sentenced to death penalty or to rigorous imprisonment for life, the sentence should be reduced to 10 to 20 years of imprisonment. There are some provisions in the Constitution and other subsidiary laws that promote children’s right to survival and development.

**Respect for the views of the Child:** There is no law in the country that incorporates child participation

<sup>7</sup> Article 123.

as provided for in the CRC and the ACRWC. However, the Act on the Protection of Children and Suppression of Juvenile Delinquency allows the juvenile judge to devolve the powers and responsibility regarding the child to the child himself where it is necessary to take protective measures. In case of an offence, the procedural provisions require that the views of the child be heard in the court of law. There are few measures in place to promote child participation. For instance, the children's parliament, which almost every year, in observance of the Day of the African Child, organizes an event that allows children to engage with, ministers in matters that affect children's rights. This initiative is commendable.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

According to the Civil Status Act No. 84-10/AF of 15 May 1984, the birth of a child should be registered within 15 days. Failure of such a registration can be corrected by the registrar who may record it pursuant to a suppletive decision by a court. Since the birth registration should indicate the names of the child, the right to a name is often exercised immediately after birth. The Family Code distinguishes children born in wedlock from those who are born outside wedlock. A child born in wedlock bears his/her father's name, while a child born outside wedlock bears the name and surname that his/her mother gives him.<sup>8</sup> A child born outside wedlock will not have any familial relationship with his/her father and if such a relationship exists will not in any way have an effect. The child will, however, have the same familial relationship with his/her mother like a child born in wedlock.<sup>9</sup> Islamic Law prohibits any legal relationship from being created between a biological father and a child born outside wedlock,

even with the consent of all parties (biological father, the child and mother).

Article 5 of the Constitution provides that the Comoran nationality is acquired, conserved and lost according to the law. According to the Nationality Code issued by the Act No.79-12/PR of 27 July 1980, the Comoran nationality law passes on by blood. It is provided that "[a] Comorian is an individual born in the Comoros of Comorian parents or outside the Comoros of a Comorian parent".<sup>10</sup> It is also possible that birth or descent can confer a Comorian nationality, but this can only happen when confirmed by a civil-status record or a judgment.<sup>11</sup>

According to the Code, nationality may also be acquired in other ways such as by operation of law;<sup>12</sup> by registration;<sup>13</sup> and through decision of the public authority.<sup>14</sup> There are, however, instances where children are discriminated in nationality issues, or are at times run the risk of being left stateless.

In Comoros, freedom of thought is guaranteed by the law. However, the right to freedom of religion is not guaranteed by the Comoran legislation. The Penal Code criminalises the teaching and propagation, and divulgation of another religion to Moslems and sanctions the act with three months imprisonment and fine of 50,000 to 500,000 francs.<sup>15</sup> It also punishes the sale, distribution even for free, of books, brochures, magazines, disks and cassettes talking about a religion other than Islam. Comoran children do not also have the right to choose another religion than Islam.

There is no specific provision in Comoros regulating the right to privacy of children. However, the Penal Code prohibits all administrative or judicial official, law enforcement official, including

<sup>8</sup> Article 99.

<sup>9</sup> See Articles 99 and 100 of the Family Code.

<sup>10</sup> Article 4.

<sup>11</sup> Article 13.

<sup>12</sup> Articles 15-18.

<sup>13</sup> Articles 20-26.

<sup>14</sup> Articles 27-41.

<sup>15</sup> Articles 228 and 229.

the police from violating the domicile of a citizen without his/her consent, unless as provided by the law.<sup>16</sup> It also prohibits the violation of any correspondence or letters sent through the postal services.<sup>17</sup>

The Information Code that provides for freedom of expression, contains general provisions and does not provide specific measures to encourage the media to transmit social and cultural information and materials for children; to encourage the production and dissemination of children's books; to facilitate the elaboration of guiding principles to protect the child from information and materials not suited for his/her well-being.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The husband is the head of the household according to the Family Code. The husband is responsible for the guidance and material well-being of the family. In case of polygamy, the husband is responsible to equally treat and provide for all his/her wives.<sup>18</sup>

Article 106 of the Family Code indicates that the father has the parental authority, including a disciplinary power against his/her children without resorting to ill-treatment and torture. The application of Islamic law does not always comply with the prohibition on non-discrimination.

Certain aspects of the Government's social policy are firmly oriented towards the protection of children against marital instability. The Family Code has included new provisions, the application of which has faced resistance. For instance, the

Family Code provides that where the law nullifies a marriage between relatives, children born from the marriage may remain legitimate with the good faith of the spouses.<sup>19</sup> In addition, it allows the establishment of filiation in cases of acknowledgement by the father and the testimony of two witnesses.<sup>20</sup> It also accepts scientific proof to establish paternity. Adoption as a measure of alternative care is recognised Under the Family Code.<sup>21</sup> The adopted child maintains his/her rights from his/her family of origin, in particular his/her name and rights of inheritance.

## 7. HEALTH AND DISABILITY

The Constitutions of the autonomous islands recognise in their preamble the right to health of their citizens. The number of laws that have impacted on the right to health and access to health care services is a long one. These include the Public Health Code of 24 June 1995; Act of 24 June 1995 on the general protection and promotion of public health; and Act No.94-016/AF of 17 June 1994 providing the general framework of health system and defining the missions of public health service. The main policies adopted on health include the National Policy on Health; Vision 2015; National Programme of Action on Survival, Protection and Development of the Comoran Child (1992); Advocacy Document on the Fight against HIV/AIDS (projection of epidemiology and socio-economic impacts of HIV/AIDS in Comoros (2000 – 2018)); and the National Strategy Document on the Prevention of Mother to Child Transmission of HIV in Comoros;

In 2008 the United Nations Statistics Division indicated that in 2007, the proportion of people living with HIV, 15-49 years old, was 0.1 per cent.

<sup>16</sup> Article 163.

<sup>17</sup> Article 166.

<sup>18</sup> Article 54 of the Family Code.

<sup>19</sup> Article 101 of the Family Code.

<sup>20</sup> Article 102 of the Family Code.

<sup>21</sup> Article 2 of the Family Code.

There are some programmes in Comoros that attempt to address HIV/AIDS related issues. Quality primary health care that is designed to reduce infant and child mortality and diseases continues to be central to Governments efforts in relation to child health.<sup>22</sup>

Chapter VI of the Public Health Code and Social Action of 24 June 1995 is dedicated to handicapped and aged people. The Code states that the prevention of disability is the right and duty of all citizens, the society at large, and the State.<sup>23</sup> On the other hand, Article 161 of this Code states that the State is responsible for the mental health of citizens.

## 8. EDUCATION

A number of laws contribute to the regulation of the right to education in Comoros. It is proclaimed under the preamble of the Constitution that every child has the right to an education and to instruction by the state, by parents, and teachers chosen by the latter. In addition the other laws include Act No 94-035/AF on the Outline of the Education System; Act No. 83-19/AF of 14 December 1983 instituting the participation of citizens on the education of children; and Act No. 80-18 on education of 3 May 1980. The main policies adopted in the area of education include Guideline for Education and Training (1997 – 2001) in 2005; Statement on Education for All of 2000; National Plan on Education for All (NPE/EFA); National Policy on Youth adopted in June 2001. There is no policy on the protection of children. There is, however, since 2004 a national strategy document on the protection of most vulnerable children.

*The Outline Act on the Education System Act of 20 December 1994 has prioritized, amongst other things, quality education for all Comoran children.*

*This law also makes school attendance compulsory for all children between 6 and 12 years of age. It does not, however, specify that education is free. As a result of societal attitude, boys generally are more likely to attend schools than girls, although the gender gap has considerably dropped in recent years.*

The National Plan on Education for All in the year 2015 and the Plan of Action (2005 – 2009) were elaborated and headed by the Minister of National Education. These documents refer to the Millennium Development Goals, PRSP and CRC. Some of the priorities set are: the restructuring and reinforcement of support system of the child; universal primary education; diversification and development of technical and professional training; creation of favourable conditions for the literacy of young people and adults.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

In Comoros, there are few laws that address issues related with violence against children. This is despite the fact that violence is widespread, especially against women and girls. However, in recognition of the issue, some efforts, such as an amendment of the Penal Code to include criminalization of sexual abuse of children, approved by the National Assembly in August 2007, have been undertaken by Government.

The Government of Comoros still remains to draft and adopt a comprehensive anti-trafficking law. As a result, certain provisions of the Penal Code are often interpreted and relied on in order to address child trafficking related issues. These include Article 323 of the Penal Code provision on child prostitution; Article 2 of the Labour Code prohibiting forced and bonded labour and Article

<sup>22</sup> The national plan of action and the Health and Social Welfare Code contained in Act No. 95-013/AF.

<sup>23</sup> Article 1158 of the Code.

333 of the Penal Code for illegal restraint under which trafficking offenses could also be tried. However, the provisions of the Penal Code or any other law in Comoros lack specific provisions concerning the forced prostitution of adults.

The Comoran Penal Code criminalises exploitation and sexual abuse of children. Article 323 of the Code provides that whoever commits an immoral offence, by inciting or enticing a young person for sex under the age of 21 or even occasionally on a child of 16 years is punishable to an imprisonment of two to five years and a fine of 150,000 to 2,000,000 francs. The Code also has provisions which aim at preventing and protecting children from being incited into an illegal sexual activity or that they are exploited through prostitution or other illegal sexual practices.

The Government has adopted the 2010-2015 National Action Plan for the Elimination of the Worst Forms of Child Labour, which includes activities to address child prostitution; child soldiering; child labour in the domestic, agricultural, and fishing sectors; and the use of children in drug and narcotics trafficking. The Government, in March 2011, managed to create a police unit charged with the investigation of child labour cases, fulfilling one of the action items of the plan. The law establishes 15-years of age as the minimum age for employment.

It is not clear whether the law in Comoros explicitly prohibits the recruitment and use of children below the age of 18 for armed conflict. In the past, however, issues of child soldiers have existed in the country, and in July 2010, the Ministries of Defence, Interior, Justice and Education – in cooperation with partners undertook the implementation of a National Disarmament, Demobilization, and Reintegration Plan and former child soldiers benefitted from this program.

In Comoros, there are no separate jails for minors, thus children in conflict with the law are jailed in the same quarters as adults in Moheli, Anjouan, and in Grande Comore, where they are housed in the prison guards' barracks.

The Information Code of 27 June 1994 stipulates that the publication or diffusion, through public or specialized media, electronic, print or any other mass media, of any information, photograph or films that go against the decency and morals are punished by the Penal Code.

Corporal punishment of children is lawful in the home. The Penal Code permits the use of "light" punishment by parents and those with authority over children.<sup>24</sup> The same provision allows corporal punishment in the school environment. The Family Code provides that those with parental authority must protect children from violence, with the exception of "light" violence exercised under the "right of correction" of parents.<sup>25</sup> While minor violence is punished under Article 12(7) of Law No. 81/007, this is not interpreted as prohibiting all corporal punishment.

If the child below the age of 15 is found guilty of a crime, the court can only take an educational measure, such as handing him/her over to the parents, tutor, guardian or a person worthy of trust.

If a child between the ages of 15 and 18 is found guilty of a crime, the juvenile court will consult on the issue of criminal responsibility. The maximum sentence may not however be more than half of what would have been given if he had been 18 years of age at the time he committed the crime. The Juvenile Court may delay the punishment by a special and justified decision. If the punishment is to be implemented, the Juvenile Court will give order for an educational measure, or the

<sup>24</sup> Articles 297 and 298.

<sup>25</sup> Article 95 of the Code.

placement of the minor in an institution for a determined period that may not exceed the time within which the child attains the age of 21. Though minority is an extenuating circumstance for children between the ages of 15 and 18 years,

the judge has the discretion not to consider and sentence the child as an adult. However, the death penalty may not be imposed on a person below the age of 18.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 18/03/2004
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 18/03/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 22/06/1993
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	-
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 23/02/2007
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Signature, 26/09/2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 17/03/2004
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 17/03/2004
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

## 2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

Committee	Initial Report	Second
ACERWC	-	-
UN Committee	24 Mar 1998	-

## 3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Comoros

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)	African Committee of Experts on the Rights and Welfare of the Child
None	None

## 4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and to the UN Committee on the Rights of the Child

African Committee of Experts on the Rights and Welfare of the Child	UN Committee
None	None

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN ERITREA

## COUNTRY BRIEF

### ABSTRACT

Eritrea is a young country that attained independence in 1991. The progress in the harmonisation of children's laws with the CRC and the ACRWC has been slow. The Transitional Civil Code and the Transitional Penal Code cover a number of child rights provisions and protections. The Constitution adopted in 1997, and a number of other Draft Codes could have accelerated harmonisation efforts. However, they are not in operation. Proclamation No. 158 of 2007 aimed at abolishing female genital mutilation is proving to yield a positive impact in Eritrea. Harmonising children's laws in the country requires a substantial work that is yet to be done.

The main objective of the review was to ensure the harmonisation of domestic laws with international law. Subsequent to the debate and deliberation on the draft the National Assembly ratified the Constitution in 1997.<sup>1</sup> Nonetheless there are indications that, to date, the Constitution has not yet come into force.

The Constitution envisages a state based on national unity and democratic principles.<sup>2</sup> Personal liberties in the Constitution guarantee a number of fundamental rights,<sup>3</sup> and require the state to guarantee socio-economic rights to the best of its capacity.<sup>4</sup> It imposes duties on the individual to respect rights of others and to look after older members of the society.<sup>5</sup> As the supreme law of the land, the Constitution requires that all laws be consistent with its provisions.<sup>6</sup>

Eritrea is a civil law country. As such, it holds codified laws, which are authoritative, comprehensive and systematic collections of general clauses and legal principles. These laws are divided into Books and Parts.

The 1997 Constitution expressly states that the President is empowered to negotiate and sign international agreements.<sup>7</sup> The National Assembly must ratify international agreements by law.<sup>8</sup> The phrase "by law" means that the signed and ratified international agreement must be transformed into domestic law. The transformation of international law into domestic law ensures the compatibility of

## 1. INTRODUCTION

The State of Eritrea has an estimated population of 4.5 million people. There are an estimated 1.9 million children that are defined to be persons below the age of 18 years.

In March 1994, the Transitional Government of Eritrea established a Constitutional Commission under Proclamation 55/1994. The Constitutional Commission conducted a review of international conventions, declarations and other instruments that the State of Eritrea has signed and ratified.

<sup>1</sup> Adopted 23 May 1997.

<sup>2</sup> Articles 6 and 7 of the Constitution.

<sup>3</sup> Chapter 3 of the Constitution.

<sup>4</sup> Articles 8 and 21 of the Constitution.

<sup>5</sup> Articles 21 and 22 of Constitution.

<sup>6</sup> Article 2 of the Constitution.

<sup>7</sup> Article 42(6) of Constitution.

<sup>8</sup> Article 32(4) of Constitution.

domestic laws with the signed and ratified international law. It also states express domestic enforcement mechanisms.

Eritrea is essentially a dualist State. A treaty or convention is domesticated if the National Assembly ratifies and proclaims it as the law of the state of Eritrea. However, state practice indicates that the executive organ alone has been signing and ratifying international agreements.

The State of Eritrea ratified the CRC on 03 August 1994 and ACRWC on 22 December 1999. The Government of Eritrea adopts the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict on 16 February 2005. The legislative measures taken to implement the CRC and ACRWC include the Constitution, Proclamation No. 158 of 2007 aimed at abolishing Female Genital Mutilation, National Service Proclamation No.11/1991 as amended by No.71/1994, Press Proclamation No.90/1996, Labour Proclamation No.8/1991 as amended by Proclamation No 118/2001, The Public Sector Pension Scheme Proclamation No.136/2003, Goods for the Disabled Government Assistance Regulation Legal Notice No.82/2004, the Transitional Civil Code and Penal Code, and the process of drafting new Civil and Penal Codes, Civil and Criminal Procedures and Commercial Code.

## 2. GENERAL MEASURES OF IMPLEMENTATION

Unfortunately, in Eritrea, there is no independent national human rights institution to monitor and promote children's rights. A number of treaty bodies, including the United Nations Committee on the Rights of the Child (UN Committee), have made recommendations to the State to establish a national human rights institution.

A Constitutional Commission was duly established following the ratification of the CRC by the Government of Eritrea. The Constitutional Commission among others reviewed the CRC and examined whether the principles of the CRC could be enshrined in the Constitution.

The Ministry of Labour and Human Welfare (MoLHW) established the Child Law Committee, as an inter-ministerial Committee, responsible for the coordination of policies and programmes, but the ad hoc nature of the Committee has hindered the desired outcome. The Division of Child and Family within the (MOLHW) is required to follow-up and perform the Committee's responsibilities and duties.

In Eritrea, a CRC Committee was also established to compile the states' periodic reports on implementation of the CRC. The establishment of the Committee played a significant role in ensuring a comprehensive report. It further secured the participation of all child concerned government organs.

There are few other organs that have a role to play in the realisation of children's rights. For instance, in the area of data collection and research the National Statistics and Evaluation Office (NSEO), Ministry of National Development (MoND), Ministry of Health (MoH), Ministry of Education (MoE) and Ministry of Labour and Human Welfare (MLHW) are relevant.

Some programs that promote child rights are also implemented by the Government. For instance, the Government, in partnership with the World Bank and Italian Cooperation, established Eritrean Integrated Early Childhood Development (EIECD) programs in September 2000. There is however a lack of a comprehensive National Plan of Action and information indicating the outcome and evaluation of the National Programme of Action on Children 2002-2006.

However, the Government has drawn up a National Plan of Action to Combat Female Genital Mutilation (FGM). The National Plan of Action is based on a two pronged approach that are prohibition of genital mutilation and rendering support for victims. Thus, one of the positive developments in relation to legislation is Proclamation No. 158 of 2007 aimed at abolishing female genital mutilation.

### 3. DEFINITION OF THE CHILD

The Transitional Civil Code of Eritrea, Transitional Penal Code of Eritrea (based on the 1957 Penal Code of Ethiopia, amended by Proclamation No. 4/1991), Draft Penal Code of Eritrea (DPCE) and Labour Proclamation No.118/2001 enshrine a definition of a child as a person below 18 years, and, as an exception, a minimum age lower than 18 years. The Transitional Civil Code of Eritrea defines a child as a “minor” “... of either sex who has not attained the full age of 18 years”<sup>9</sup> And deems a child below 18 years to be legally incapable.<sup>10</sup> Thus the civil majority age remains 18 years, unless the law expressly states otherwise.

The Transitional Civil Code states that the minimum age for betrothal and marriage is 18 years.<sup>11</sup> However, a child aged 15 years and above may be permitted to conclude betrothal or marriage provided it would serve the best interest of the child and the family. In this case the court is vested with the power to assess the best interest of the child. Age for emancipation of a

minor child is 15 years<sup>12</sup> and such child is presumed to attain civil majority,<sup>13</sup> which is enshrined under The Draft Civil Code of Eritrea. The Labour Proclamation puts the age of employment at 14 years.<sup>14</sup>

The Transitional Penal Code states that criminal majority is attained at the age of 15 years. The Draft Penal Code has lowered the criminal majority from 15 to 12 years and criminal responsibility from 12 to 9 years (the Draft Code was not promulgated until 2007). There is no substantial justification for lowering criminal irresponsibility and majority.

Table showing the definition of a child in Eritrea

Category	Age
Definition of a child	-
Age of majority	18
Minimum age of employment	14
Minimum age of sexual consent	18
Minimum age of marriage	18
Minimum age of criminal responsibility	12
Minimum age of recruitment into the army	18

<sup>9</sup> Provisional Government of Eritrea, Proclamation No. 2/1991, The Transitional Civil Code of Eritrea, The Gazette of Eritrea Laws, Vol. 1/1991, No.1/1991, 15 September 1991, Article 198.

<sup>10</sup> Article 199. A minor is placed under the guardianship to ensure proper care, rearing and up bringing. The juridical acts of the minor are restricted under the law. Pursuant to Article 306(1)(2) a minor may engage in acts of daily transaction that does not exceed one hundred *Nakfa* (local currency of Eritrea).

<sup>11</sup> Article 46(2).

<sup>12</sup> Articles 329 and 330.

<sup>13</sup> Article 328 of the Civil Code.

<sup>14</sup> Article 68(1).

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** While it is difficult to assert that Eritrean laws have comprehensively incorporated the best interests of the child principle, some laws refer to the principle. For instance, in accordance with Article 681 of the Transitional Civil Code of Eritrea, the custody and maintenance of children born outside of wedlock shall be regulated having regard solely to the interest of the children.

**Non-discrimination:** According to Article 14 of the Constitution, no person shall be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, age, political belief or opinion or social, economic status or any other factors. De facto discrimination against certain groups of children persists, particularly with regards to girls, children living in poverty, children affected by and/or infected with HIV/AIDS, orphans and children belonging to nomadic and pastoralist minorities.

**The right to life, survival and development:** The right to life is recognised in Eritrean law. The Transitional Penal Code and Draft Penal Code proscribe abortion that is the intentional termination of pregnancy by the pregnant woman, or another person who rendered assistance or performed the act for gain.<sup>15</sup> Article 527 of the penal Code also criminalises infanticide. There are some provisions in the Civil Code and other laws that promote the right to survival and development.

**Respect for the views of the child:** Concern has been raised that sufficient legal provisions have not been implemented to guarantee the right of the child to participate, particularly to be heard in

judicial and administrative proceedings affecting the child. In July 2009, about 100 children from all over Eritrea took part in the country's first-ever Children's Forum, organized by UNICEF and the National Union of Eritrean Youth and Students. The boys and girls, all between 10 and 18 years of age, came from a wide range of socio-economic backgrounds. Among them were children from rural areas and towns, children both in and out of school, disabled young people and children made vulnerable by HIV/AIDS and poverty.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Constitution states that “[a]ny person born of an Eritrean father or mother is an Eritrean by birth”.<sup>16</sup> As far as foreigners are concerned, they may acquire Eritrean citizenship pursuant to law.<sup>17</sup> The Eritrean Nationality Proclamation No.22/1992 renders nationality based on birth to abandoned children who cannot trace their descent. The Proclamation does not take into account other circumstances, such as refugees, who could otherwise be left stateless.

Birth registration of children is a challenge. The non-establishment of a national structure to coordinate and supervise the Office of Civil Status responsible to register birth, death and marriage remains a formidable challenge to ensure birth registration. The existing Civil Status Offices in some regions and sub-regions are poorly distributed and lack necessary facilities.

The Constitution guarantees some civil and political rights to everyone, including children. However, the Constitution is not yet operational. There are also severe restrictions on the freedom of expression and the lack of free media, which

<sup>15</sup> See Article 528-534, as amended.

<sup>16</sup> Article 3 (1).

<sup>17</sup> Article 3(2) of the Constitution.

has a negative impact on children's right to access information, to which the UN Committee raised concerns.

The UN Committee has also expressed deep concern in 2008 over measures by the State to confiscate certain child orphanages and kindergartens. The detention of children belonging to certain religious denominations that are not recognized by the State has also been raised as a concern, as it limits children's right to exercise their freedom of religion.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

A number of provisions of the Transitional Civil Code provide for parental rights and responsibilities. For instance, Articles 265-274 of the transitional Civil Code have provisions on parental responsibilities. According to the Civil Code, the father and mother are jointly required to perform the functions of guardian and tutor of the child.<sup>18</sup> In instances of default by any one or both of the parents, the possibility of appointing a guardian and tutor for the child is envisaged.<sup>19</sup>

There is a challenge on enforcing maintenance payments for children. According to Article 821 of the Transitional Civil Code, the obligation to maintain starts with parents. It then extends to ascendants, brothers and sisters of full and half blood, then to descendants by affinity and ascendants by affinity. Often, neither parents nor children apply to court for securing maintenance orders, or even when they do, such orders are hardly enforced. However, the State has been rendering maintenance to certain disadvantaged children under institutional care or placed under

group homes and foster home care. The availability of very limited resources at the disposal of the State results in inadequate support.

The Transitional Civil Code recognizes the institution of adoption. Accordingly, the Code requires the approval of court for the adoption to be legal. However, the customary laws of Eritrea do not expressly require the approval of judiciary or any other administrative tribunal for the conclusion of a valid adoption.

## 7. HEALTH AND DISABILITY

There is no specific law that addresses the right to health in Eritrea. The Ministry of Health is the main Ministry dealing with health related issues.

At the programme level, there are indications that the Government has made progress on children's health, and the child mortality rate was reduced. While medical facilities are still primarily concentrated in the urban areas, there has been some progress in increasing access to primary health care in the country.

The Government of Eritrea attempts to make anti-retroviral treatment available free of charge. However, accessibility to all those who need the life-saving treatment is limited. As a result, prevention of mother to child transmission services have been inadequate, and voluntary, counselling and testing (VCT) services are insufficient. It is not clear if there is any legislation in the country that protects the rights of children that are infected or affected by HIV/AIDS. In 2008, concerns were raised by the UN Committee about the insufficient attention that has been paid to adolescent health issues, including developmental, mental and reproductive health concerns. The Committee has also

<sup>18</sup> Article 204.

<sup>19</sup> Article 205.

specifically aired its concern over the situation of girls due to the high incidence of early pregnancies.

Eritrea has not signed or ratified the Convention on the Rights of Persons with Disabilities. There is no law that addresses the issue of children with disabilities. There are, however, some programmes that provide for wheelchairs, or generally assist children with disabilities.

## 8. EDUCATION

According to the Constitution, “[e]very citizen have the right of equal access to publicly funded social services and the State shall endeavour, within the limit of its resources, to make available to all citizens health, education, cultural and other social services”.<sup>20</sup>

Though there is no clear legislation that makes primary education free and compulsory. In its latest report to the UN Committee, the Eritrean government has indicated that as part of its transformation of the education sector, it has introduced a 12-year academic cycle, the first five years of primary school (age 6-10) are compulsory for all citizens. Concern on low level of literacy rate remains high as access to primary education is insufficient and net enrolment still low.

There are indications that, in 2010, a number of schools were constructed in Eritrea. Most of these schools are located in rural areas, and there was a particular improvement in girls’ access to primary education.

While Government insists that schools and military camps are separated, the UN Committee has raised concern over information that secondary school students have to undergo

obligatory military training. This is because the government requires all students who have reached the final year of secondary school to attend grade 12 at the Sawa military and educational camp. There are reports that students who do not attend this final year may not graduate and could fail to take examinations that are necessary, as they determine a child’s eligibility for advanced education.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL SAFEGUARDS

Some of the provisions of the Constitution of Eritrea address violence against children issues. For instance, the Constitution upholds the dignity of every person and prohibits cruel, inhuman or degrading treatment or punishment.<sup>21</sup> Generally abuse and neglect of children is criminalized. For instance, negligent treatment is criminalized in Eritrea by Articles 626 of the Transitional Penal Code and Article 292 of the Draft Penal Code.

There is no comprehensive law in Eritrea addressing child trafficking, child pornography and the sale of children. However, there are some provisions that can be applied to prosecute some aspects and elements of these crimes. For instance, Articles 605 and 606(a) of the Transitional Penal Code of Eritrea criminalise the act of trafficking women or infants and young persons, whether by seducing them or inciting them, or by procuring them or otherwise. Whosoever procures or engages in child trafficking under the age of 15 years of age is punished with rigorous imprisonment from 3 to 10 years.<sup>22</sup> Child pornography is not explicitly proscribed in Eritrea. However, Article 608 of the Transitional Penal Code on “public indecency and

<sup>20</sup> Article 21(1).

<sup>21</sup> Article 16 of the Constitution.

<sup>22</sup> Article 606 of the Transitional Penal Code.

outrages against morals” can be used to prosecute child pornography.

The establishment of a national plan of action against sexual exploitation of children is commendable. The Government has also drawn up a National Plan of Action to Combat Female Genital Mutilation. The latter has fortunately led to the adoption of Proclamation No. 158 of 2007 aimed at abolishing female genital mutilation.

Article 276(d) of the Draft Penal Code provides that a person who commits sexual assault is liable to severe punishment. According to Article 594(a) of the Transitional Penal Code, a rigorous imprisonment not exceeding 5 years will be imposed to any one causing an infant or young person under the age of 15 years to have sexual intercourse or to perform an act corresponding to sexual Act”. Incest as well is criminalised under Article 279 of the Draft Penal Code and Article 621 of the Transitional Civil Code. In instances where the offence is committed against an infant or young person, a rigorous imprisonment not exceeding 10 years is imposed.

According to the Constitution, all citizens have to “be ready to defend the country and complete ... National Service”.<sup>23</sup> In implementing this provision, the National Service Proclamation No. 82/95 of 23 October 1995 makes national service of six months of military training and twelve months of military service as obligatory for men between the ages of 18 and 40, which has subsequently been extended to 50 years. The recruitment of children into the armed forces is prohibited under Proclamation 11/1991.

There are concerns that female children appointed as domestic servants may be abused. Moreover, the Labour Proclamation No.118/2001 does not

address child labour in agricultural sector and petty trading. In the Eritrean context, child labour in agricultural sector remains socially and culturally acceptable as children are viewed as contributors to the family’s income. A specific study could however recommend relevant interventions to alleviate child labour in the agricultural sector and petty trades.

Articles 548 and 64 of the Transitional Penal Code confirm the right to administer “lawful and reasonable chastisement” or other acts carried out in exercising the “right of correction”. In instances where a court considers a child’s actions as rebellious and unruly, and the court is of the view that punishment will reform the child, the court has the discretion to impose corporal punishment.<sup>24</sup> There is no indication that the right to administer lawful and reasonable chastisement is explicitly repealed from the Code. This is despite the fact that during the Universal Periodic Review of Eritrea in 2009, the Government indicated that Proclamation No. 4/1991 prohibits corporal punishment.<sup>25</sup> Although in 2010 there were indications that the government was in its final stages of drafting Civil and Criminal Codes and Civil and Criminal Procedure Codes, this information has not been confirmed and the Codes have not materialised.

A child friendly juvenile justice system is non-existent in Eritrea. For instance, children between ages of 15 and 17 years are tried as adults. Moreover, deprivation of liberty is not applied as a measure of last resort and there is a lack of separation of children from adults in pre-trial detention. Detentions and ill-treatment directed against children who seek to avoid military service has also been recorded. Alternatives to deprivation of liberty, such as diversion programmes, do not exist in the State.

<sup>23</sup> Article 25.

<sup>24</sup> Article 172 of the Transitional Penal Code.

<sup>25</sup> See A/HRC/13/2/Add.1, (08 March 2010) Report of the Working Group: Addendum, para. 14.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 22/12/1999
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	-
Convention on the Rights of the Child (CRC), 1989	Ratification, 3/08/1994
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Accession , 16/02/2005
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 16/02/2005
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	-
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 22/02/2000
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	-
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

## 2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

Committee	Initial Report	Second and third	Fourth
ACERWC	-	-	-
UN Committee	27 July 2001	14 June 2007	-

## 3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Ertrea

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Child Helpline International	January 2008	None
Global Initiative to End Corporal Punishment	Jan/Feb 2008	

## 4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and to the UN Committee on the Rights of the Child

African Committee of Experts on the Rights and Welfare of the Child	UN Committee
None	None

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN ETHIOPIA

## COUNTRY BRIEF

### ABSTRACT

Ethiopia does not have a comprehensive child law in the form of a Children's Act or Proclamation. In the absence of such law, the Federal Democratic Republic Constitution (FDRE), the Revised Family Code (RFC), the Criminal Code of Ethiopia and the Labour Proclamation, remain the main instruments addressing issues pertaining to children's rights in Ethiopia. These laws do not only cover a range of substantive child rights related issues, but they also address, albeit inadequately, some relevant institutional frameworks necessary for the full implementation and realisation of children's rights in Ethiopia.

### 1. INTRODUCTION

The Federal Democratic Republic of Ethiopia (FDRE) has a population of around 83 million people half of which are believed to be children or persons below the age of 18. The country mainly adheres to the civil law legal system.

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE), adopted in 1995, has an in-built mechanism of incorporating international

agreements into the national legal framework. Under Article 9(4), the Constitution makes all international agreements ratified by Ethiopia part of the law of the land. Thus, the incorporation of international agreements in the Ethiopian legal system is a function of the signature and adoption processes. Moreover, Article 13(2) of the FDRE Constitution has a specific provision for international human rights instruments, such as the Convention on the Rights of the Child (CRC), which also provide standards for the interpretation of the Constitution in matters related to fundamental human rights.<sup>1</sup>

International human rights agreements ratified by Ethiopia are considered part and parcel of the human rights chapter of the FDRE Constitution for the purpose of harmonisation. One should, however, note that the explicit scope of Article 13(2) is inherently limited to the substance of the rights and does not extend to the mechanisms for implementation.<sup>2</sup> Thus, persisting gaps in constitutional alignment would constitute a critical challenge to harmonisation of child rights unless addressed through appropriate constitutional interpretation or amendment processes.

Ethiopia ratified the Convention on the Rights of the Child on 14 May 1991 and it was proclaimed by Parliament on 19 January 1992.<sup>3</sup> Ethiopia

<sup>1</sup> Art 13(2), FDRE Constitution provides that 'The fundamental rights and freedoms specified in this constitution shall be interpreted in manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia',

<sup>2</sup> The assumption here is that the provisions of an agreement may come into conflict with those of the Constitution in terms of the substance of a specific right or measures for its implementation. In terms of substance, the problem arises only where the Constitution imposes limits beyond those permissible under the international human rights framework. A narrower definition or omission of a specific right in the Constitution does not constitute conflict and would simply permit application of the standards incorporated through 9/2. Similarly, constitutional recognition in excess of the international provisions reflects the role of international human rights norms as minimum standards. Conflicting obligations arising from the Constitution and human rights agreements could also be a problem, especially in federal arrangements where the relevant mandate resides with regional states.

<sup>3</sup> Proclamation No. 10/1992.

ratified the African Charter on the Rights and Welfare of the Child (ACRWC) on 2 October 2002.<sup>4</sup> Among others, the Ethiopian government has also ratified the Convention on the Rights of Persons with Disabilities (CRPD), ILO Conventions No. 182 on the Elimination of the Worst Forms of Child Labour, and No.138 on Minimum Age of Employment.<sup>5</sup>

## 2. GENERAL MEASURES OF IMPLEMENTATION

There are a number of general provisions on human rights in the FDRE Constitution that are applicable to all persons, including children. The Constitution also provides specifically for the rights of children under Article 36, namely the rights of the child to life, name and nationality, to know and be cared for by parents or legal guardians, to be protected from exploitative labour and not to be forced to undertake work that may harm his or her education, health and well-being, to be free from cruel and inhuman treatment in schools or child care institutions. Article 36(2) of the Constitution goes beyond recognition of specific child rights and incorporates the principle of the best interests of the child.

The federal ministries responsible for the sectors and sub-sectors relevant to child rights not only undertake responsibilities for the realisation of specific rights but also exercise monitoring and information management mandates. The Ministry of Women, Children and Youth Affairs (MoWCYA), formerly the Ministry of Women's Affairs (MoWA), is the core executive body mandated for the rights

of women and children. Moreover, MoWCYA is the lead agency for implementing the policy framework on women's and children's issues.<sup>6</sup>

There are a number of plans and policies that are relevant to the realisation of children's rights. For instance, the development and publication of the alternative child care guidelines and the standard OVC service delivery guidelines by the then MoWA represent an important step in translating child rights principles and standards into workable practice standards. However, the status of these guidelines as binding legal standards should be established and clarified. The development of organisational child protection standards within institutions working with children is of particular importance in this respect. The MoWA directives on intercountry adoption, on the other hand, need to be updated in line with the current policy and legal framework as well as taking into account the expanding practice.

Other key structures established for the purpose of coordinating and monitoring the implementation of the rights of the child include the Children's Rights Committees and structures stipulated within the national action plans, especially the NPA for Children.<sup>7</sup>

The Ethiopian Human Rights Commission and Ombudsman institutions were established by law in 2000 and the Human Rights Commissioner and Ombudsman were appointed in 2004. Similarly, the Parliament has established a Women's and Children's Affairs sub-committee under the Social Affairs Standing Committee.

<sup>4</sup> Proclamation No. 283/2000.

<sup>5</sup> Other ILO Conventions ratified by Ethiopia are; No.181 (The Private Employment Agencies Convention), No.105 (The Abolition of Forced Labour Convention), and No.111 (Discrimination in Employment and Occupation).

<sup>6</sup> National Plan of Action on Children (2003-2010), the National Action Plan on Sexual Abuse and Exploitation of Children (2006-2010), and the National Plane of Action on Gender Equality (2005-2010).

<sup>7</sup> Coordination and monitoring structures have also been provided for in the NPA on Sexual Abuse and Exploitation of Children, and the (draft) NPA on Child Labour. Specialized coordination structures such as the National Committee on Trafficking in Women and Children have been established to address specific concerns pertinent to child rights.

Proclamation 210/2000 was enacted to provide for the establishment of the Ethiopian Human Rights Commission. The EHRC had a specialised Women and Children's Affairs Department accountable to the Women and Children's Affairs Commissioner until the end of 2010.<sup>8</sup>

In line with this provision of the Constitution, the House of Peoples' Representatives enacted Proclamation 211/2000 that established the Ethiopian Institution of the Ombudsman (EIO). One Ombudsperson is charged with heading Children's and Women's Affairs.<sup>9</sup>

### 3. DEFINITION OF THE CHILD

The Civil Code of 1960 defines the word child as a "minor" of either sex who has not attained the full age of 18 years. Although the age of attaining majority is 18 years, for specific purposes, a child may be emancipated at an earlier age either by marriage or upon authorisation of the family council. Under the provisions of the Revised Family Code (2000), a child or minor is defined as "a person of either sex who has not attained the full age of eighteen years".<sup>10</sup> The Criminal Code (2005) classifies children into three age groups using ages 9 and 15 as thresholds for criminal responsibility<sup>11</sup> while 13 appears to be an important landmark in the classification of victims.

The Labour Proclamation (Proclamation No. 377/2003) uses age 14 as a point of reference. The Proclamation forbids the employment of children under 14 and categorizes children between 14 and 18 as young workers.

The Revised Family Code considers all persons below the age of 18 as minors and provides that the minimum marriage of age is 18. The Ethiopian Criminal Code has set the minimum age of sexual consent at age of majority, eighteen. The Criminal Code sets the age of criminal responsibility at 9 years implying that contraventions of the Code by 'children' below this age will not be considered as a crime.<sup>12</sup> Children between the ages of 9 and 15, named 'young persons' in the Criminal Code, benefit from protections as child offenders. Children above the age of 15 are generally to be treated as adults if they are accused of violating the Code.

Since primary education is not compulsory, there is no statutory minimum age set for the compulsory completion of primary education. The education policy documents follow a system parallel to school age for pre-school (ages 3-6), primary (ages 7-14), and secondary (ages 15-18) grades.

<sup>8</sup> The Women and Children Affairs Department of the EHRC has been removed from the organizational structure of the Commission after completion of the BPR process.

<sup>9</sup> Art 8 (2) (c) Ombudsman Proclamation 211/ 2000.

<sup>10</sup> Proclamation No 213/2000, The Revised Family Code of the Federal Democratic Republic of Ethiopia, 2000, Article 215.

<sup>11</sup> Age nine is the minimum age of criminal responsibility, i.e. children younger than nine are considered 'infants' whose actions cannot constitute an offence/crime. Children aged nine to fifteen, on the other hand, are designated 'young persons' and benefit from special protections within the juvenile justice system. Finally, children above fifteen years of age are for the most part treated as adults though some of the protections available to 'young persons' may be extended to them by law or judicial discretion.

<sup>12</sup> Article 52 of the Criminal Code (In such cases, appropriate measures may be taken by the family, school or guardian).

**Table showing the definition of a child in Ethiopia**

Category	Age
Definition of a child	-
Age of majority	18
Minimum age of employment	14
Minimum age of sexual consent	18
Minimum age of marriage	18
Minimum age of criminal responsibility	9
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** Article 36(2) of the FDRE Constitution provides that the best interests of the child shall be the primary consideration in all actions concerning children by public institutions, courts of law, administrative authorities or legislative bodies. The Revised Family Code has explicitly incorporated the principle of the best interests of the child. Moreover, the Revised Family Code states that decisions by competent authorities shall be “appropriate to the proper care and well being of children” (Article 2/8) and provides for consultation of a minor in all important matters concerning him / her unless the latter is below

14 years of age (Article 291/1).

Under Article 249/2 of the Revised Family Code, the Court may, before reaching a decision on the appointment or removal of a person as guardian or tutor of a minor, hear the opinion of the minor to establish best interest. The same is true in decisions relating to adoption (Article 194/3/a). Similarly, the Court may decide a case of disputed child custody between divorced couples after hearing the opinion of the concerned child where such child is aged ten or above (Article 191/3). Article 113 of the Code directs the court to take into account the age and interests of the children in determining the custody and maintenance of children upon the dissolution of marriage.

**Non-Discrimination:** The FDRE Constitution recognises, under Article 25, the principles of non-discrimination and equality before the law as one of the fundamental rights and freedoms. Moreover, Article 36(4) of the Constitution also provides that children born out of wedlock have the same status with those born in wedlock. The Family Code contains similar provisions. Similarly, the Labour Proclamation prohibits the employer from discriminating among workers, including young workers aged 14 and above.

**The right to life, survival and development:** The child’s right to survival and development is enshrined in the Constitution in terms of access to food, health care, education and leisure. The Constitution also stipulates that the child must be protected from harm, abuse and exploitation. In addition, Articles 219 and 220 of the revised Family Code provide that both parents have the responsibility for the proper upbringing of their children. The provisions of the Criminal Code enforcing these family code provisions are also relevant.<sup>13</sup>

<sup>13</sup> Article 659, Criminal Code

**Respect for the views of the child:** Article 29 of the FDRE Constitution enshrines the right of every citizen to freedom of expression and access to information. The Revised Family Code has recognised the principle of child participation in relation to some key issues and processes. The provisions of the Code on the issue of adoption direct the Court to consult the child and seriously consider the child's opinions Article 194(3,a).

A slightly different approach is reflected in Article 294(2) which gives the Court discretionary power to consult the child before deciding on the appointment and removal of guardians and tutors of the child. The tutor is also directed to consult the child in relation to serious matters affecting the child's property if the child is at least 15 years of age.<sup>14</sup> Article 191(3) of the Revised Family Code provides that the court would decide on disputes between spouses on the matter of child custody after hearing the opinion of the child.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Civil Code (1960) contains detailed provisions for the establishment, mandates and operation of an office of civil status to keep records pertaining to civil status including the birth of a child. However, the coming into effect of this part of the Code was contingent upon the promulgation of antecedent legislation that never materialised. Thus, birth registration as understood within the international child rights framework, i.e. an official and permanent record of a child's existence established at the time of birth, did not exist in Ethiopia. Instead, various modalities of formal and informal record and registration systems existed to fill the legislative and administrative lacuna.

The Revised Family Code incorporated provisions recognising "certificates of birth, marriage, and other relevant certificates issued or to be issued by an appropriate authority" in lieu of a record of civil status pending the establishment of a comprehensive system of Office of Civil Status (Article 32(2)). Despite the provisions of the Revised Family Code, the absence of a comprehensive and effective birth registration system is among the most critical gaps in the child rights legislative framework. The Revised Family Code also suffers from challenges related to the jurisdiction of the Federal Government in matters of personal relations, including family law. That is, the FDRE Constitution grants the legislative mandate over personal matters to the Regional States. As such, the Revised Family Code is applicable only in the two federal city administrations, i.e. Addis Ababa and Dire Dawa. Even within the limited jurisdiction, the enforcement of the birth registration provisions of the Revised Family Code lacks the necessary legislative and institutional framework.

Although the Criminal Code (2005) makes it mandatory for parents and guardians to have the birth of a child registered, the provision cannot be applied due to the absence of a record of civil status or an officer responsible for keeping such a record.

The only meaningful legal regime for birth registration is the practice of issuing birth certificates by municipalities which has been given recognition by Article 321(2) of the Revised Family Code as a transitory measure until the government establishes institutional arrangements for civil registration.<sup>15</sup>

<sup>14</sup> Article 291 of the Revised Family Code sets forth the age limit of fourteen so that a minor may be consulted in relation to important matters concerning him or her.

<sup>15</sup> Article 321/1/ of the Revised Family Code issued in July 2000 directs the Federal Government to issue a law and to establish institutional arrangements for civil registration within six months. In the event that the government fails to do so, Article 321 (2) of the Code considers certificates of civil status, i.e., birth, marriage, death and the like, given by appropriate bodies as if they were given by an officer of civil status until such time that the office of civil status is established.

The FDRE Constitution bestows Ethiopian nationality on anyone born of an Ethiopian parent, i.e. where both or one parent is an Ethiopian national.<sup>16</sup> The naturalisation of foreign nationals has also been anticipated by the Constitution, subject to the provisions of substantive laws to be promulgated as per its provisions.<sup>17</sup> The Ethiopian nationality law (Proclamation No. 378/2003) recognises the acquisition of nationality by descent, i.e. where one or both parents are Ethiopians, as inclusive of an infant abandoned in Ethiopia.<sup>18</sup> The law also provides for conditions under which a child adopted by an Ethiopian parent<sup>19</sup> or a child born to a naturalised citizen<sup>20</sup> could acquire Ethiopian nationality. Once nationality has been established, all Ethiopian nationals have equal rights and obligations of citizenship regardless of the manner in which nationality is obtained.<sup>21</sup> Nationals who acquired Ethiopian nationality by law are to be treated equally with Ethiopian nationals by birth. However, the overall approach does not address the situation of stateless for children born of parents of foreign nationality.

The FDRE Constitution provides for freedom of thought, conscience and religion.<sup>22</sup> There are, however, no subsidiary laws for the implementation of these constitutional provisions, including the rights and duties of parents in relation to the religious beliefs of their children.

The FDRE Constitution also provides for the right to freedom of association for any cause or purpose.<sup>23</sup> The constitutional provision proceeds to state that organisations formed, in violation of

laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited. The Constitution also recognizes the right to voluntary membership in “a political organization, labour union, trade organization, or employers’ or professional association” as well as “civic organizations which significantly affect the public interest” subject only to fulfilling the requirements stipulated by such organisation.<sup>24</sup> In addition, a ‘free and democratic’ electoral process is prescribed for the named organisations. Specific to workers, the Constitution recognises the rights of private and public sector employees to form associations.<sup>25</sup> This right, which is properly an element of labour rights, includes the right to form trade unions and other associations to bargain collectively with employers or other organisations that affect their interests.

Under the FDRE Constitution, everyone has the right to assembly, peaceful demonstration, and to petition.<sup>26</sup> The right to privacy is also enshrined in the FDRE Constitution.<sup>27</sup>

## 6. PARENTAL CARE/ RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Parents are jointly tasked with the responsibilities of tutors and guardians.<sup>28</sup> The Revised Family Code also provides for situations under which tutors and guardians may be removed from these responsibilities.<sup>29</sup>

<sup>16</sup> Article 6/1, FDRE Constitution.

<sup>17</sup> Articles 6/1 and 6/2, FDRE Constitution.

<sup>18</sup> Articles 3/1 and 3/2, Proclamation No. 378/2003.

<sup>19</sup> Article 7, Proclamation No. 378/2003.

<sup>20</sup> Article 9, Proclamation No. 378/2003.

<sup>21</sup> Article 18, Proclamation No. 378/2003.

<sup>22</sup> Article 27 of the FDRE Constitution; and, Article 18 of ICCPR.

<sup>23</sup> Article 31, FDRE Constitution.

<sup>24</sup> Articles 38/2, 38/3 and 38/4, FDRE Constitution.

<sup>25</sup> Article 42/1/a, FDRE Constitution.

<sup>26</sup> Article 30 of the FDRE Constitution.

<sup>27</sup> Article 26, FDRE Constitution.

<sup>28</sup> Articles 216 and 219, Revised Family Code.

<sup>29</sup> Articles 243-245, 247-249, Revised Family Code.

The Ministry of Women's Affairs (MoWA), now renamed Ministry of Women, and Children and Youth Affairs (MoWCYA), has developed and adopted a comprehensive set of guidelines<sup>30</sup> for alternative child care based on the principles and standards stipulated in the CRC, the ACRWC, the FDRE Constitution, and Ethiopian laws.<sup>31</sup>

The FDRE Constitution, under Article 36(5), directs the State to accord special protection to orphans and encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education. This constitutional provision has been given effect through the provisions of the Revised Family Code.<sup>32</sup>

The Standard Service Delivery Guidelines for Orphans and Vulnerable Children Care and Support Programs were developed by MoWA and the Federal HIV/AIDS Prevention and Control Office (FHAPCO/HAPCO) to address gaps in standardisation and uniformity in services offered to OVC by various actors.<sup>33</sup>

As for intercountry adoption, the figures show that there were 1415 cases of inter-country adoption with 701 male and 714 female children in 2003/04, and 1855 in total with 985 male and 870 female children, in 2004/05.<sup>34</sup> A MoWCYA's source indicates that a total of 2,900 Ethiopian children benefited from intercountry adoption in

2008.<sup>35</sup> Data for the last five years shows that the number of adoption cases has been consistently increasing to a total of 17,358 cases. Information acquired from the Federal First Instance Court in Addis Ababa indicates that the number of adoption cases decided by the Court stood at 1,607, 2,196, 2,727, 3,609 and 4,213 for the four years between July 2004-June 2009.<sup>36</sup>

The Revised Family Code provides for the process of adoption, legal basis and effects of adoption, domestic adoptions, adoption by a foreign citizen, and adoption through orphanages. The provisions of the Code on adoption in general direct the Court to consult the child and to seriously consider the child's opinions. Article 194(2) of the same Code provides that the court shall decisively verify the adoption as to the best interests of the child before an agreement of adoption.

The Directives for the Provision of Inter-country Adoption Services were issued by the then MoWA in 2008, replacing a similar document which had been operational since 2002. The directives were developed as per MoWA's mandate to follow up the implementation of the CRC and ACRWC as well as the provisions of the Revised Family Code (Preamble and Article 3) as well as in recognition of the need to ensure proper execution of adoption by putting in place a transparent, swift and accountable procedure.

<sup>30</sup> MoWA, Alternative Child Care Guidelines on Community Based Child Care, Reunification and Reintegration Program, Foster Care, Adoption and Institutional Child Care Service, Federal Democratic Republic of Ethiopia, Addis Ababa, June 2009.

<sup>31</sup> The Guidelines were originally developed by the Ministry of Labour and Social Affairs, which had the mandate on child rights issues until 2005. However, the document was not officially adopted or published until after the transfer of the mandate to the Ministry of Women's Affairs, renamed the Ministry of Women's, Youth and Children's Affairs in 2010 (Proclamation 691/2010).

<sup>32</sup> Articles 228, 229, 192, 193, 197 and 198, Revised Family Code.

<sup>33</sup> MoWA and HAPCO, Standard Service Delivery Guidelines for Orphans and Vulnerable Children Care and Support Programs, Addis Ababa, February 2010.

<sup>34</sup> Third Government report to CRC.

<sup>35</sup> Calculated from the monthly and quarterly internal periodic reports on the performance of MoWA.

<sup>36</sup> This information doesn't however make it clear that the numbers are all about inter-country adoptions and if all these cases have ended up with adoption of children. They represent number of cases entered into the data system of the court as adoption. They are included for lack of organised data.

## 7. HEALTH AND DISABILITY

The FDRE Constitution recognises “the right to equal access to publicly funded social services”, including health services for all Ethiopians<sup>37</sup> and directs the government to “allocate progressively increasing funds for the purposes of promoting the people’s access to health, education and other social services”.<sup>38</sup> More specific to children, the Constitution protects children from exploitation and work which is hazardous or harmful to their health or wellbeing.<sup>39</sup> The Revised Family Code makes the guardian responsible for the health of the minor (Article 257). On the basis of state obligation and policy directions set out in the Constitution, some Regional Governments and the Addis Ababa City Administration have issued legislations on health service delivery that provides for free access to health services for those who cannot afford it.<sup>40</sup>

## 8. EDUCATION

The FDRE Constitution (1995) extensively covers issues related to education within its provisions including the recognition of the right to education for everyone and the child’s right to be protected from practices prejudicial to his/her education.<sup>41</sup> The State also undertakes to: allocate ever increasing resources to the education sector;<sup>42</sup> and, develop and implement national standards and policy measures on education.<sup>43</sup> Corporal punishment and cruel and inhuman treatment in institutions responsible for the care of children is prohibited.<sup>44</sup>

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

The FDRE Constitution recognises the right of every person, including children, to protection against bodily harm and to protection against cruel, inhuman and degrading treatment and punishment (Articles 16 & 18). More specific to children, the Constitution recognises the rights of every child “to be free of corporal punishment or cruel and inhuman treatment in schools and other institutions responsible for the care of children.” The Criminal Code criminalises most forms of violence against children including sexual offences such as rape (Article 620-628), trafficking in children (Article 597 and 635), and prostitution of another for gain (Article 634). The criminalisation also extends to acts of HTPs in general with specific provisions on abduction (Article 587-590), female genital mutilation (Article 565 and 566), early marriage (Article 649), bigamy (Article 650) and endangering the lives of or causing bodily injury to children (Article 561-563). Article 576 of the Criminal Code also criminalises the ill treatment, neglect, over tasking and/or beating of minors by parents, legal guardians and other custodians.

Article 626(1) dealing with sexual outrage on minors defines it as performing sexual intercourse with a child of the opposite sex or causing a child of the opposite sex to perform sexual intercourse. In addition to sexual outrage, the Code, under Article 627, addresses ‘other indecent acts on minors of the opposite sex’.

<sup>37</sup> Article 41/3, FDRE Constitution.

<sup>38</sup> Article 41/4, FDRE Constitution.

<sup>39</sup> Article 36/1/d, FDRE Constitution.

<sup>40</sup> Articles 18 and 19, Proclamation No. 10/2003, A Proclamation to Provide for the Addis Ababa City Government Health Service Delivery, Administration and Management Proclamation; Arts 31 and 32, Proclamation No. 117/2005, The Amhara National Regional State Health Service; and, Articles 12. and 13, Proclamation No 84/2004, The Southern Nations, Nationalities and Peoples’ Regional State Health Service Delivery, Administration and Management Proclamation.

<sup>41</sup> Articles 90/1 and 36/1/d, FDRE Constitution.

<sup>42</sup> Article 41/4, FDRE Constitution.

<sup>43</sup> Article 51/3, FDRE Constitution.

<sup>44</sup> Article 36 /1//e/ of the FDRE Constitution.

**Homosexuality**, i.e. performing sexual intercourse with a person of the same sex “...an act corresponding to the sexual act...” under Article 629 of the code, and indecent acts performed on another person of the same sex are generally punishable under the same provision. The Criminal Code further punishes procuring children for prostitution for gain, keeping a brothel and leasing over a house for prostitution (Article 634). The Criminal Code also provides protection for children from public indecency, obscene and indecent publications and other materials, which may pervert or misdirect their sexual instincts. (Articles 639, 640, 644 and 645).

Slavery and slavery-like practices, as well as the worst forms of child labour are dealt with in the provisions of the Criminal Code (2005). Offences that fall under the category of ‘slavery and slave-like practices’ include illegal restraint (Article 585), abduction of a minor (Articles 589, 590 and 594),<sup>45</sup> enslavement (Article 596), trafficking in children and child labour (Articles 596, 597 and 635). As appropriate, the provisions of the Code dealing with maltreatment, neglect and negligent treatment (Articles 576, 658 – 659), and exposure to imminent danger or abandonment of a child (Article 574) could also be used to prosecute offenders.

The Criminal Code has opted to define ‘trafficking’ in terms of its purposes, which in this case is compulsory or forced labour (trafficking for purposes of sexual exploitation is covered by other provisions). By doing so, the Code has made the end purpose an element of the crime that would need to be proved during prosecution. The Criminal Code (2005) includes provisions criminalising the use of children in child prostitution, which is punishable under the provisions of the Code dealing with trafficking in minors for prostitution (Articles 635 and 636).

Furthermore, the Criminal Code, under its Article 636, also expressly prohibits trafficking in children.

Thus, it can safely be said that the word ‘traffic’ in Article 636 includes the use of violence, threat, deceit, kidnapping and giving of advantages to persons that have control over the child; and includes all persons who are involved from the recruitment to the final point of exploitation of the victim. Moreover, Article 636 provides that the consent of the victim cannot be raised as a defence.

The Criminal Code also provides for ‘a catch all provision’ under Article 637 stating:

Whoever makes arrangements or provisions of any kind for the procurement of or traffic in women or minors...with simple imprisonment, or according to the circumstances of the case, especially where a professional procurer is involved or where the arrangements are fully made and intended to apply to many victims, shall be subject to a rigorous imprisonment not exceeding three years, and a fine which shall be for not less than five hundred Birr in grave cases.

This Article is applicable to all persons involved in trafficking children not covered by Article 636.

Provisions on aggravation of the offence of abduction under Article 590(1) of the Code reinforce these provisions. When read in conjunction with Article 590 dealing generally with the abduction of minors and Article 590(2,e), Article 590(1).

Proclamation number 377/2003, i.e. the Labour Code applicable to employment relationships within the private sector, explicitly prohibits the employment of children below the age of 14 years Article 89(2). It also provides special protections for child workers between the ages of 14 and 18 including prohibition of employment to perform work whose nature or the circumstances under which it is to be carried out is harmful to the life

<sup>45</sup> The crime established under Article 589 is aggravated under the next Article where the purpose of the abduction is exploitation or the treatment of the child is considered cruel and inhuman. The crime may also be aggravated under Article 594 where the intent is permanent removal of the child.

or health of the young worker Article 89(3). The Code sets the maximum working hours for young workers at 7 hours a day (Article 90 and precludes the employment of young workers for night work, overtime work, and work on weekly rest days and on public holidays (Article 91). The Labour Proclamation provides a general definition of 'hazardous work' that is a verbatim copy of the applicable international standard<sup>46</sup>

In line with the provisions of the ILO Conventions Nos. 138 and 182, the Proclamation prohibits the employment of young workers for 'hazardous work'. The labour law mandates the Ministry of Labour and Social Affairs to prescribe the schedules of dangerous operations that are not to be performed by persons below the age of 18 (Article 89(4)).

Corporal punishment and cruel and inhuman treatment in institutions responsible for the care of children is prohibited.<sup>47</sup>

The minimum age of military service in the Ethiopian Defence Forces, which is a volunteer army, is 18.<sup>48</sup> However, the recruitment of children for armed conflict by non-state actors is not explicitly defined, criminalised and penalised. International good practice shows that such an approach makes the practice a separate and severely punishable offence which is likely to be effective as a preventive measure.

The FDRE Constitution provides that the treatment of children deprived of their liberty, the provision directs corrective or rehabilitative institutions to keep children in conflict with the law separate from adults.<sup>49</sup> Corporal punishment and cruel and

inhuman treatment in institutions responsible for the care of children is also prohibited.<sup>50</sup> The provisions of the FDRE Constitution on the rights of arrested and accused persons as well as the rights of persons held in custody and convicted prisoners are also applicable to children deprived of their liberty.<sup>51</sup> The rights of arrested persons include speedy trial, *habeas corpus*, the right to bail and protection from self-incrimination.<sup>52</sup> Rights recognized for persons held in custody and convicted prisoners include right to public trial, presumption of innocence, right to be represented by legal counsel including representation at state expense, right to treatments respecting their human dignity, and rights relating to communication.<sup>53</sup>

The substantive law provisions pertaining to the rights of children coming in contact with the criminal justice system are to be found in the revised Criminal Code and the Criminal Procedure Code. The Criminal Code categorizes children into three groups: children under 9; children between 9 and 15 or young offenders; and, children between 15 and 18. The protections within the Code are typically available to 'young offenders' although those above 15 years of age also benefit from protection measures (usually at the discretion of the court). Under normal circumstances, the 'young person' is to be released for the duration of the investigation to the custody of the parents, guardian or relatives or to a person who will be responsible for the appearance of the 'young person' in court.<sup>54</sup> If the person responsible for the child is not present, he/she will be summoned by the court immediately.<sup>55</sup> Failing this, the Court will appoint legal counsel and release the 'young person' to the custody of 'a reliable person'.<sup>56</sup>

<sup>46</sup> Labour Proclamation number 377/2003, Article 89/.3

<sup>47</sup> Article 36 /1//e/ of the FDRE Constitution.

<sup>48</sup> Defence Forces Proclamation, Proclamation No. 27/1996.

<sup>49</sup> Article 36/3/ of the FDRE Constitution.

<sup>50</sup> Article 36 /1//e/ of the FDRE Constitution.

<sup>51</sup> Articles 19 – 21 of the FDRE Constitution.

<sup>52</sup> Article 19 of the FDRE Constitution.

<sup>53</sup> Articles 20 & 21 of the FDRE Constitution.

<sup>54</sup> Article 172/4/ of the Criminal Procedure Code.

<sup>55</sup> Article 173 of the Criminal Procedure Code.

<sup>56</sup> Articles 174 & 172/4/of the Criminal Procedure Code.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 02/10/2002
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003	Signature, 01/06/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 14/05/1991
Optional Protocol on the involvement of the Child in Armed Conflict (OPAC), 2000	Signature, 28/09/2010
Optional Protocol on Child Sale, Prostitution & Pornography (OPCS), 2000	-
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
ILO Convention 138 on Minimum Age of Employment 1973	Ratification, 27/05/1999
ILO Convention 169 on Indigenous and Tribal Peoples 1989	-
ILO Convention 182 on Worst forms of Child Labour 1999	Ratification, 02/09/2003
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 07/07/2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006	-
Hague Convention on International Child Abduction 1980	-
Hague Convention on Intercountry Adoption 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

## 2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

Committee	Initial Report	Second	Third	Fourth and fifth
ACERWC	-	-	-	-
UN Committee	19 Mar 1998	17 Jul 2008	-	-

## 3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Ethiopia

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Child Helpline International	May 2006	None
Global Initiative to End Corporal Punishment	May/June 2006	
The Lutheran World Federation on Behalf of Oromo Human Rights and Relief Association	September 2006	
NGO Group for the Convention on the Rights of the Child	March 1996	

## 4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC		UN Committee
Name	Term of service	
Dr. Assefa Bequele	2003- 2008	-
Dr. Benyam Dawit Mezmur (Second vice chair)	2010 -2015	-

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clar/vol2](http://www.africanchildinfo.net/clar/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN KENYA

## COUNTRY BRIEF

### ABSTRACT

The Children's Act of 2001 remains the primary law in Kenya which sets forth legal obligations of all duty bearers - the government, parents, and civil society- to respect, protect and fulfill the rights of children. The Act provides for a kind of "Bill of Children's Rights" with a catalogue of rights for children. A recent significant development has been the passage of a new Constitution (2010) that includes a progressive children's rights clause and offers a transformative legal framework within which to address Kenya's poor health, education and other social welfare indicators that hinder the rights of children.

### 1. INTRODUCTION

Over half of Kenya's near 40-million people are children – persons under the age of 18 years. More than half of Kenyans live below the poverty line.<sup>1</sup>

The Kenyan Government has ratified both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The enactment of The Children's Act of 2001 was widely seen as a new beginning for the development and effective protection of Kenya's children. The Children's Act codified and replaced three statutes: The Children's and Young Person's Act (Cap 141), The

Adoption Act (Cap 143), and The Guardianship of Infants' Act (Cap 144).

A new Constitution adopted in 2010 has elevated the rights of children at the constitutional level. While there continue to be a number of challenges that children in Kenya face, the enhanced constitutional protection of children's rights is expected to help in the advancement of children's rights in Kenya.

### 2. GENERAL MEASURES OF IMPLEMENTATION

**Constitutionalisation of children's rights:** Kenya's new Constitution, in legal force since 27 August 2010, introduces a progressive Bill of Rights (Chapter 4) that is by and large guided by international human rights standards. It guarantees economic, social and cultural rights – including the rights to food, housing, sanitation, water, health (including reproductive health care), education, social security as enforceable rights, alongside civil and political rights – including rights to life, liberty and security of the person, privacy, freedom of conscience, religion, belief and opinion, freedom of expression and freedom of association. In addition the Bill of Rights provides for other rights including equality and freedom from discrimination. It includes specific provisions on the rights of minorities, persons with disabilities, older members of society, youth and children.

Article 53 of the Constitution provides every child with the right to a name and nationality from birth;

<sup>1</sup> Kenya Second Periodic Report (2005), p66, stated that at the time up to 56% of Kenyans live below the poverty line.

to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and be separated from adults and in conditions that take account of the child's sex and age. Article 53(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".

In addition to the children's rights clause in Article 53 of the Constitution children are entitled to the full gamut of rights under the Bill of Rights – including socio-economic rights under Article 43.

The Constitution also recognises the right of every one, children included, to pursue action in the courts in the event of denial of any of the guaranteed rights – whether civil, political or economic, social and cultural. The Constitution also provides for access to other institutions such as the independent human rights institution—where Article 59 entrenches the Kenya National Human Rights and Equality Commission.

The Kenyan Children's Act (2001) is Kenya's the key legislation that seeks to domesticate the provisions of the CRC and the ACRWC. However, since 2007 there have been government-led efforts to review the Children's Act with a view to strengthening its provisions for children in alternative care, adoption and diversion for children in conflict with the law.<sup>2</sup> A draft Children's

(Amendment) Bill, 2008 sought, amongst others, to introduce improved provisions relating to the protection of children from abuse while in alternative custodial care, the creation of child protection units, the establishment of places of safety and provisions to underpin diversion of children accused or alleged to have committed crimes from the formal justice system. The need for a dedicated legislation to underpin the importance of a child-specific justice system for children in conflict with the law, has led to the proposal for a specific legislation on child justice in the form of the Child Justice Bill, 2010. The Child Justice Bill proposes raising the minimum age of criminal responsibility from the current low age of 8 to a new age of 12.

**Implementation of the Children's Act** – particularly the development of official policy is principally led by the Ministry of Gender, Children's Services and Social Development which has led the process of developing proposed amendments to the Act. The Children's Act establishes the National Council on Children Services the membership of which is drawn from government departments and non-government representatives. The Council is charged with the duty of exercising general supervision and control over the planning, financing and co-ordination of children's rights and welfare Activities and advise the government in this regard.<sup>3</sup> On the flipside however, the Council's potential in policy formulation and ensuring a coordination role is yet to be fully fulfilled.

**Civil society organisations**, mainly child rights NGOs, continue to play a vital monitoring role as regards the monitoring of the implementation of child rights. NGOs have had particular high visibility in advocating for the enactment of laws guaranteeing child rights.

<sup>2</sup> Hussein, A, keynote address at the First African conference on child sexual abuse, hosted by ANPPCAN, Kenya, 24-26th September 2007 (on file with author).

<sup>3</sup> The Children's Act, section 30(1) and 32(2).

### 3. DEFINITION OF THE CHILD

Article 260 of the **Constitution** of Kenya (2010), expressly defines a child as a person who has not yet attained the age of 18. Similarly, section 2 of the **Children's Act** provides that a "child" is any person under the age of 18 years. In practice, it is clear that varied widespread cultural definitions of a child remain prevalent much to the detriment of children's rights. In addition inconsistencies remain between the legal reference of 18 as the age below which persons are considered children and the applicable and often discriminatory different low legal minimum ages. One key area relates to the age of marriage. There are current legislative proposals for **harmonisation of the different marriage law regimes** (African, Christian, Muslim and Hindu marriage regimes) with reference to one coordinated marriage statute – the Marriage Bill, 2007. Part of the proposed changes includes the legal provision for the age of 18 as the minimum age of marriage.

The **Employment Act of 2007** defines a child (in Section 2) as a person "who has not attained the age of 18 years". It provides for a minimum legal age of 13 as the age below which a child cannot be engaged in labour or employment (Section 56(1)). It provides that between the age of 13 and 16 a child can be employed to "perform light work" which must not be 'harmful to the child's health and development' and "not prejudice the child's attendance to school or vocational programme" (Section 56(2)).

The **Sexual Offences Act** of 2006 (Section 2) adopts the same definition of a child as a person under the age of 18 years for both girls and boys.

Table showing the definition of a child in Kenya

Category	Age
Definition of a child	18
Age of majority	18
Minimum age of employment	13
Minimum age of sexual consent	16
Minimum age of marriage	18
Minimum age of criminal responsibility	8
Minimum age of recruitment into the army	18

### 4. THE FOUR GENERAL PRINCIPLES

The children's rights clause of the Constitution (Article 53) when read together with the other provisions of the Bill of Rights, provides for the domestic incorporation, in Kenya's supreme law, of the four general principles which underlie the child rights framework.

Part II of the Children's Act (Section 3-22) which deals with the "rights and welfare of the child", is said to be the most significant part of the Act, providing for the core principles of the CRC and the ACRWC.

The principle of the best interests of the child is provided for in Section 4(2) of the Children's Act. Secondly, the Act guarantees the child's right to life, survival and development (Section 4(1)). Thirdly, the Act provides for the right to non-discrimination on any grounds (Section 5). Lastly, the Act also provides for the rights of the child to participation and to be accorded the opportunity to express his/her opinion taking into account the child's age and degree of maturity (Section 4(4)).

**The best interests of the child:** Although the principle of the 'best interests of the child' has hitherto been part of Kenyan family law as relates to guardianship and custody issues, the Children's Act revolutionises the importance of this principle by extending its application to the entire panoply of matters affecting children; whether private (involving parents and families) or public (by government, public authorities and courts etc). The Act provides that: "the best interests of the child shall be a primary consideration in all Actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies".<sup>4</sup>

**Non-discrimination:** The overarching right of the child to non-discrimination is a key provision under the Children's Act and the Constitution. Further, recently passed legislation including the Sexual Offences Act and the law against female genital mutilation seek to ensure equal treatment of children under the law. The discrimination, of children born to foreign fathers, under the Births and Deaths Registration Act is set to be reversed in the new Kenya Citizenship and Immigration Act, 2011.

**Right to life, survival and development:** The Children's Act (Section 4(1)) explicitly provides for

this right. The inclusion of a child rights clause which contains children's socio-economic rights (Article 53) and a general clause providing for enforceable socio-economic rights (Article 43) in the Constitution also ensures that this right is now part of Kenya's Constitution.

**Respect for the views of the child:** The Children's Act (section 4(4)) expressly provides for the right of children to have their views taken into account in matters affecting them. It is significant that the Act further specifies that this right is to be taken into account in light of the degree of the child's maturity a consideration that corresponds to the concept of the evolving capacities of children. Although not expressly provided for under the child rights clause in the Constitution (Article 53) it is clear, based on the provision in Article 52(2) that the provisions of the children's clause are to be read 'not as qualifying or limiting' the rights enumerated, that this right is implied as part of the constitutionally guaranteed rights of children. In practice there are examples of official initiatives to encourage greater children's participation.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The new Constitution of Kenya (2010) recognises the right of every one, children included, to pursue action in the courts in the event of denial of any of any of the guaranteed rights – whether civil, political or economic, social and cultural. The Constitution also places an obligation on the state to "observe, respect, promote and fulfil" the rights and freedoms in the Bill of Rights and to enact and implement legislation to fulfil its international obligations in respect of human rights and freedoms.<sup>5</sup>

<sup>4</sup> The UN Committee has called on the Kenyan government to "ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children, and especially aiming at addressing vulnerable and disadvantaged children, inter alia by sensitizing and training all involved officials and other professionals". Concluding Observations on Kenya's Second Periodic Report, 19 June 2007, CRC/C/KEN/CO/2, para 27.

<sup>5</sup> Article 21.

Article 53(1) of the Constitution provides that “[e]very child has the right – to a name and nationality from birth”. The child’s right to a name and nationality is also provided for in Section 11 of the Children’s Act. In practice, discrimination remains regarding registration of certain categories of children who have no access to registration including children born of foreign fathers and children from certain minority communities such as the Nubian and Somali communities. In 2010, the African Committee of Experts on the Rights and Welfare of the Child issued its first adjudicative decision finding a violation of children’s right to a nationality by the Kenyan government in relation to the Nubian community, a minority group in Kenya.<sup>6</sup> The discrimination of children born to foreign fathers, under the Births and Deaths Registration Act is set to be reversed in the new/proposed Citizenship and Immigration Bill (August 2011) that is expected to be passed by the Kenyan Parliament.

Kenya’s new Constitution introduces a progressive Bill of Rights (Chapter 4) which has a number of civil and political rights that are guaranteed to everyone and are also relevant to children’s civil and political rights. These include the right to privacy (Article 31), the right to freedom of conscience, religion, belief, and opinion (Article 32), the right to freedom of expression (Article 33), the freedom of the media (Article 34), the right to access to information (Article 35), the right to freedom of association (Article 36), and the right to assembly, demonstration, picketing and petition (Article 37).

These rights are further elaborated in the Children’s Act. There are a number of provisions

that are aimed at protecting children’s privacy in the Children’s Act. For instance, Section 76(5) of the Children’s Act states that in any proceedings concerning a child, whether instituted under this Act or under any written law, the child’s name, identity, home or last place of residence or school, shall not, nor shall the particulars of the child’s parents or relatives, any photograph, or depiction or caricature of the child be published or revealed, whether in any publication or report including any law report or otherwise. According to Section 74 of the Children’s Act, a Children’s Court shall sit in a different building or room or at different times from those in which sittings of courts other than Children Courts are held and no person shall be present at any sitting of a Children’s Court, except for those listed in the section.<sup>7</sup> The child’s rights to leisure and privacy are also the subject of Section 18 of the Act.

## 6. PARENTAL CARE/ RESPONSIBILITIES, FAMILY ENVIRONMENT, AND ALTERNATIVE CARE

The provisions of the Children’s Act in Part III – sections 23-28 – provide for the concept of ‘parental responsibility’ in a way that affirms the primary duty of parents and guardians to ensure children’s rights – including provision of basic needs of children.

The new Constitution provides for the right of children to parental care in Article 54 (1) (e) which provides for the child’s right to parental care and protection, “which includes equal responsibility of

<sup>6</sup> In the case, Communication No. 002/009 *Nubian Children in Kenya v Kenya* the Committee issued a preliminary (interim) decision in March 2011 finding Kenya in violation of its obligations under the Charter for not granting Nubian children nationality at birth. The case was brought on behalf of Nubian children by an NGO, the Institute for Human Rights and Development in Africa (IHRDA) in conjunction with the Open Society Justice Initiative (OSJI).

<sup>7</sup> These are:- (a) members and officers of the court; (b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case; (c) parents or guardians of any child brought before the court; (d) *bona fide* registered representatives of newspapers or news agencies; (e) such other persons as the court may specially authorise to be present’.

the mother and father to provide for the child, whether they are married to each other or not". In contrast the Children's Act in particular Sections 24 and 25 places a particular emphasis on the marital status of parents, providing, for children born outside marriage, for the mother's parental responsibility in the 'first instance,'<sup>8</sup> and for a process by which the father applies to a court to 'acquire' parental responsibility under Section 25 (1).<sup>9</sup>

In cases regarding children born within a marriage or cohabitation where the father is presumed to have accepted *de-facto* parental responsibility as envisaged by Section 25(2) of the Children's Act<sup>10</sup> courts have, in contrast, consistently upheld children's right to parental care taking into account the child's best interests.

On a different note, the Children's Act makes 3 sets of provision for children without parental care. The first and second sets of provisions relates to provisions regarding foster care and adoption. Part XI (Sections 147-153) of the Act provides for conditions upon which children can be placed into the custody and care of foster parents or institutions.

Part XII (Sections 154-183) of the Act deals with provisions regarding the adoption of children.

Section 158 contains detailed provisions regarding the conditions to be fulfilled in regard to both national and inter-country adoptions. It includes a provision granting the court power to make an adoption order where such an order would not be in the "best interests of welfare of the child".

The third set of provisions relating to alternative care concerns the provisions of section 119 of the Act in relation to children defined as being "in need of care and protection" a category which includes orphaned and vulnerable children and child victims of crime including trafficking and negative cultural practices such as FGM.

It is argued that the absence of a state-funded, adequate, and state-wide child support programme in Kenya means that the children's rights guaranteed under the Children's Act and the new Constitution "remain paper rights and pipe dreams for the hundreds of thousands of doomed poor children in Kenya who are decimated daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country".<sup>11</sup> As of 2009, up to 12% of Kenya's children some 1.8 million were orphans.<sup>12</sup>

<sup>8</sup> Section 24(3) (a), Children's Act

<sup>9</sup> The Children's Act provides in section 25(1) thus: "Where a child's father and mother were not married at the time of his birth, the court may, on application of the father, order that he shall have parental responsibility for the child; or the father and mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility for the child.

<sup>10</sup> Section 25 (2) provides: "Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child".

<sup>11</sup> Wabwire, M.N, 'Rights Brought Home?: Human Rights in Kenya's Children Act 2001', in Bainhaim, A and Rwezaura, B (eds) (2005) *The International Survey of Family Law 2005 Edition* Bristol: Jordan Publishing p. 413. As cited in note 13

<sup>12</sup> Bryant, J.H, "Kenya's cash transfer program: Protecting the health and human rights of orphans and vulnerable children", (2009) *Health and Human Rights – an International Journal* Vol 11, No. 2, available at <<http://www.hhrjournal.org/index.php/hhr/Article/viewArticle/174/259>> (last accessed 15 August 2011), as cited on note 13

At the end of the year 2004 the government, with the assistance of donor and international agencies,<sup>13</sup> introduced an experimental social security programme aimed partly at addressing the vulnerability of families and children from poverty. This involves the granting of limited forms social cash transfers to targeted households.

Between 2006 and 2010 each beneficiary households within selected districts across the country received a flat rate amount of Kshs. 1500 (US \$ 18) per month.

One policy document related to the plight of OVC is the *National Policy on Orphans and Vulnerable Children (2007-2010)* which sought to provide for, in further detail (in addition to existing legislation<sup>14</sup>), measures for the protection of orphans and vulnerable children from abuse, exploitation and discrimination.

The Act's catalogue of 'duties and responsibilities of the child' in Section 21 has been considered as a first amongst the new children's legislation that have been enacted in different African countries since 1990. The influence of the ACRWC (Article 31) on the provisions of the Kenyan Children's Act is evident in the inclusion of these 'duties and responsibilities'. By providing for the responsibilities of the child, the Act takes on board the opinion that children's rights cannot be viewed in isolation and that emphasis should not be placed solely on children's rights to the exclusion of the rights of their parents and the community at large.<sup>15</sup>

## 7. HEALTH AND DISABILITY

The right to "the highest attainable standard of health which includes the right to health care services" under Section 43 of the new Constitution and the right to health under Section 9 of the Children's Act are provided for. Section 12 of the Children's Act provides for the right of 'the disabled child' to have access to education, special care and be treated with appropriate treatment. A proposed amendment to the Act – part of the Children's (Amendment) Act, 2008 proposes the substitution of the use of 'disabled child' with 'children with disabilities'. Children with disabilities are further entitled to legal protection under the Persons with Disabilities Act, 2003 which provides for the rights, rehabilitation and equal opportunities for persons with disabilities.

Despite these and other related provisions, access to health in Kenya is said to be marked by poor indicators in general. The factors affecting households' health status in Kenya include low income per capita, low literacy levels, poor government spending in the health sector resulting in restricted immunisation coverage and inadequate household access to doctors by households and the high HIV/AIDS prevalence rates. Government spending and complementary private sector support to the health sector are crucial for the improvement of the poor health indicators and children's adequate access to health care. The government is also advised to expand the household/child-support programme in addition to examining how the user-fees in the public health sector inhibit access to health care especially for the majority poor family households.<sup>16</sup>

<sup>13</sup> These are mainly the World Bank, UNICEF, the Swedish International Development Cooperation Agency (SIDA) and the UK Department for International Development (DFID).

<sup>14</sup> The existing Kenyan law in relation to children living with/affected by HIV/AIDS and who may be without parental care is section 119 of the Children's Act which stipulates categories of children in 'in need of care and protection' and in respect of whom courts or government officers can intervene. The options open to a court or an officer who encounters such children is limited perhaps to a referral to private charitable institutions. This provision is further discussed in a subsequent section of this report below.

<sup>15</sup> Godfrey Odongo, *Caught between Progress, Stagnation and a Reversal of some Gains - Reflections on Kenya's Record in Implementing Children's Rights Norms*, but cautioning however that the concept of children's duties is amenable to abuse.

<sup>16</sup> Kenya is yet to abolish the imposition of user fees in the public health institutions. The applicable government policy still requires the standard payment of Ksh 10 (US \$ 0.08) to access the lowest health unit (dispensary) and Ksh 20 (US \$ 0.16) for access to health centres. For many low income families these standard payments are beyond their reach and often entail a balancing of expenditure between health care and other basic needs such as food.

## 8. EDUCATION

Under Article 53 of the Constitution and Section 7 of the Children's Act, the right to primary/basic education is clearly stated to be "free and compulsory". Section 7 of the Children's Act specifically states that basic education shall be compulsory "in accordance with Article 28 of the CRC". The realisation of this right is currently being done under the auspices of the government's free primary education programme.

According to statistics from the Ministry of Education the government's Economic Survey of 2011 reports that as of the year 2009 there were 8.83 million children enrolled in primary schools and 9.38 million by the end of 2010.<sup>17</sup>

The impressive increase in enrolment rates has not been matched by a concomitant increase in the quality of education in Kenya's public primary schools where the FPE policy is being implemented. A comprehensive and effective pre-school programme is vital for the success of primary schooling. It is observed that the lack of a comprehensive programme endures to date despite several pronouncements regarding the formulation of a policy on early childhood education.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Section 13 provides for the child's right to protection from physical and psychological abuse, neglect and exploitation. Section 14 (which is now repealed by the enactment of a specific law – the Prohibition of Female Genital Mutilation Act,

2011) guarantees the right of the child to be protected from female circumcision, early marriage or other cultural rites customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. In addition Sections 15, 16 and 17 provide for the right of the child to be protected from sexual exploitation, drugs, torture, and deprivation of liberty, capital punishment and life imprisonment.

The Children's Act explicitly prohibits the imposition of corporal punishment on child offenders.<sup>18</sup> A subsequent 2003 legal amendment to Kenya's Penal Code abolished the use of corporal punishment in the criminal justice system whether for children or adults.<sup>19</sup> A legal instrument (legal notice) promulgated by the Education Minister in 2001 specifically provides that corporal punishment should not be used as a form of school discipline.<sup>20</sup> Kenya's new Constitution, under Article 29, now provides for an absolute legal protection of children from all forms of corporal punishment in all settings – including in homes and schools. Article 53 (1) (d) further makes provision for every child's right "to be protected from all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour".

The Sexual Offences Act (2006) which provides a legal framework for the criminalisation of sexual offences in Kenya was passed by Parliament on 31 May 2006. The law is general in scope covering the issue of sexual offences against adults and children. It consolidates previous laws on sexual offences in Kenya. It makes provisions for new forms of sexual violence, including sexual violence against men and boys.<sup>21</sup> There are offences under

<sup>17</sup> Government of Kenya (2011) *Kenya Economic Survey* (n 29 above), p 38.

<sup>18</sup> Section 191(2). Section 18(1) of the Children's Act on the prohibition of torture, cruel and inhuman treatment is also relevant for the prohibition of corporal punishment.

<sup>19</sup> Criminal Law (Amendment) Act No. 5 of 2003.

<sup>20</sup> Legal Notice No. 56 of 2001 – The Education (School Discipline) Regulations 2001.

<sup>21</sup> Federation of Women Lawyers in Kenya (FIDA-K) (2009) *Implementation of the Sexual Offences Act – A Research report* pp 7-8, as cited in note 12

the Act which are specific to children. These include sexual offences 'committed within the view of children' (Section 7); defilement (Section 8); attempted defilement (Section 9); indecent act with a child (Section 11), child trafficking (section 13); child sexual tourism (Section 14) and child prostitution (Section 15).

The Counter Trafficking in Persons Act (2010) broadens the definition of child trafficking to include other purposes beyond the 'purpose of committing sexual offences' (a specific ingredient of the offence under the Sexual Offences Act). The main purpose of this Act is to implement Kenya's obligations under the UN Conventions against Transnational Organised Crime including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children and all other relevant international conventions (as well as the CRC and ACRWC) to which Kenya is party.<sup>22</sup> Beyond criminalisation of trafficking and provision for the imposition of deterrent penalties (it provides for imprisonment for up to 30 years), the Act also makes provision for the protection and support of trafficked persons – including provisions on witness and victim protection.

Despite the practice of FGM being criminalised under the Children's Act, it remains steadily practiced within some communities despite its damaging impacts to the dignity, health and lives of affected women and children.<sup>23</sup> With the limited reach of the Children's Act before it, the Prohibition of Female Genital Mutilation (FGM) Act (2011) serves as the first comprehensive attempt

to address the problem of genital cutting. The new law imposes a life imprisonment term where FGM leads to the death of the victim. The Act provides for a wider definition of 'law enforcers' in relation to FGM to include the police and other government officers including children's officers, members of the provincial administration and probation officers. The new law also provides for its extra-territorial application where the offence is committed outside Kenya by Kenyan citizens or residents.

The Refugee Act of 2006 progressively makes provision regarding the human rights of refugees including a prohibition of refoulement/forced return and the protection and survival of refugee children.<sup>24</sup> In similar vein to refugees there are hundreds of thousands (estimated by the UNHCR as 300,000) internally displaced persons (IDPs), including children in Kenya.<sup>25</sup>

Both the Children's Act (Section 10) and the Employment Act, 2007 make provision regarding the protection of children in employment, including the protection of children from the worst forms of child labour. The Employment Act prohibits the employment of children into worst forms of child labour and gives the Minister of Labour the power to declare that work, activity or contract of service that is harmful to the health, safety or morals of a child constitute a worst form of child labour (section 53). The Employment Act is more detailed as regards the regulation of children in employment than the Children's Act. It provides for a minimum legal age of 13 as the age below which a child cannot be engaged in labour

<sup>22</sup> See, the Preamble to the Act. For some analysis of the Act see, "Kenya – Analysis of the Counter Trafficking in Persons Bill in the light of morality, legality and culture", Catholic Information Service for Africa, 12 October 2010, available at < <http://allafrica.com/stories/201010130533.html> > (last accessed 15 August 2011).

<sup>23</sup> As above.

<sup>24</sup> In addition to the general protection under the Act, section 23 of the Act provides for the need to ensure protection of 'refugee women and children'. In particular section 23(4) provides that: "Where the parents of the child or other members of the child's family cannot be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family".

<sup>25</sup> See UNHCR Kenya country page < <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16> > (last accessed 23 August 2011).

or employment (section 56(1)). It provides that between the age of 13 and 16 a child can be employed to 'perform light work' which must not be 'harmful to the child's health and development' and 'not prejudice the child's attendance to school or vocational programme' (Section 56(2)). Children between the ages of 16 and 18 are employable, although the Act does not clearly define the parameters for the employment of this category of children. The Act also fails to define 'light work' for which children between the ages of 13 and 16 are deemed eligible and does not provide protections for children in such employment. Article 53(1)(f) of the Constitution provides for the protection of children from, *inter alia*, "hazardous and exploitative labour" thereby reinforcing the provisions of the Children's Act and the Employment Act. In practice there remain considerable gaps in enforcing the existing domestic legal provisions on the protection of children from harmful child labour.

In terms of the legal and policy framework the Children's Act recognises children in street situations as children 'in need of care and protection'.<sup>26</sup> The government interprets its obligation in relation to street children to be 'primary' and as "involving the rehabilitation and reintegration of street children back to society".<sup>27</sup>

In relation to child justice, Part XIII of the Children's Act provides for detailed provisions guaranteeing the due process of children's rights and an array of alternative sentences which a court has at its disposal to deal with a child found by a court to have committed a crime.<sup>28</sup> It prohibits the use of the death penalty, imprisonment and corporal punishment of children in line with the provisions of the CRC and ACRWC.<sup>29</sup>

Since 2006 there are now three more child-specific courts<sup>30</sup> with physically separate court houses and infrastructure designed for children – whether as victims of crimes, witnesses, in need of care and protection and in conflict with the law.

In a number of court cases between 2003 and 2006 the Kenyan High Court and subordinate courts upheld the provisions of the Child Offender Rules (made under Schedule 5 of the Children's Act) relating to time limits for trials and the pre-trial detention of children in conflict with the law.<sup>31</sup> The effect of these decisions was to implement the principle of detention as a last resort and for the shortest period of time for children (as provided for under the CRC and ACRWC and in the subsidiary legislation – the Child Offender Rules made under the Kenyan Children's Act).

<sup>26</sup> Section 119 of the Act.

<sup>27</sup> Kenya's Second Periodic Report (2005) p90.

<sup>28</sup> Ss 186 & 191, respectively.

<sup>29</sup> Supra note 13 p.52 the Act commendably goes further than the CRC (Article 37) and ACRWC (Article 17) which outlaw the use of life imprisonment and not all forms of imprisonment as the Act does.

<sup>30</sup> In Nakuru, Mombasa and Kakamega (in addition to the Nairobi Children's Court).

<sup>31</sup> For example in *R v S.A.O (a Minor)* [2004] eKLR in which the High Court enforced the provisions on time limits by ordering the release on bail (pending trial) of a child in a case involving a 13-year old girl charged with the crime of murder. The court cited the inordinate delay in the start of trial in applying the provisions of the Child Offender Rules.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 25/07/2000
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 06/10/2010
Convention on the Rights of the Child (CRC), 1989	Ratification, 30/07/1990
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 25/07/2000
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Signature, 08/09/2000
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 19/05/2008
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 09/04/1979
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 07/05/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	Accession , 12/02/2007
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second	Third
ACERWC	2007	-	-
UN Committee	13 Jan 2000	20 Sep 2005	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Kenya**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Human Rights Watch	April 19, 2001	None
The Kenya NGO CRC Coalition	March 2001	
Child Helpline International	September 2006	
Global Initiative End Corporal Punishment	September 2006	
The Kenya NGO CRC Coalition	July 2006	
World Organisation Against Torture(OMCT)	January 2007	

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC		UN Committee
Name	Term of service	
Ms. Joyce Aluoch	2003- 2009	-

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN LESOTHO

## COUNTRY BRIEF

### ABSTRACT

HIV/AIDS epidemic in Lesotho is the third highest HIV prevalence in the world at 23%. The epidemic coupled with poverty pose the biggest challenge to the realisation of children's rights in the country. Enactment of the Child Protection and Welfare Bill (2004) in to an Act in the year 2011 has been considered the major achievement in harmonising children's rights legal framework in the country. The challenge ahead, is to make this Act operational, and mobilize the human and financial resources necessary for its full implementation.

### 1. INTRODUCTION

Lesotho has a population of 2 million. Since more than 50% of Lesotho's population live below the poverty line, poverty is a major factor in most Basotho children's lives and the greatest threat to the full realisation of their rights. The child population comprises 49% of the total population of Lesotho's 2.2 million people. Unfortunately, within the context of a society characterised by extreme poverty, children are overrepresented.<sup>1</sup> The country also has an HIV/AIDS prevalence of 23 % which is considered to be the third highest in the world.

Lesotho is a constitutional monarchy. The Constitution (1993) defines itself to be the supreme law of the land. The Constitution provides for human rights.

However, some of these rights are in the "Principles of State Policy" section (including the protection of workers' rights and interests, protection of children and young persons, rehabilitation, training and social rehabilitation of disabled persons, economic opportunities.), which are not enforceable by courts of law, but are to be implemented on an incremental basis. This implementation is supposed to happen through policies, guidelines and social programmes that are subject to Lesotho's economic capacity and development.

The Constitution provides for an independent judicial system. And although Lesotho has a mixed general legal system that resulted from the interaction between the Roman-Dutch Civilian law and the English Common Law, its general law operates independently. Lesotho also applies the common law, which refers to unwritten law or law from non-statutory sources, but excludes customary law.

The Government of Lesotho has ratified a number of international instruments which protect the rights of children. These include the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, International Labour Organisation (ILO) Convention 138 on the Minimum Age for Employment and ILO Convention 182 on the Worst forms of Child Labour. In Lesotho, international conventions are not self executing (save for International Labour Organization agreements) and need to be domesticated into national laws or administrative regulations in order to be enforced.

<sup>1</sup> 2000, Etsa Letsete la Kamoso, Netefatsa Litokelo Tsa Ka: The State of Children's Rights in Lesotho, NGO Coalition for the Rights of the Children, Save the Children UK.

Lesotho has been involved in a lengthy and much praised<sup>2</sup> process of law reform in the sphere of child law. The process has been undertaken under the auspices of the Lesotho Law Reform Commission. A highly consultative process was followed involving multi-sectoral teams and researchers. This led to the Children's Protection and Welfare Bill (CPWB). In June 2011, the Government of Lesotho enacted this Bill as the Children's Protection and Welfare (CPW) Act (2011) which replaces the outdated Children's Protection Act of 1980. This Act was launched by the Queen of Lesotho in August 2011.<sup>3</sup> The Act's credibility has been greatly enhanced by the fact that the enactment process has been widely regarded as highly consultative, as it involved active participation by government ministries, development partners, and non-governmental organizations. The effort to accelerate the process of writing subsidiary regulations, developing a costed implementation plan and sensitization with all concerned partners on the new law is currently an on-going process. However, the recent enactment with its non-operationalisation, coupled with the non-availability of the Act in the official gazette, has made it impossible to closely scrutinize the Act, thus the brief focuses mainly on the Bill, the provisions of which are reportedly very similar to the passed Act.

## 2. GENERAL MEASURES OF IMPLEMENTATION

Some child rights are constitutionalised in Lesotho. Article 32 of the Constitution of Lesotho (of 2 April 1993) states that "Lesotho shall adopt policies designed to provide that -(a) protection and assistance is given to all children and young

persons without any discrimination for reasons of parentage or other conditions; (b) children and young persons are protected from economic and social exploitation; (c) the employment of children and young persons in work harmful to their morals or health or dangerous to life or likely to hamper their normal development is punishable by law; and (d) there are age limits below which the paid employment of children and young persons is prohibited and punishable by law".

In early 2011, Lesotho was still in the process of setting up a national human rights institution. Government was reportedly considering a draft bill on the establishment of the Commission. The mandate of the Commission is envisaged to include investigating all human rights violations and making recommendations to the Government. It will also be charged with monitoring government's compliance with its international human rights obligations, and hence will have a crucial role in the monitoring of the implementation of children's rights in the country.

The Office of the Ombudsman is established by the Constitution<sup>4</sup> and is further elaborated by the Ombudsman Act 1996. The main task of this Office is to investigate actions taken by any officer or authority in the exercise of its administrative functions of that officer or authority in cases where it is alleged that a person has suffered injustice in consequence of that action.<sup>5</sup>

The Ministry of Justice, Human Rights and the Correctional Service has a Human Rights Unit which was established in 1995. The Unit aims to promote a culture of human rights in Lesotho and addresses reported violations where necessary.

<sup>2</sup> The Lesotho law reform process has been showcased at a number of international events, such as the University of the Western Cape/Miller Du Toit, child and family law conferences in 2003, 2004, and 2006. Lesotho also was a learning site for visits by consultants from UNICEF, South Sudan.

<sup>3</sup> As a result of the very recent enactment of the Act (officially launched in August 2011) and its non-application to date, this brief focuses on the Bill, and other relevant laws.

<sup>4</sup> Section 134 of the Constitution.

<sup>5</sup> Section 135(1)(a) of the Constitution.

Some current policy documents and plans relevant for children’s rights include the National Social Welfare Policy 2004 which undertakes to protect children in all areas of life; National Policy on Orphaned and Vulnerable Children 2005 which aims at ensuring full care and support for orphaned and vulnerable children. The National Youth Policy aims at promoting the dignity and self esteem of all youth; nurturing their physical, intellectual and moral being and calls for government to take all measures necessary to accelerate their full participation in the socio-economic, cultural and political spheres of life.

### 3. DEFINITION OF THE CHILD

Previously, before the coming into force of the Children’s Act, the age of majority was 21 years, and although the Children’s Protection Act 6 of 1980 contains a definition of a child as being an unmarried person aged below 18 years (implying that married persons under that age of 18 years do not qualify for the benefits of the Act), numerous other statutes contained different age thresholds.<sup>6</sup> The Age of Majority Ordinance 62 of 1829 stipulated that the age of majority for civil law purposes is 21 years.

The CPWB defines a child in its definition section as a person below the age of 18 years. In addition, the age of criminal responsibility is raised from 7 years to 10 years.<sup>7</sup> Consent to medical treatment is set at 12 years in clause 140(2) (a). In clause 63(1) (d), consent to adoption is to be given by a child 10 years or older. Clause 245(5) provides that “[r]eproductive health protective/preventive devices and technologies may be provided to a child on request by the child and without the consent of the parent or guardian of the child provided-(a) the child is at least twelve years of

age.” Clause 22(l) of the CPWB also places a duty on the State to “set minimum ages for employment and regulate working conditions”. The legal minimum age for employment in commercial or industrial enterprises is 15 years, or 18 years for hazardous employment. The Sexual Offences Act sets the minimum age for consensual sex at 16 years.

Table showing the definition of a child in Lesotho

Category	Age
Definition of a child	18
Age of majority	21
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	21
Minimum age of criminal responsibility	10
Minimum age of recruitment into the army	18

### 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The CWPB provides for a general best interests provision in Clause 3. In addition the CPWB addresses the best interests’ principle in specific child rights thematic area such as child justice, the child’s right to know and live with his or her parents, and the right to

<sup>6</sup> 1998, *Lesotho country report on the Convention on the Rights of the Child*; Also see: 2001, *The Committee on the Rights of the Child Concluding observations to the Lesotho Country Report*, (CRC/C/15/Add.147 (26 January 2001) at par 23.

<sup>7</sup> Clause 83 of CPWB.

social activity.

**Non-discrimination:** Chapter II of the Constitution sets out in Section 4 (1) (o) the right to equality and in 4 (1) (n) freedom from discrimination. Any act contradicting the same is prohibited in Section 18 (1) and (3) which elaborates and qualifies the prohibition under Section 18(4) (c). Female descendants including that of girls experience gender discrimination with regard to the inheritance of family property, especially land, as it can only be inherited through the male lineage. More directly, the CPWB in Clause 4, provides that “[a] child shall not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status or other status”. Other laws, such as the Race Relations (Amendment) Act 2005, prohibit discrimination.

**The right to life, survival and development:** Whilst Section 5 states that no person shall be deprived of life, except for a death penalty imposed by a court in respect of a criminal offence of which that person has been convicted, the CPWB does not have a specific clause on the right to life. However, various provisions in the CPWB protect and promote these rights. For instance, Clause 166(1) provides that “[n]o sentence of life imprisonment or death may be imposed on a child or any person who was 18 years or below at the time the offence was committed”. The right to survival and development is explicitly provided for by clause 22(c) of the CPWB.

**Respect for the views of the Child:** Clause 13 of the CPWB firmly grounds child participation by explicitly providing that “(1) a child has the right to express his / her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child. (2) The opinion of the child shall be given due weight in accordance with the age and maturity of the child”. Examples of child participation in Lesotho exist. For instance, the first-ever shadow children’s parliament (SCP) sitting in Lesotho took place on

16th June 2010 in the national parliament buildings in Maseru, Lesotho and involves one hundred children. The key objective of the SCP was policy-related: for children to call for the speedy enactment of the long-overdue Children’s Protection and Welfare Bill by the parliament of Lesotho.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The CPWB clearly spells out the child’s right to a name and a nationality (Clause 6), as well as the general right to registration of birth within three months from birth (Clause 7). However, this must be seen against a backdrop of low levels of birth registration that have prevailed in practice. The United Nations Committee on the Rights of the Child (UN Committee), expressed the concern that procedures for the registration of birth were inaccessible, cumbersome and expensive. It has been argued that “invisibility” puts children beyond the reach of laws, research, budgets and programmes, and often beyond the reach of governments, organisations and individuals seeking to fulfil their rights.

As a response to the onset of the HIV/AIDS crisis affecting children in the country, Lesotho has introduced a system of “vital registration” to identify and capture the details of vulnerable children. This policy initiative is supported by proposed provisions of the CPWB which provides for the right of orphaned and vulnerable children to vital registration, and further that the Department of Civil Registration shall ‘maintain a systematic and comprehensive disaggregated quantitative and qualitative data in relation to all groups of orphaned and vulnerable children (Clause 8 (2)), and that the Bureau of statistics shall put in place mechanism and strategies for the collection, analysis and dissemination of data in respect of these children (Clause 8 (3)). As a key factor supporting services to the most vulnerable, this legislative provision must be regarded as a concrete and advantageous best practice in the African context.

The right to acquire a nationality/citizenship is not provided for in detail. However, Clause 6 of the CPWB indicates that “[a] child has a right from birth to a decent name and to acquire nationality”. In addition to the generality of the CPWB provision, Section 40 of the Constitution, which regulates acquisition of citizenship by marriage, is fraught with discriminatory rules as it only limits itself to women, and citizenship by marriage can only be passed by a male national to a foreign female spouse.

Clause 9 of the CPWB provides that “[a] child has a right to know and live with his/her parents and family and grow up in a caring and peaceful environment unless it is proved in court that living with his/her parents would- (a) lead to significant harm to the child; or (b) subject the child to abuse and neglect; or c) not be in the best interests of the child”. The Constitution guarantees the right to freedom of expression and the press and the right to hold opinions without interference under Section 14. The CPWB on the other hand provides for the right to privacy of children, at least in the context of court appearances (Clauses 142 and 149), and duty of the State to “respect the child’s right to freedom of thought, conscience and religion, subject to appropriate parental guidance” (Clause 22(f)).

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The CPWB provides for a number of provisions on parental rights and responsibilities. It also provides guidance on the need to protect children’s family environment, and efforts to be undertaken to promote their best interests once they are deprived of this environment. Under the “Objects” section of the CPWB, Clause 2 indicates that “parental rights and responsibilities conferred should be exercised, as far as possible, so as to

facilitate and encourage and foster the full enjoyment by the child of the rights conferred”.

Clause 19(1) of the CPWB clearly indicates that a parent or a guardian (irrespective of marital status and living arrangements) shall not deprive a child of his or her welfare. Clause 19(2) of the Bill provides a list of responsibilities of parents or guardians which include the duty to “protect the child from neglect, discrimination, violence, abuse, exploitation, exposure to physical and moral hazards and oppression; provide good guidance, care, assistance and maintenance for the child to ensure his/her survival and development; ensure that during temporary absence, the child shall be cared for by a competent person; exercise joint primary responsibility for raising the children, except where the parent or guardian has surrendered his/her rights and responsibilities in accordance with the law”.

There has been a realisation that the existing legal and administrative framework is exceedingly weak as regards the protection and promotion of the rights of orphans. The Children’s Protection Act of 1980 has also proved inadequate in protecting OVCs. The Act is criticised for focusing predominantly on children in conflict with the law.

The CPWB makes several important provisions in respect to children without parental care. Firstly, it provides for the right of orphaned and vulnerable children to vital registration. Secondly, it gives children, whether or not born in wedlock or orphaned, rights to reasonable access to the estate of their parents.<sup>8</sup> There is an intentional emphasis in the CPWB that both boy and girl children should enjoy similar rights in respect of family property. Duties are placed on a range of role players in this regard, including employers, the Master of the High Court and financial institutions.

<sup>8</sup> Clause 38 et seq of the CPWB.

The CPWB is the first piece of legislation in Lesotho, which empowers the social workers to deal with cases involving vulnerable children. This is considered to be a great achievement, and it is advantageous to all children in difficult circumstances.” The centrality of a children’s court in making order regarding children in need of care and protection is confirmed throughout the CPWB (see for example, Clauses 37 and 137). The Bill also consists of provisions for more comprehensive regulation of alternative care facilities under part XXI of the Bill headed ‘Institutions’. The involvement of the Director of Social Welfare in registering and maintaining appropriate standards in such care institutions and place of safety is evident.<sup>9</sup>

The CPWB purported to comprehensively regulate adoption. Not only are important aspects such as children’s consent to adoption, the necessity of taking into account their best interests, and dispensing with parental consent in suitable situations covered, but the jurisdiction of the High Court in making adoption orders is spelt out in detail. As regards inter-country adoption, the CPWB expressly permits adoption by persons who are non-citizens of Lesotho, provided that he or she has stayed in the country for at least three years, has fostered a child for at least two years under supervision of a social worker, does not have a criminal record, has a recommendation concerning his or her suitability to adopt children from his or her country of origin, and has satisfied the High Court that his or her country of origin will respect and recognise the adoption order and will grant residence status to the child.<sup>10</sup>

## 7. HEALTH AND DISABILITY

Clause 22(j) of the CPWB places a duty on the State to “place special emphasis on the provision of primary and preventive health care, public health education, reduction of infant mortality and

ensure that no child is deprived of access to effective health services”. The Bill also explicitly indicates that “[a] child has a right to access ... preventive health services, adequate diet, clothing, shelter, medical attention, social services or any other service required for the child’s development”.<sup>11</sup>

HIV/AIDS is considered the single most important threat to development in Lesotho. It is therefore inherent that the CPWB contains some useful provisions applicable to the HIV/AIDS environment. Not only are provisions made for vital registration and testamentary issues, as mentioned above, but the legislation will also cover a range of protective measure relating to child health. Part XXV of the Bill deals with consent to medical treatment or surgical operations, and provides for the child’s right to provide independent consent as of the age of 12 years. Unless it is in the best interests of the child no child may be tested for HIV/AIDS without his/her consent. Consent may be given by a child aged 12 years or older, or where a child is aged below 12 years or is not of sufficient maturity or does not have the mental capacity to consent, by a parent, guardian or caregiver, by a social worker arranging placement of the child, and in some instances by the head of a hospital or a children’s court. Further provisions relating to children’s access to reproductive health information and provision of reproductive health devices and technologies “on request by the child and without the consent of the parent or guardian of the child provided that the child is at least twelve years of age, proper medical advice to be given to the child, medical examination carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.”<sup>12</sup>

Section 33 of the Lesotho Constitution makes provision for the rehabilitation, training and social resettlement of persons with disabilities (PWDs).

<sup>9</sup> See for instance clause 201(1) and (2) of CPWB.

<sup>10</sup> Clause 65 (1). See further the remainder of the provisions in clause 65, which spell out further protections for inter-country adoptions both by foreigners, and of foreign children by Mosotho persons residing in Lesotho.

<sup>11</sup> Clause 10(1) of CPWB.

<sup>12</sup> Clause 245 of CPWB.

The CPWB provides that no person should treat a disabled child in an undignified or discriminatory manner and the sexual Offences Act stipulates that it is a criminal offence to commit a sexual act in relation to or in the presence of a disabled person as defined in the Act. In an effort to promote the rights of people with disabilities, the Government has established the Rehabilitation Unit in the Ministry of Health to empower and rehabilitate people with disabilities. Lesotho has enacted laws that protect and promote disability rights and these include Buildings Control Act 1995 that specifies designs of new suitable and accessible buildings to people with disabilities.

## 8. EDUCATION

Section 28(b) of the Constitution, which deals with education, provides that primary education is compulsory and shall be available to all. For the enforcement of this provision the Primary Education and Education for All Policy of 2000 was formulated and came in to effect. Clause 10(3) and (4) of the policy provides “[a] child has a right to education regardless of the type or severity of the disability he/she may have” and that “[n]o child shall be expelled or denied the right to education by any education institute on account of pregnancy, circumcision, initiation, or other cultural rituals”.<sup>13</sup>

The 2010 Education Act made primary education in Lesotho free and compulsory for children between the ages of 6 and 13 years. The Act states that children from age 6 shall be enrolled in a primary school and that they should stay in school until they reach the age yet to be determined by the Minister of Education. Penalties for violation are also provided for, and a fine of not less than 1,000 maloti (\$143) or imprisonment can be imposed on a parent whose child fails to attend school regularly. The Government has

further put in place a number of measures such as bursary schemes for orphaned children, especially double orphans as well as those who are destitute at secondary level. Furthermore, there was an introduction of the Text book Rental Scheme. Despite the introduction of Free Primary Education in the country, many still cannot access education for a number of reasons such as care giving to HIV/AIDS infected parents and siblings, and lack of access to nearby school facilities.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

The CPWB contains a comprehensive framework for addressing child abuse and neglect, and identifies the relevant duty bearers responsible for intervening to protect children. The Children’s Court is accorded a central role in making placement orders, and social workers are accorded a vital role in child protection processes. Ill-treatment, neglect, abandonment or exposure of children to abuse are proscribed, and a prohibition on the use of children in begging is envisaged.<sup>14</sup> An independent chapter of the CPWB is devoted to trafficking and abduction of children.<sup>15</sup> In short, provisions of the Act on child protection can be regarded as extensive, and constitute the strong side of the draft legislation.

The CPWB also specifically addresses protection issues such as harmful practices,<sup>16</sup> prohibition of recruitment of child soldiers, child protection from harmful substances,<sup>17</sup> using children in begging,<sup>18</sup> and torture and degrading treatment. In 2011, Government issued a comprehensive anti-trafficking legislation that prohibits and punishes all forms of trafficking and requires protection measures for victims of trafficking.

<sup>13</sup> Clause 22(k) of the CPWB reiterates this obligation of the State.

<sup>14</sup> See CPWB clauses 44-46.

<sup>15</sup> Part V111.

<sup>16</sup> Clause 16 of CPWB.

In 2003 Sexual Offences Act was enacted in Lesotho, as a response to widespread rape and the burgeoning HIV/AIDS crisis. For the first time, the law sets stiff penalties for rape, incest and other offences, including inducing children in to sexual activity. Whereas rapists formerly received suspended sentences or a few months in jail, the sanction is now a minimum 10 years prison sentences. A dedicated Gender and Children Unit was established in 2002 as a specialized unit within the Police under the Ministry of Home Affairs to respond to the persisting acts of violence against women and children. This legislation also contains specific sections that protect children against commercial sexual exploitation as well as their use in pornography.

An amendment to the Criminal Procedure and Evidence Act was passed in 2009 that provides for the transfer of mentally ill convicts to a forensic hospital. To facilitate reporting, a child helpline, which operates for 24 hours, was established in 2009. The degree of connectivity nationwide is the key to the success of this endeavour.

The CPWB articulates what exploitative labour is and emphasizes the need for protecting children from its different forms. Engaging a child in night work and in industrial undertakings is prohibited. The minimum age for child labour is set at 15 and for light work at 13. Children below the age of 18 years are debarred from engaging in any form of hazardous work. The laws consider Herding as one of the worst forms of child labour because it involves long hours and night work, and exposes children to extreme weather conditions in isolated areas and often prevents the boys involved from attending school. However despite the legal

provisions barring this form of hazardous labour, the practice still takes place in the countryside.

Regarding the provisions related to age and criminal capacity, the CPWB increases the minimum age of criminal capacity from 7 to 10 years and a retention of the rebuttal presumption of incapacity for children aged between 10 and 14. Legal representation for children, via the appointment of a legal aid lawyer, is comprehensively spelt out in part XV1 of the Bill. The key mechanism for the advancement of diversion is the proposed preliminary inquiry, a novel pre-trial procedure at which (*inter alia*) diversion can be considered at the earliest possible stage after arrest of a child.<sup>19</sup> Most importantly, the Bill consists of substantive and innovative provisions on restorative justice.<sup>20</sup> It envisages that imprisonment shall be limited to a maximum of 3 years where child offenders are concerned, provided that the child was 14 years or older. Substantial and compelling reasons must exist before a sentence of imprisonment can be imposed, and the charge against the child must be of both a serious and a violent nature, or the child must have failed to respond to previously imposed alternative sentences.<sup>21</sup> In addition to the above conditions, the Bill further provides that “no sentence of imprisonment may be imposed on a child under the provisions in the [Act] for a period exceeding 15 years on any charge”.<sup>22</sup> Further than this and in line with international law, the Bill proposes a specific prohibition on the use of corporal punishment by courts<sup>23</sup> and makes explicit provision in relation to a variety of alternative sentences such as community service and probation.<sup>24</sup> With regard to the former the Bill under Section 158 (l), prohibits the imposition of community service on a child under the age of 13 years).

<sup>17</sup> Clause 17 of CPWB.

<sup>18</sup> Clause 22(o) of CPWB.

<sup>19</sup> CPWB part X11.

<sup>20</sup> CPWB, clause 131(7) (f).

<sup>21</sup> CPWB, clause 164,

<sup>22</sup> CPWB, clause 164 (9).

<sup>23</sup> Clause 166(2) of CPWB provides that: “No sentence of corporal punishment or any form of punishment that is cruel, inhumane and degrading may be imposed on a child”. Clause 166(1) of the proposed Bill expressly confirms the prohibition of both the death penalty and life imprisonment for all children who commit crimes whilst under the age of 18 years.

<sup>24</sup> CPWB, Part XVII (Sentencing) which uses the term ‘sentences not involving a residential element’.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 27/09/1999
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 26/10/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 10/03/1992
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 27/09/1999
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Ratification, 24/09/2003
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 02/12/2008
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 14/06/2001
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 14/06/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second
ACERWC	-	-
UN Committee	27 APR 1998	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Kenya**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	None
NGO Coalition for the Rights of the Child- Save the Children UK	May 2000	

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC		UN Committee
Name	Term of service	None
Mrs. Mamosebi T. Pholo (2nd Vice-Chairperson)	July 2005- July 2010	
Mr Karabo Karabo Mohau	-	

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN MADAGASCAR

## COUNTRY BRIEF

### ABSTRACT

The last decade has resulted in a number of achievements in the area of children's laws in Madagascar. There are a number of laws in Madagascar that address children's rights issues including Act No. 2007-022 of 20 April concerning marriage and systems of matrimonial property; Act No. 2007-023 of 20 August 2007 on the rights and protection of the child which covers child victims of all forms of abuse; Acts Nos. 94-033 of 13 March 1995 and 2004-004 of 26 July 2004 on free and compulsory primary education; Act No. 97-044 of 2 February 1998 on the rights of persons with disabilities; and Act No. 2005-1040 of 14 October 2006, on the protection of persons affected by HIV/AIDS. The main challenge now remains the effective implementation of these and other laws for the full realisation of children's rights in the country.

### 1. INTRODUCTION

The population of Madagascar was estimated at more than 20 million in 2011. More than half the population is under 20 years of age. For instance, in 2008, the total population of children was estimated to be 9,694,000. 8 persons out of 10 live in rural areas.

Madagascar's Constitution has provisions on general human rights as well as children's rights. A constitutional reform took place on 4 April 2007.

However, this process did not affect children's rights provisions as the provisions pertaining to the protection of women's and children's rights under the former Constitution were maintained. Article 132 of the Constitution establishes that "treaties or agreements that are duly ratified or adopted shall have, as from their publication, an authority higher than that of laws, subject, for each agreement or treaty, to its implementation by the other party".

Having ratified the Convention on the Rights of the Child (CRC) on 19 March 1991 and the African Charter on the Rights and Welfare of the Child (ACRWC) ratified on 30 March 2005 Madagascar must guarantee to Malagasy<sup>1</sup> children the exercise of these rights and ensure legal protection in conformity with the international legal standards. Madagascar has also ratified the two Optional Protocols to the CRC in 2004. Direct applicability of international conventions by the courts is guaranteed by the Constitution, which, in its preamble, recognizes the International Bill of Human Rights, the African Charter on Human and Peoples' Rights and the Conventions on the Rights of Women and the Rights of the Child, which are considered to be an integral part of positive law.

There are a number of laws in Madagascar that address children's rights issues including Act No. 2007-022 of 20 April concerning marriage and systems of matrimonial property, which sets the marriageable age at 18 years for both girls and boys; Act No. 2007-023 of 20 August 2007 on the Rights and Protection of the Child which covers child victims of all forms of abuse; Acts Nos. 94-033 of 13 March 1995 and 2004-004 of 26 July

<sup>1</sup> Madagascar is officially known as the Malagasy Republic.

2004 on Free and Compulsory Primary Education; Act No. 97-044 of 2 February 1998 on the Rights of Persons with Disabilities; and Act. No. 2005-1040 of 14 October 2006, on the Protection of Persons Affected by HIV/AIDS.

## 2. GENERAL MEASURES OF IMPLEMENTATION

The Malagasy Government, in order to ensure that national legislation is compatible with the CRC and the ACRWC, introduced the Commission on the Rights of the Child, or CRRC, by Decree No. 2005-025 (of January 2005). Mandate of the Commission is to enhance coordination of the reforms that need to be undertaken in the area of child rights. The Commission is coordinated by the Ministry of Justice and is composed of representatives from the ministries involved in the implementation of child rights in Madagascar.

The Commission Nationale des Droits de l'Homme (National Human Rights Commission) has the mandate to look into children's rights related issues. It was established in 1996 under Article 40(2) of the 1992 Constitution, providing that "the State shall guarantee, through the establishment of specialized bodies, the promotion and protection of human rights".

The National Human Rights Council established under Act No. 2008-012 of 17 July 2008 has the mandate to undertake administrative inquiries, based on individual or collective complaints it received pertaining to ill-treatment. There are however indications that the appointment of members of the Council has not materialised, and that the Council has been unable to function since its establishment in 2008. Although an Office of the Ombudsman exists in Madagascar, it is to be noted that it has a very limited mandate. As a result, it only deals with public administration matters and does not have a practice of considering complaints from children.

Through the Ministry of Justice and the Ministry of Foreign Affairs, the Malagasy Government has, by inter-ministerial Order No. 18600 of 30 October 2003, set up a committee for drafting initial and periodic reports on international instruments relating to human rights. A joint Government/ UNICEF programme called "Governance for the Rights of the Child", has coordinated, monitored and evaluated the activities undertaken in the area of child protection since 2004. Government has also reported that the Integrated National Monitoring System (INMS) is the main monitoring device for evaluating and executing the Convention on the Rights of the Child. Its implementation is based on the new National Strategy for the Development of Statistics (2007). The Indian Ocean Child Rights Observatory Network (ODEROI) is also playing a role in developing tools to monitor the rights of the child systematically in Madagascar (but also including in Mauritius, Seychelles, the Comoros and Reunion)

## 3. DEFINITION OF THE CHILD

The definition of the child in Article 1 of the CRC was transposed in Law No. 2005-014 of 7 September 2005, pertaining to adoption, and in Law No. 2007-038 of 14 January 2008, amending and completing some provisions of the Penal Code concerning trafficking.

It should be noted that different minimum ages were set by the Malagasy legislation. These are minimum age for employment, for marriage, which appears to be early and unequal between the two sexes, for criminal responsibility, adoption, deprivation of liberty, imprisonment, and to participation in administrative or legal procedures. It is worth noting that according to Articles 101 and following of Act No. 63-022 of 20 September 1963 relating to filiation, rejection and guardianship, the child acquires full legal capacity as a result of his/her marriage.

In Malagasy legislation, the age of criminal liability is age 18 however the state report to the CRC states that Malagasy penal legislation does not recognize the criminal responsibility of minors under 13 years of age.<sup>2</sup> The age of civil majority is 21. Marriage and Matrimonial Property Act No. 2007-022 of 20 August 2007 on marriage, sets the legal age for marriage at 18. It is notable that this law standardizes the minimum age of marriage at 18 years for both genders and replaces the previously existing discriminatory minimum age of marriage for boys 17 years 14 years for girls. However this law has an exception in that where there is “good cause” and on express consent of the child, the judicial authority can exercise the discretion to authorize marriage before the child reaches the legal minimum age. The age of sexual consent is not explicitly set by law. Nevertheless, age has been taken into consideration to define some morality-related offenses, in order to better protect children from the risk of abuse. The Penal Code therefore sets the minimum age at 14 years to characterise indecent assault without violence.<sup>3</sup>

As far as minimum age for labour related activities are concerned, Law No. 2003-044 of 28 July 2004 on the Labour Code raised the minimum legal working age to 15 years instead of 14 years. This law further indicates that the minimum age must not be under the age at which school attendance is compulsory.<sup>4</sup>

Table showing the definition of a child in Madagascar

Category	Age
Definition of a child	18
Age of majority	21
Minimum age of employment	15
Minimum age of sexual consent	14
Minimum age of marriage	18
Minimum age of criminal responsibility	13
Minimum age of recruitment into the army	18

#### 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The principle of the best interests of the child is explicitly provided for in Law No. 2007-023. The law on the rights and protection of the child and the law concerning adoption provide explicitly that in any decision to be taken, the best interests of the child must be the overriding consideration. Some national plans of actions also have elements of the best interests of the child principle embedded in them

<sup>2</sup> Third and fourth State Party Report 2009:

<sup>3</sup> *Id.*

<sup>4</sup> See Article 100.

**Non-discrimination:** There are a number of laws in Madagascar that prohibit discrimination. These include Law No. 2005-014 of 7 September 2005, pertaining to adoption; Law No. 2007-023, concerning the rights and protection of children; Law No. 2005-040 of 20 February 2006 concerning HIV/AIDS protects adults and children living with HIV/AIDS; and Decree No. 2001-162 concerning the implementation of Law No. 97-044, on the Rights of Persons with Disabilities. However, *de facto* discrimination against the descendants of slaves persists, children with disabilities, the girl child and children infected or affected by HIV/AIDS continue.

**The right to life, survival and development:** A number of provisions of the Constitution as well as other subsidiary legislations promote the right to life, survival and protection. For instance, the Constitution ensures all individuals protection of the right to physical integrity and the right to health beginning with conception. The Malagasy Penal Code, updated in 2005, punishes offenses pertaining to abortion, infanticide, child abuse, child abandonment and child neglect. Despite these, and other similar provisions, traditional beliefs (for instance that twins bring bad luck, and the rejection and abandonment of twins in some instances leading to the violation of the right to life of a child) and other factors continue to affect children's rights to life, survival and development in a grossly negative way.

**Respect for the views of the Child:** The Constitution, in Article 10 guarantees freedom of expression and opinion without discrimination based on age. In addition, Article 38 of the law on the rights and protection of the child establishes that the child may be consulted when a decision regarding his or her guardianship is being considered. In addition, Article 6 of the law pertaining to adoption provides that the child be

informed and consulted, and that his or her opinion be taken into consideration on any matter that concerns him or her. A number of platforms that facilitate child participation in Madagascar, including clubs for youth reporters aged 13 to 18 to present and cover the news, start discussions and fuel thinking about topics that concern youth on 45 local radio stations have also helped to contribute to the realisation of this right.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The relevant law on nationality is Ordinance No. 60-064 of 22 July 1960, which establishes the conditions under which Malagasy nationality may be acquired or granted.<sup>5</sup> Unfortunately, it is only a legitimate child born to a Malagasy father that is recognized as Malagasy. The UN Committee has raised its concern that this law discriminates against children born to a Malagasy mother and a father of foreign nationality as well as children born out of wedlock in some cases.

With respect to birth registration, Law No. 61-025 of 9 October 1961 is relevant. This law establishes that any birth occurring on Malagasy soil must be reported to an officer of the civil registry within 12 days. Exceptions to this time frame are only allowed through a supplementary judgment. In order to further facilitate the use of this exception, Law No. 2007-040 of 14 January 2008, pertaining to issuing supplementary birth judgments, empowered district administrative authorities to issue judgments in this area. The Government has also adopted a National Programme to Rehabilitate the Registry of Births.

Order No. 62-003 of 24 July 1962 concerning name, residence and absence modified by Act No. 90-012 of 18 July 1990 determines the various

<sup>5</sup> Article 3 and 10 of the Code.

rules governing the individuality of physical persons, which is initially achieved through the giving of a name and the changing of a name or renaming. Pursuant to Order No. 62-003 of 24 July 1962 on name, residence and absence, it is a duty of a citizen to bear a name, that figures on his/her birth certificate. However, adopting the patronymic name is optional.

The Constitution, sometimes through interpretation, provides for the rights of children that are relevant for the exercise of civil and political rights such as the right to freedom of religion. In addition, other subsidiary laws, in particular Law No. 2007-023, on the rights and protection of children, regulate non-separation from parents, family reunification, and the right to know ones origins and other related matters.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Article 21 of the Constitution indicates that the State shall protect the well-being of the family, the mother and child, by legislative and other appropriate social institutions. The Government has followed through on these obligations by adopting a number of legislative and administrative and other appropriate measures.

Central to Law No. 2007-023, on the Rights and Protection of Children, in the context of parental responsibilities is the message that for the harmonious development of children rests first and foremost with their parents. Law No. 2007-023 (2007) on the rights and protection of children also provides that children may only be separated from their parents by judicial decision, based on their best interests, when their safety, health and care are compromised. It also spells out the equality of fathers and mothers with

regard to their rights and obligations concerning their children, and the joint exercise of parental authority.

In relation to child care, according to the law, the periodic evaluation of the placement in families or public or private institutions, of children deprived of their family environment, adoptees, refugees, disabled children, children suffering physical or mental disorders, those placed in boarding schools, those deprived of their freedom, in the course of rehabilitation or subjected to other placements because of a punishable behaviour is provided for. The evaluation must consider the adequacy of the placement and progress of the treatment. The rules for the periodic evaluation of the treatment set standards, define the practices, which the professionals dealing with children thus placed must respect and guarantee the rights of the children.

Apart from the role of families in the upbringing of their children, the law also regulates and provides for the role of different stakeholders, such as Family Courts. For instance, these Courts have a role to play when “the safety, physical or moral integrity, health or education of a child are compromised”.<sup>6</sup>

It is also notable that Decree No. 2006-886 of 5 December 2006 regulates the foster family and foster care arrangements. Moreover, Act No. 2005-014 of 7 September 2005 on adoption, which sets up a new procedure concerning legal adoption in particular international adoption. Having ratified The Hague Convention of on the Protection of the Child and the Co-operation as regards International Adoption in 2004, Madagascar needs to have a modern legislation in conformity with the provisions of the aforesaid Convention. For this purpose, Act No. 2005-014 of 7 September 2005 on adoption was adopted by the two houses of Parliament during the first

<sup>6</sup> See for instance Articles 48-57 of Law No. 2007-023.

parliamentary session of 2005 at the end of a participative process with all the concerned entities.

At the policy and programme level, the National Strategy for Preventing Abandonment, Deinstitutionalization and Community Care of Children in Madagascar (2011-2015) and the National Strategic Plan to Combat HIV/AIDS (2007-2012) are worthy of mention. In addition, it is important to re-emphasise that Law No. 2005-040 of 20 February 2006 concerning HIV/AIDS protects adults and children living with HIV/AIDS, including partners and immediate family members, against any form of discrimination.

## 7. HEALTH AND DISABILITY

Article 30 of the Constitution provides that the State endeavours to provide for the needs of any citizen who, because of age or disability, is unable to work. A number of other subsidiary laws have implication on health and disability. For instance, Inter-ministerial Decree No. 6363/93 of 10 December 1993 relating to the movement of the blind who use the white cane: enables the carriers of the white cane or some other distinctive sign to have priority to circulate in the same way as duty drivers of emergency vehicles. Act No. 2003-044 of 28 July 2004 bearing on the Labour Code, in its Articles 104 to 109 forbids the discrimination of disabled persons with regard to work or employment and encourages employers to hire a given number of disabled persons. Act No. 97-044 of 2 February 1998 on disabled persons: enumerates the various rights of disabled persons. The State ensures that any disabled child's access to adequate education, with activities allowing him to guarantee his personal development. Decree No. 2001-162 of 21 February 2001 on disabled persons lays down the details for the implementation of Act No. 97-044 of 2 February 1998 on disabled persons.

Moreover, according to Article 19 of the Constitution, the State recognises that all individuals have the

right to protection of their health from the moment of conception; the Penal Code: sanctions infanticide (Article 300), abortion (Article 317); Order No. 1023-S of 7 May 1951 sets the duration and conditions of ousting for contagious diseases in public and private institutions; Decree No. 97-657 of 7 May 1997 stipulates the creation, functions, organisation and pilot operation of national days of vaccination; Decree No. 90-026 of 16 January 1990 provides for the creation of the National Council to fight against sexually transmitted diseases (STDs) and HIV/AIDS and Act No. 2005-040 of 20 February 2006 on the fight against HIV/AIDS and the protection of the rights of people living with HIV/AIDS.

On 25 September 2007, Madagascar signed the Convention on the Rights of Persons with Disabilities. It is the Ministry of Health, Family Planning and Social Welfare (MHFPSW) and the Ministry of National Education and Scientific Research (MNESR) are concerned with implementing the rights of children with disabilities.

The UN Committee has appreciated the adoption of the Madagascar Action Plan 2007-2012 to Combat Poverty and Foster Development. This Plan stands to address a number of health and disability related issues. A number of other efforts are also being undertaken by government to promote health, including WASH (Water, Sanitation and Hygiene) and Hygiene Improvement Project (HIP).

## 8. EDUCATION

Article 23 of the Constitution provides that “[e]very child has the right to instruction and to education at the responsibility of the parents, with respect to their freedom of choice” and that “[e]very adolescent has the right to professional training”. Of significant relevance is Article 24 of the Constitution that provides that the “State organizes public education, free and accessible to all. Primary education is obligatory for all.”

Budgeting for education in Madagascar has been progressively increasing over the years in accordance with Madagascar's commitment to education for all. Despite this, there are indications that the right to free primary education faces implementation problems, partly as a result of shortage of resources. Support to orphans and vulnerable children in order to increase enrolment and attendance levels are not adequate.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

The problem of domestic servitude, commercial sexual exploitation, trafficking, and forced labour in mining, fishing, and agriculture are some of the types of violence against children that takes place within the country. A National Action Plan to Combat Violence against Children (2008-2011) was adopted by Government in 2007. This plan continues to be the national organising framework in addressing violence against children in Madagascar.

Law No. 2007-038 of 14 January 2008, in Article 335(1)(3), provides that "pornography that makes use of children, in any representation and by any means, or the possession of pornographic material involving children, is punishable by the penalties prescribed by Article 334 of the Penal Code."

Child labour provisions are provided for in, Decree No. 2007-563 of 3 July 2007 which prohibits children under the age of 18 from performing domestic labour and prohibits their employment in work that is hazardous, unsanitary and harmful to their health.<sup>7</sup> The law also prohibits over-time and night-time work by children including as apprentices. The authorisation of the Labour

Inspector is required (and on the condition that the work must not be harmful to a child's health and intellectual development),<sup>8</sup> for children below the age of 15 to get involved in any work. The National Commission to Combat Child Labour (NCCCL), an inter-sectoral organ is charged with overseeing the implementation of the National Plan of Action to Combat Child Labour.

Harmful practices that affect children, in particular the harmful practices affecting twin children of Mananjary and young girls of the Tsimihety region, in connection with "molestry," continues to exist. No legislation addresses this issue comprehensively.

The juvenile justice reform has not been finalised and a draft law on the administration of juvenile justice awaits consideration by Parliament. There is no separate jurisdiction for children and in particular girls face challenges as children and adults are often not separated from adult detention facilities and prisons. On a positive note, Law No. 2007-021 of 30 July 2007 amends and complements some provisions of the Code of Criminal Procedure with the goal of reducing the number of individuals in pre-trial detention, including imprisoned minors, and speeding up court procedures.

The Adoption Act. No. 2007-038 of 14 January 2008, that amends and supplements certain provisions of the Criminal Code concerning measures to prevent trafficking in persons and sex tourism, and the Act ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), has improved the legal framework in Madagascar.

<sup>7</sup> See Article 16.

<sup>8</sup> See Article 102 of the Law.

The US Department of State Trafficking in Persons Report for the year 2011 recommended to the government to “Issue a presidential decree codifying and mandating use of the anti-trafficking law at the provincial level; to utilise the anti-trafficking law to investigate and prosecute trafficking offenses, including those involving forced labour and public officials suspected of trafficking-related complicity; consider amending the anti-trafficking law to provide sufficiently stringent penalties for labour trafficking’.

The juvenile justice administration law in Madagascar is outdated. Under Order No. 62-038 of 19 September 1962, which provides for the exemption from criminal liability of children aged up to 13 years, minors held in prison in Madagascar are between 14 and 18 years of age. There are re-education measures to be imposed on child offenders below the age of 14.

Neither the Constitution nor Act No. 2007-023 on the Rights and Protection of the Child prohibit all corporal punishment of children. In addition, provisions against violence and abuse in the Criminal Code (1972) and the Constitution are not interpreted as prohibiting all corporal punishment in childrearing. However, corporal punishment is

unlawful in schools under Article 11 of Ministerial Decree No. 5246-96 MEN (1996). In the penal system too, corporal punishment is unlawful as a sentence for crime although it is not prohibited as a disciplinary measure in penal institutions. No law also exists against using corporal punishment in alternative care settings.

There are a number of opportunities to lodge complaints to the authorities in relation to issues pertaining to violence against children. The law on the rights and protection of children addresses the issue of mandatory reporting. Everyone is required to report abuse, including parents, family members, neighbours, friends, local authorities, teachers, religious leaders, social workers and medical and judicial personnel. A hotline dedicated to counselling adult and child trafficking victims was rolled-out in some parts of the country.

Apart from the lack of concrete implementation of the legislative framework on child rights, complaints are not lodged due to social attitudes and pressures. In order to improve this situation it is important that the Government ensure the implementation of Decree No. 2009-970 of 14 July 2009 regulating legal assistance.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 30/03/2005
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Signature, 28/02/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 19/03/1991
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 30/03/2005
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Ratification, 22/09/2004
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Signature, 25/09/2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Signature, 25/09/2007
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 31/05/2000
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 04/10/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	Ratification 12/05/2004
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

## 2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	20 July 1993	12 Feb. 2001	17 April 2009

## 3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Madagascar

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	None
The Coalition to Stop the Use of Child Soldiers (report on the OP-AC)	June 2003	
Global Initiative End Corporal Punishment	June 2011	
International Disability Alliance	CRC 58 <sup>th</sup> session	
Madagascar Civil Society Child Rights Group	May 2011	
World Organisation Against Torture(OMCT)	April 2003	
Confederation nationale des Plates Formes en Droits Humains	April 2011	
International Baby Food Action Network & Geneva Infant Feeding Association(GIFA)	November 2011	
Save the Children & Handicap International		

## 4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC		UN Committee
Name	Term of service	None
Mr. Andrianirainy Rasamoely	July 2008- July 2013	

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>  
The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN MALAWI

## COUNTRY BRIEF

### ABSTRACT

The Government of Malawi has undertaken a number of general measures of implementation in order to promote and protect the rights of children in the country. These measures are taken both on the legal and institutional framework. Until recently, Malawi's child rights framework was characterized by a list of archaic laws. However, in 2010, Parliament passed the Child Care Act No. 22 of 2010 which overhauled the child rights law framework in the country.

## 1. INTRODUCTION

Malawi has an estimated population of 12 million people. The latest census indicated that half of the population are persons below 18 years of age.

Malawi is a democracy governed by a Constitution. Adopted in 1994, the Constitution contains a Bill of Rights. Chapter IV of the Constitution, which is the Bill of Rights, guarantees human rights to "every person" which includes children. The Malawian Constitution protects the specific rights of children in sections 23 and 42(2) (g). As the supreme law of the land, any law that contravenes the Constitution shall be declared void.

The Constitution clearly provides a clear outline of the status of international law within the domestic legal system. Therefore, while international agreements that were ratified by Malawi are considered to be part of the domestic law of

Malawi, those agreements that are ratified after 1994 are required to be domesticated by an Act of Parliament for it to be part of Malawi's law.

Customary international law too is considered to form part of the law of Malawi.<sup>1</sup>

Malawi is a State Party to a number of human rights instruments among which are the Convention on the Rights of the Child (CRC) and the two Optional Protocols and the African Charter on the Rights and Welfare of the Child (ACRWC).

Until recently, Malawi's children's rights framework was characterized by a list of archaic laws. However, in 2010, Parliament passed the Child Care, Protection and Justice Act of 2010, which overhauled the child rights law framework in the country and replace a number of laws, such as the Children and Young Persons Act.

## 2. GENERAL MEASURES OF IMPLEMENTATION

The Government of Malawi has undertaken a number of general measures of implementation in order to promote and protect the rights of children in the country. These measures include both institutional and substantive law measures some of which are highlighted below.

The Constitution of Malawi established a Human Rights Commission as the National Human Rights Institution of the country.<sup>2</sup> The Commission is an independent body with the mandate to receive, investigate and recommend measures in order to uphold human rights in the country. As a testament to its compliance with the Paris

<sup>1</sup> Section 211(3).

Principles, the Commission was accredited with an “A” grade by the International Coordinating Committee of National Human Rights institutions.

The Constitution also established the Office of the Ombudsman.<sup>3</sup> The Office has the mandate to investigate any alleged injustice, especially in the context of any decision made by public authorities. The Office of the Ombudsman enjoys a good deal of independence, as it is accountable to the Parliament.

Another important institution worth mentioning is the Malawi Law Commission. The Law Commission too is established by the Constitution.<sup>4</sup> Its main function is to review the laws of Malawi against the Constitution and international standards.

Children’s rights related issues are the main responsibilities of the Ministry of Gender, Child Development, and Community Development. Within the Ministry, the Child Development and Welfare Department is directly responsible for children’s rights related issues. Apart from providing direct support to children, families and communities, the Department coordinates Government’s efforts on child rights. With the adoption of the National Plan of Action for Orphans and Other Vulnerable Children (2005-2009), the role of the Ministry in service delivery to orphans and vulnerable children has been strengthened.

In 2009, the UN Committee had regretted the non-finalisation of the National Plan of Action which meant the absence of a comprehensive children’s policy in the country. The absence of a comprehensive children’s policy also meant absence of an accountable national body with clear authority on child-related issues.

### 3. DEFINITION OF THE CHILD

While it is difficult to mention that there is an overarching definition of a child in the Malawi Constitution, it is notable that Section 23 defines the word “children” for its purposes as persons below the age of 16 years.<sup>5</sup> The Child Care, Protection and Justice Act (2010) gives a similar definition under Article 2. Despite the recommendation of the Malawi Law Commission that the age limit be extended to 18 years, it is unfortunate that the Child Care, Protection and Justice Act defines a child as a person below the age of 16 years.<sup>6</sup> In the context of setting minimum ages for various activities, the Constitution has some relevant provisions. For instance, it allows marriage, upon fulfilment of some conditions, for persons between the ages of 15 and 18. It also sets the voting age at 18 years.<sup>7</sup>

A number of other subsidiary laws provide for minimum ages. The Marriage Act sets the minimum age for marriage at 21.<sup>8</sup> Thus there is a lack of clarity with respect to the minimum age for marriage in Malawi. With regard to the minimum age of criminal responsibility Article 70(1) of Children and Young Persons Act 2001 conclusively presumes that no child under the age of 10 years can be guilty of an offence. Furthermore, it shall not be presumed that a child aged 10 years or over is incapable of committing an offence. According to the Adoption of Children Act (Cap 26:01 of the Laws of Malawi), any person below the age of 21 can be adopted.

While there is no explicit minimum age for sexual consent under the law, the Penal Code notably criminalises the Act of any person engaged in sexual intercourse with a child (a child below the age of 16 years) and provides for punishment of 14 years imprisonment.<sup>9</sup> A boy below the age of

<sup>2</sup> Section 129 of the Constitution.

<sup>3</sup> Section 120 of Constitution.

<sup>4</sup> Section 132 of the Constitution.

<sup>5</sup> Section 23(5) of the Constitution.

<sup>6</sup> Malawi Law Commission *Report of the Law Commission on the review of the Constitution* (Lilongwe: Government Printer, 2007) 30-32.

<sup>7</sup> Section 77(1)(b) of the Constitution.

<sup>8</sup> Chapter 25:01 of the Laws of Malawi.

<sup>9</sup> Art 160(b) ,Penal Code Act No 1 2011.

12 years is irrebuttably presumed to be incapable of having sexual intercourse.<sup>10</sup> A young prisoner is defined as a person under the “apparent age” of 19 years,<sup>11</sup> while a young person is defined as any person below the age of 18 years under the Liquor Act (Cap 50:07 of the Laws of Malawi).

**Table showing the definition of a child in Malawi**

Category	Age
Definition of a child	16
Age of majority	21
Minimum age of employment	14
Minimum age of sexual consent	16
Minimum age of marriage	15
Minimum age of criminal responsibility	10 and 12 for sexual offence by boys
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The Constitution of Malawi has been amended recently to entrench the best interests of the child principle expressly. The Child Care, Protection and Justice Act also incorporates the principle explicitly. In fact, the best interest of the child principle is mentioned in different parts of the Act almost 20 times. For

instance, in Section 8(3), the Act stipulates that “[t]he child justice court shall consider the best interests of the child and the importance of the child, on account of age, being with his mother when making an order for custody or access”. In the past, in recognition of the important role of including the principle in domestic legislation, the Malawi Law Commission had recommended as early as 1998 that this principle should be included by way of an amendment to the Constitution.<sup>12</sup>

**Non-discrimination:** The Constitution explicitly incorporates the rule against discrimination on children. It states that “all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law”.<sup>13</sup> The Constitution also provides for a general non-discrimination provision in Section 20(1). However, the Child Care, Protection and Justice Act does not have a general non-discrimination provision for children similar to Article 2 of the CRC and Article 3 of the ACRWC. However the Child Care, Protection and Justice Act provides that parents or guardians have the “responsibilities whether imposed by law or otherwise towards the child which include the responsibility to protect the child from...discrimination.”<sup>14</sup>

*De facto* discrimination within the family, in schools and communities against the girl child, children with disabilities, children from minority groups and orphans and vulnerable children exists. The need to address *de facto* discrimination is also as urgent as the need to address discriminatory provisions in the law books, such as in the Wills and Inheritance Act (Cap 10:02 of the Laws of Malawi) which does not comply with the non-discrimination rule when applied against the girl child.

<sup>10</sup> Section 14 of the Penal Code.

<sup>11</sup> Section 2 of the Prisons Act (Cap 9:02 of the Laws of Malawi)

<sup>12</sup> See Malawi Law Commission *Law Commission Report on the technical review of the Constitution* (Zomba: Government Printer, 1998) 260.

<sup>13</sup> Section 23(1) of the Constitution.

<sup>14</sup> Section 3(1)(b)(i) of the Act.

**The right to life, survival and development:** The Malawian Constitution does recognise the right to life and prohibits arbitrary deprivation of life.<sup>15</sup> In addition, it expressly recognises the right to development in the Constitution.<sup>16</sup>

Unfortunately, the Child Care, Protection and Justice Act does not recognise the right to life explicitly. However, the concepts of survival and development are incorporated in the Act. For instance, parents and guardians have the duty to “provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention.”<sup>17</sup> As a general rule, in the application of the provisions of this Act, due regard shall be had to duties and responsibilities of the child to “contribute towards the child’s own development into being a useful member of the society...”<sup>18</sup>

**Respect for the views of the Child:** The Constitution does not expressly recognise the child’s right to participate. However, the Constitution provides that “every person shall have the right to freedom of opinion, including the right to hold and receive opinions without interference and to impart opinions”.<sup>19</sup> It also enshrines the right to freedom of expression.<sup>20</sup>

The Child Care, Protection and Justice Act, however, entrenches the principle of child participation in different contexts. In instances of preliminary inquiries, one of the objectives of the exercise is

to “encourage participation of the child and his or her parent, guardian, or appropriate adult in decisions concerning the child”.<sup>21</sup> One of the factors that a child justice court has to consider before deciding on a matter involving children is the views of the child.<sup>22</sup> Moreover, before making an adoption order, due consideration should be given to the wishes of the infant, having regard to the age and understanding of the infant.<sup>23</sup>

The National Youth Policy adopted in 1996 which was made into law in 1996 through the National Youth Council Act,<sup>24</sup> also offers children an opportunity to participate. Children in Malawi also participate in the Youth Parliament, which has been convened regularly for over a decade now.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

Section 23(2) of the Constitution provides that “[a]ll children have the right to a given name and a family name and the right to nationality.”<sup>25</sup> Under the Births and Deaths Registration Act,<sup>26</sup> registration is compulsory only for children whose parents are or either of them is not of African origin or race.<sup>27</sup> According to the Child Care, Protection and Justice Act, “[u]nless the duty to do so has been conferred on another authority, a local government authority shall keep and maintain a register of the births and deaths of children in the area of its jurisdiction”.<sup>28</sup> The Act further provides what the contents of the

<sup>15</sup> Section 16.

<sup>16</sup> Section 30.

<sup>17</sup> Section 3(1)(b)(ii) of the Act.

<sup>18</sup> Section 4(e) of the Act.

<sup>19</sup> Section 34 of the Constitution.

<sup>20</sup> Section 35.

<sup>21</sup> Section 99(3)(g) of the Act.

<sup>22</sup> Section 8(4) of the Act.

<sup>23</sup> Section 4(b) of the Adoption Act.

<sup>24</sup> Act No 22 of 1996.

<sup>25</sup> Section 23(2).

<sup>26</sup> Chapter 24:01 of the Laws of Malawi.

<sup>27</sup> Section 18(1).

<sup>28</sup> Section 76(1) of the Act.

registration of the birth or death certificate should be. Accordingly “[t]he registration of the birth or death of a child ...shall be with sufficient particulars including in particular...the name and gender of the child; ...the name of the parents of the child; ...place of birth and the home origin of the child; ...”.<sup>29</sup>

The Act, in Sections 72 and 77 respectively, also provides for specific provisions for the registration of children with disabilities and children that are affected by HIV/AIDS. This is a positive move in order to facilitate the registration of these groups of marginalized children.

In 2009, during the consideration of the Periodic State Party Report of Malawi, the UN Committee expressed concern that the National Registration Bill had not yet passed into law and that many children were still without proper proof of age and at risk of exploitation and abuse. The Committee recommended that Malawi expedite the enactment of the Bill as a matter of priority, and urged it to ensure the allocation of adequate financial, human and other resources to registration offices, as well as take measures to ensure that the population, particularly those in rural areas, have access to the registration offices.

Under Section 9 of the *Malawi Citizenship Act* (1966), a Malawian woman loses her national citizenship when she marries a non-Malawian man<sup>30</sup>. This is in direct contravention of the Constitution of the Republic of Malawi.<sup>31</sup>

According to Section 23(3) of the Constitution, children in Malawi have the right to “know and to be raised by their parents”.<sup>32</sup> The Constitution also provides that “every person shall have the right to freedom of opinion, including the right to hold and receive opinions without interference and to impart opinions”.<sup>33</sup> It also enshrines the right to freedom of expression,<sup>34</sup> the right to freedom of association,<sup>35</sup> the right to freedom of opinion,<sup>36</sup> the right of access to information,<sup>37</sup> and the right to freedom of assembly.<sup>38</sup>

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Child Care, Protection and Justice Act states that parents have the responsibility to “protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards” and “provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development”.<sup>39</sup> This right is supported by Section 22(1) of the Constitution, which states that the family is “the natural and fundamental unit of society which is entitled to protection by society and the State”.

In addition, “[a] parent or guardian shall be responsible for the registration of the birth of his or her children”.<sup>40</sup> Moreover, under the guise of exercising parental duties and responsibilities, a

<sup>29</sup> Section 76(2) of the Act.

<sup>30</sup> Chapter 15:01 of the Laws of Malawi (2002).

<sup>31</sup> Section 24(2).

<sup>32</sup> Section 23(3) of the Constitution.

<sup>33</sup> Section 34 of the Constitution.

<sup>34</sup> Section 35.

<sup>35</sup> Section 32.

<sup>36</sup> Section 34.

<sup>37</sup> Section 37.

<sup>38</sup> Section 38.

<sup>39</sup> Section 3.

<sup>40</sup> Section 3(2) of the Act.

parent cannot act in any way that would be incompatible with any court order made in respect of the child.<sup>41</sup> For the purpose of safeguarding the welfare of the child, a person who does not have parental responsibility for a child but has the duty to care for a child has the mandate to do what is reasonable under the circumstances.<sup>42</sup> All these duties and responsibilities provided for in the Act are in addition to those imposed by Section 23 of the Constitution.

In the past, child maintenance used to be obtained through the Affiliation Act. With the coming into force of the Child Care, Protection and Justice Act, the issue of maintenance for children is regulated in further detail. For instance, while Section 12 generally refers to maintenance orders, according to Section 9(1) of the Act, “[w]here a parent or any other person who is legally liable to maintain a child ...neglects to maintain the child or to make the contribution”, a long list of persons including the child, the parent of the child, the relatives of the child, a social welfare officer, a teacher or any other appropriate person with authority may apply against such person to the child justice court for a maintenance order of the child. According to the Penal Code and Section 22 of the Child Care, Protection and Justice Act, a parent, guardian or any other person having lawful care or charge of a child under the age of 14 years and neglects or deserts such child<sup>43</sup> commits an offence. Section 2 of the Adoption of Children Act provides that children younger than 21 years may be adopted. The person applying to be an adoptive parent must not be less than 25 years old.<sup>44</sup> An adoption by a person younger than 25 years may be permitted where the applicant and the child are related and the court sanctions it.<sup>45</sup>

There is currently a cash-transfer programme as an innovative way to help the poorest households – while simultaneously increasing school attendance – in order to end the cycle of poverty for future generations. Malawi’s social cash-transfer programme began as a pilot project in Mchinji district in 2006 and has since been extended to more districts.

In 2011, the Malawi Parliament passed the Deceased Estates (Wills, Inheritance and Protection) Act,<sup>46</sup> in order to address the problem of property grabbing by relatives of the deceased. This phenomenon adversely affects women and children, especially those that are infected or affected by HIV/AIDS.

## 7. HEALTH AND DISABILITY

In Malawi, the right to health is mainly implemented through the Essential Health Package (EHP) that contains the priorities of the Ministry of Health. These priorities include issues such as major causes of morbidity and mortality that disproportionately affect the poor and most vulnerable groups in society. The right to health is also one of the main priority areas of the Government in its vision 2020.

The Child Care, Protection and Justice Act, while it does not explicitly provide for the right to access to health care, it contains some provisions that are intended to promote a child’s right to health. For instance, the provision on social or customary practice that is harmful to the health or general development of the child,<sup>47</sup> and the provision on HIV/AIDS affected children in Malawi.<sup>48</sup>

<sup>41</sup> Section 3(3) of the Act.

<sup>42</sup> Section 3(4) of the Act.

<sup>43</sup> Section 164.

<sup>44</sup> Section 3(1).

<sup>45</sup> Section 3(2).

<sup>46</sup> Deceased Estates (Wills, Inheritance and Protection) Act, 2010.

<sup>47</sup> Section 80 of the Act.

<sup>48</sup> Section 77 of the Act.

Malawi ratified the Convention on the Rights of Persons with Disabilities on 27 August 2009. The domestication of this instrument is still ongoing. However, there are two provisions in the Child Care, Protection and Justice Act that directly address children with disabilities. Apart from the registration of children with disabilities under Section 72, already mentioned above, a child justice court has the duty to ensure that “children with disabilities are accorded assistance to meet their special needs where necessary”.<sup>49</sup>

## 8. EDUCATION

According to Article 13(f,ii) of the Constitution the state has the obligation to make primary education compulsory and free to all citizens of Malawi. Since 1994, the Government of Malawi has strived to provide free primary education. Despite the abolition of school fees in 1994, over 10% of eligible children in Malawi do not attend school. Partly because the 1994 Fee-Free primary policy was not adequately planned for, there is still a severe shortage of teachers, which was compounded by a fairly incoherent teacher deployment system as well as an extensive shortage of teaching and learning materials in schools. Access, retention and completion rates remain unsatisfactory due to a complex web of related factors around tradition, culture and poverty. Primary education is also not compulsory.

Government is undertaking some programmes to facilitate access to primary education. For instance, the Girls' Attainment of Basic Literacy and Education programme which sought to increase girls' enrolment, achievement and persistence in schools by paying primary school fees for non-repeating girls can be highlighted.

Corporal punishment is unlawful in schools under Section 19 of the Constitution. There were however reports that a review of the Education Act was planned. School environments in Malawi are generally unsafe, with cases of bullying, gender-based violence and abuse, and corporal punishment still frequently reported.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Section 23 of the Constitution addresses a number of violence against children related issues. In particular, Section 23(4) of the Constitution protects children from economic exploitation or any treatment, work or punishment that is likely to be hazardous, interfere with their education, or harmful to their health or physical, mental, spiritual or social development.<sup>50</sup>

Child abduction is prohibited by Section 78 of the Child Care, Protection and Justice Act. Child trafficking is also prohibited. In this regard, Section 79(a) provides that “[a] person who takes part in any transaction the object or one of the objects of which is child trafficking commits an offence and shall be liable to imprisonment for life”. Trafficking is defined under Section 79(b) as “...the recruitment, transaction, transfer, harbouring or receipt of a child for the purposes of exploitation”. The sale of a child or use of a child as a pledge to obtain credit; as well as use as surety for a debt or mortgage; or the use of force on a child into providing labour for the income of a parent, guardian or any other person are also explicitly prohibited under Section 82 of the Act.

<sup>49</sup> Section 145(d) of the Act.

<sup>50</sup> Section 23(4).

Given the fact that there are a number of harmful practices in Malawi that infringe on children's rights, the Child Care, Protection and Justice Act prohibits anyone from subjecting a "...child to a social or customary practice that is harmful to the health or general development of the child".<sup>51</sup> For instance forcing a child into marriage or forcing a child to be betrothed are specifically prohibited under Section 81 of the Act. Though the practice of Female Genital mutilation exists in some communities there is no law prohibiting it.<sup>52</sup>

The Act places a duty on a social welfare officer who has reasonable grounds to believe that any of these prohibited acts have taken place in relation to a child, to remove and temporarily place the child in a place of safety.<sup>53</sup>

Despite the fact that the Malawi Law Commission completed a draft comprehensive anti-trafficking legislation, which specifically prohibits all forms of human trafficking, it appears that the document remains a draft. In 2010, the Penal Code Section 147 was amended to specifically prohibit trafficking for sexual exploitation.

The Employment Act,<sup>54</sup> in an effort to complement Section 23(4) of the Constitution provides that no person under the age of 14 years may be employed in any public or private agricultural, industrial or non-industrial undertaking.<sup>55</sup> Therefore, according to the Employment Act, any economic activity by a child under 14 years of age is child labour. However, this prohibition has an exception and does not apply to work done in homes, vocational technical schools or other training institutions.<sup>56</sup>

As mentioned above, corporal punishment is unlawful in the penal system as a sentence for

crime and as a disciplinary measure in penal institutions under Section 19 of the Constitution. The Child Care, Protection and Justice Act provides, under Section 176, for the manager of a reformatory centre or safety home to "make rules not repugnant to, or inconsistent with, this Act for the maintenance of discipline at the centre or home". A regulation by Ministry of Education and Vocational Training bans corporal punishment in schools.<sup>57</sup> Corporal punishment would appear to be lawful in private institutions and in non-institutional forms of care.

The Constitution, in Section 42(2)(g), provides a long list of rights of children that come in conflict with the law. These rights include the right not to be sentenced to life imprisonment without a possibility of release; to be imprisoned only as a last resort and for the shortest period of time; to be separated from adults when imprisoned; to be treated in a manner consistent with the promotion of their sense of dignity and to be treated in a manner which takes into account their age and the right to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.

As the title of the Act- the Child Care, Protection and Justice Act- indicates, the Act governs issues related to children in conflict with the law and builds on Section 42(2)(g) of the Constitution. In fact, the Act governs child justice issues in a fairly comprehensive manner by providing for age determination procedures, diversion and diversion processes , preliminary inquiry, children's right to legal representation, rules for children in custody, a child justice court and other important child friendly substantive and procedural rights.<sup>58</sup>

<sup>51</sup> Section 80.

<sup>52</sup> Concluding observation second periodic report 2009 CRC/C/MWI/CO/2 30

<sup>53</sup> Section 84(1).

<sup>54</sup> Act No 6 of 2000.

<sup>55</sup> Section 21(1).

<sup>56</sup> Section 21(1).

<sup>57</sup> Concluding observation second periodic report to the UN Committee 2009

<sup>58</sup> See Part III-Part VIII of the Act.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 16/09/1999
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 20/05/2005
Convention on the Rights of the Child (CRC), 1989	Ratification, 02/01/1991
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 16/09/1999
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Ratification, 07/10/2009
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Signature, 27/08/2009
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 19/11/1999
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 19/11/1999
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	1 Aug 2000	17 Oct 2007	-

3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Malawi

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Child Helpline International and Member Help lines	January 2009	None
The Human Rights Consultative Committee (HRCC) & Plan International Malawi	September 2008	

4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC	UN Committee
None	None

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN MOZAMBIQUE

## COUNTRY BRIEF

### ABSTRACT

The Government of Mozambique has undertaken a number of general measures of implementation in order to promote and protect the rights of children in the country. These measures include both legal and institutional reformation. The government of Mozambique has made considerable effort to harmonise the child rights framework with international standards as evidenced by the enactment of the children's Act No. 7 of 2008.

### 1. INTRODUCTION

The country has an estimate of 21,854 000 people about half of which are children.<sup>1</sup> The majority of the population lives in the remote rural areas and depends on agriculture.

The Republic of Mozambique follows a semi-presidential type of government with members of the National Assembly or (*deputados*) and the President ascending to their positions through a system of direct, universal, and periodic elections.<sup>2</sup> The Constitution is the supreme law of the land, and it contains a number of human rights provisions, including provisions specifically addressing children's rights.

Mozambique follows the civil law legal system where lower courts are not bound to the decisions

of higher courts. It also has a semi monist type of relationship of international and domestic legal norms. Ratified international law instruments are only binding if it is published in the *Boletim da Republica*, the country's official Government gazette.<sup>3</sup>

Like other countries in the region, Mozambique has ratified and is therefore bound by many international legal instruments dealing with the rights of the child. Among other relevant instruments, it has ratified the Convention on the Rights of the Child (CRC) and its two Optional Protocols, and the African Charter on the Rights and Welfare of the Child (ACRWC). Importantly, Mozambique has made no reservations in respect to any of these instruments. The full commitment to such international law norms regulating children's rights represents a great opportunity to advance these rights at the domestic level.

The CRC and the ACRWC as well as other relevant instruments containing provisions that can be used to advance children's rights have been domesticated and published in the Government gazette. The official publication of these instruments has given them domestic legal effect and has allowed the courts to apply them directly when resolving dispute involving children. However, the practice shows that courts have hardly used these instruments to resolve disputes as they rather prefer domestic instruments.

<sup>1</sup> See details at <http://www.tradingeconomics.com/mozambique/population>, accessed on 24 February 2012.

<sup>2</sup> Para 25 República de Moçambique, 'Relatório do Governo da República de Moçambique nos Termos do artigo 40 do Pacto, Maputo February 2012, available at <http://www2.ohchr.org/english/bodies/hrc/hrcs108.htm>, accessed on 24 February 2012.

<sup>3</sup> See Article 18 of the Constitution.

The Government has made considerable efforts to live up to its obligations emanating from the ratification of child-related international instruments such as the CRC and the ACRWC. For instance, it has adopted a new Children's Act No. 7 of 2008, and it enacted the Act No. 8 of 2008 on Jurisdiction over Minors which deals with children who come in contact with the justice system. There are several other instruments which contain provisions that are directly applicable to children, including, for example, the Family Act No. 10/2004, dated 25 August 2004 (Act No. 10/2004)<sup>4</sup>, the Prohibition of Human Trafficking Act No. 6/2009, dated 9 July 2009 (Human Trafficking Act)<sup>5</sup>, and the Domestic Violence No. 29/2009, dated 29 September 2009 (Domestic Violence Act).<sup>6</sup> These instruments play a major role in promoting children's rights and protecting their interests.

## 2. GENERAL MEASURES OF IMPLEMENTATION

Generally, all rights protected in the Constitution are also applicable to children. However, the drafters of the Constitution took a further step and incorporated a provision specifically dealing with children's rights. Article 121 is the main constitutional provision speaking to these rights and it affords children with the right to protection from the family, the society and the State. This provision also prohibits the discrimination of children on the grounds of their place of birth and it protects them against ill-treatment and child labour.

In Mozambique there are many plans and policies which may either directly or indirectly impact the lives of children. Examples include the National Action Plan for Children (*Plano de Acção para as Crianças*), and the Action Plan for Orphans and Vulnerable Children (*Plano de Acção para as Crianças Orfãos e Vulneráveis*).

A National Council on Child's Rights (Council) was established to coordinate and monitor the implementation of the Children's Act.<sup>7</sup> However, the Council has not become operational and there are concerns about its capacity to undertake its tasks given the very limited budget allocated to it.<sup>8</sup>

Mozambique has established a National Human Rights Commission, but it has not yet become operational.<sup>9</sup> The main challenge in this regard is that the law establishing this body is general and does not give the National Human Rights Commission any specific mandate for it to deal especially with matters involving children's rights.

## 3. DEFINITION OF THE CHILD

In line with the CRC and the ACRWC, the Mozambican Children's Act defines a child as every person below the age of 18 years.<sup>10</sup>

The minimum age for marriage is 18 years. However, under exceptional situations and with the authorisation of parents or legal guardians children may get married as early as 16 years.<sup>11</sup> Regarding the age of criminal responsibility Article 42 of the Penal Code states criminal responsibility

<sup>4</sup> See Law No. 10/2004, dated 25 August 2004 (Family Law of Mozambique), which repealed the provisions in the 1966 Civil Code which dealt with family matters.

<sup>5</sup> See Law No. 6/2009, dated 9 July 2009.

<sup>6</sup> Law No. 29/2009, dated 29 September 2009.

<sup>7</sup> Article 71 of the Children's Act.

<sup>8</sup> See Para 11 CRC Committee Concluding observations to 2<sup>nd</sup> periodic report submitted by State Party (CRC/C/SR. 1431).

<sup>9</sup> See Law No. 33/2009 on the establishment of the National Human Rights Commission.

<sup>10</sup> Article 3(1).

<sup>11</sup> See Family Act.

is acquired at the age of 16 however Article 43 of the Code establishes that minors aged between 10 and 14 who acted without knowing what they were doing at the moment of committing the punishable act, may not be held criminally liable.<sup>12</sup>

The minimum age of admission to employment is 15 years.<sup>13</sup> However, the law allows the Government, under a specific diploma, to define the condition in which children between 12 and 15 years can be admitted to employment.<sup>14</sup>

Table showing the definition of a child in Mozambique

Category	Age
Definition of a child	-
Age of majority	21
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	18
Minimum age of criminal responsibility	16
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The child's best interest principle is not encapsulated in the Constitution. However, Article 9 of the Children's

Act contains the *superior interesse da criança* principle, which translates into English as the best interest of the child principle. The law defines the child's best interest principle as everything required to defend and safeguard the child's integrity, identity, and development and maintenance of his or her well-being.<sup>15</sup> Importantly, the principles contained in the Children's Act override all other instruments containing less protective standards for the promotion and protection of children's rights.<sup>16</sup>

**Non-discrimination:** In Articles 36 and 44 of the Constitution, everyone is equal before the law and all individuals have a duty to respect their fellow beings without any form of discrimination. The principle of non-discrimination is incorporated in several statutes regulating children's rights. For instance, Article 4 of the Children's Act protects children from discrimination on the grounds of colour, race, sex, religion, and ethnicity, place of birth, socio-economic status, health status and disability.

**The right to life, survival and development:** Article 40 of the Constitution protects the right to life for all citizens (a category of which includes children). In view of protecting children's right to life the Children's Act includes a definition of the scope of the right to life. It states that the right to life shall include respect for the child's life, his or her physical and moral integrity and respect for the integral development of the child. The child's survival and development are linked to numerous other rights enshrined in the Constitution and other subordinate instruments. For instances, the protection afforded to women during prenatal period of pregnancy and the protection given to children to enjoy the right to health and education encapsulates these paramount principles.<sup>17</sup>

<sup>12</sup> Initial State Party Report 2000 to the CRC Committee & 2<sup>nd</sup> state party report to the CRC Committee 2008

<sup>13</sup> Article 26(1) Act No. 23/2007, dated 1 August 2007.

<sup>14</sup> Article 26(2) Act No. 23/2007, dated 1 August 2007.

<sup>15</sup> Article 9(3).

<sup>16</sup> Article 9(2).

<sup>17</sup> See Articles 13 and 14 of Children's Act of 2008.

**Respect for the views of the child:** In line with the CRC and the ACRWC, the law in Mozambique indicates that the views of the child must be given weight when it relates to situations where the child comes into contact with the system of administration of justice.<sup>18</sup> Moreover, the child must be heard and his or her opinion must be given due consideration prior to placement of the child in alternative care institutions such as adoption and foster family.<sup>19</sup>

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

Upon birth, every child is entitled to the right to be registered.<sup>20</sup> Ensuring that every child gets registered is still challenge as many are born in the rural areas where it is difficult to access the institutions mandated to register children. The Government is aware of the problem and is systematically making efforts to address the situation. Among these efforts, teams of professionals working under Civil Registrar's Office are being deployed to rural areas for purposes of undertaking registration campaigns.

Article 26(2) of the Children's Act articulates the child's right to have a name and to use the surname of his or her family. Although it is not a contentious matter, there is no provision specifically allowing children to be registered in the family name of their mothers. This would be particularly important in a context where many girls fall pregnant and their partners sometimes refuse to accept the responsibility over the children.

The Constitution grants nationality to all persons born in Mozambique provided that they are children of Mozambican nationals or that they are born of parents who are stateless.<sup>21</sup> The Mozambican nationality is also granted to children of Mozambican parents who are born abroad, provided that they declare by themselves after they achieve the age of majority or if their parents declare on their behalf while they are under age, that they so wish to have Mozambican nationality.<sup>22</sup>

In addition, the Constitution makes provision for everyone who is adopted by a Mozambican national to acquire nationality.<sup>23</sup> Moreover, children of a foreign national who acquire Mozambican nationality may become Mozambican.<sup>24</sup>

Article 26(4) stipulates that "[t]he State shall, within the terms of the law and without illegal interference, ensure that the child preserves his or her right to identity, including nationality, family name and family relations." In line with this provision the practice shows that it is very difficult for foreign nationals to adopt children in Mozambique, especially if they intend to take the children abroad. This could be attributed to the fact that, the State tries its best to retain the identity of the child by providing alternative child care.

The Constitutional provisions that are relevant for freedom of expression and the right to seek, receive and impart information; freedom of thought, conscience and religion; freedom of association and of peaceful assembly are applicable to children in appropriate circumstances.

<sup>18</sup> See Act No. 8/2008, dated 15 July 2008.

<sup>19</sup> Article 36(2) Children's Act.

<sup>20</sup> Article 26(3) Children's Act.

<sup>21</sup> Article 23(1).

<sup>22</sup> Article 23(3).

<sup>23</sup> Article 29.

<sup>24</sup> Article 28 of the Constitution.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Both the Constitution and the Children's Act emphasise the important role that families have in a child's upbringing. Parents are required to take into account the views of their children depending on their maturity and they must give children autonomy in view of allowing them to organise their own lives.<sup>25</sup>

The law affords all parents with equal responsibilities over their children. Irrespective of their financial situation, both the mother and the father have parental responsibilities over the child. Such responsibility includes ensuring the safety and maintenance of children, the parental duty with regard to health care and education of children and the duty to protect children in view of promoting their wellbeing and development.<sup>26</sup> Parental responsibilities ceases when the child attains majority – which is 21 years.<sup>27</sup>

Children shall not be separated from their parents unless with a judicial decision to that effect. Such judicial decision may only be taken when it is proven that the child's stay with the parents is not favourable to the best interests of the child.

The Children's Act and the Family Law have many provisions dealing with alternative care for children deprived of parental care. The children concerned may be subjected either to tutorship, integration into a foster family or adoption and their assets may be administered by a person legally appointed.<sup>28</sup> It is worthy to note that these means of alternative care can only be established

by a judicial decision. Caution must however; be taken with regards to foster care. The legislation is by far inconsistent with the practice to the extent that foster care families take care of children irrespective of a judicial decision establishing legal fostering.

There are no rules governing review of placement for children placed in situations of alternative care, except when they are placed with foster care families or care institutions.<sup>29</sup> Moreover, in respect of adoption applications brought by foreign nationals, the *Tribunal de Menores* (Children's Court) held that this practice may flourish and work against children's best interests if there are not enough possibilities to ensure follow up of the child after the placement.

Domestic adoption is regulated in the Family Act No. 10/2004, dated 25 August 2004 (Act No. 10/2004).<sup>30</sup> In terms of the law, adoptions shall only take place if it brings concrete advantages to the adoptee and if it does not affect negatively the relationship between the adopting parent(s) and their other children.<sup>31</sup> Prior to adoption, it is also important to ensure that there is evident possibility that the adoptee will manage to integrate within in the adopting family. In addition to the general rules on adoption, the adoptee's consent must be sought if he or she is older than 12 years.<sup>32</sup> While there are many rules on domestic adoption in Mozambique, the law is relatively silent on intercountry adoption.

The Children's Act establishes strict restrictions on children leaving the country. Article 60 provides that “[n]o child may leave the country without his or her parents or legal representatives

<sup>25</sup> Article 284(3) Family Law.

<sup>26</sup> Article 284 Family Law.

<sup>27</sup> Article 283 of Family Law.

<sup>28</sup> See Articles 330, 374, 381 and 389.

<sup>29</sup> Article 75(1)(f) and(n) Children's Act and Article 385 Family Law.

<sup>30</sup> See Law No. 10/2004, dated 25 August 2004 (Family Law of Mozambique).

<sup>31</sup> Article 391 of Family Law of Mozambique.

<sup>32</sup> Article 396(1).

or without explicit authorisation of his or her parents. Where the parents have been restricted from exercising parental responsibilities, the child may only leave the country with judicial authorisation.

There is lack of legislation dealing with children of imprisoned parents/caregivers. Appropriate laws must be adopted to address the situation of this specific group of children who are vulnerable. Besides the lack of laws dealing with children of imprisoned parents/caregivers, the current legislation does not regulate the rights of children who are in prison with their parents/caregivers. However, detention facilities are often briefed on this matter on the basis of instruction issued by the Justice Department which oversees prisons facilities for sentenced prisoners.

## 7. HEALTH AND DISABILITY

As was noted above<sup>33</sup>, the Children's Act has many provisions dealing with survival and development of the child. Among these, the Act has provisions dealing with the right to life, health and the right to development in the family environment and with knowledge of the cultural and traditional aspects of the society.

Health care-institutions, particularly primary health care institution have the following duties:

- a) Keep records of their activities in separate files;
- b) Apply all their resources to ensure the identification of a new-born;
- c) Undertake tests to diagnose any such abnormalities on a new-born and provide the parents with the necessary guidance;
- d) Offer special services, treatment, and rehabilitation for children with disabilities;

- e) Offer basic knowledge, assistance and information concerning infants' health and nutrition, advantages of breast-feeding, hygiene and sanitation, preventions of accidents as well as reproductive health and family planning.
- f) Provide a birth declaration; and
- g) Ensure that the new born is kept together with the mother.<sup>34</sup>

There is no special attention given to adolescent's reproductive rights. However, there is a general provision placing duties on health care-institutions to implement campaigns and disseminate information on the mode of prevention of diseases.<sup>35</sup>

Article 58 of the Children's Act makes it expressly illegal to sale alcoholic substances to children. The provision also places a ban on the sale for children of products containing substances which may cause physical or mental dependence, even when such is caused due to inappropriate usage.

Children with disabilities are entitled to the right of receiving special assistance under the National Health System.<sup>36</sup> However, there is still a legal vacuum as no regulation have been adopted to ensure the implementation of this right.

## 8. EDUCATION

Article 113 of the Constitution commits the State to promote an educational strategy aiming to achieve national unity and to eradicate illiteracy. Article 38 of the Act of Protection and Promotion of Children's rights contains a provision regulating on the right to education for children. The Act prohibits the exclusion of children from schools on the basis of gender, religion, social, physical or health status.<sup>37</sup>

<sup>33</sup> See Section 4 on cardinal/general principles.

<sup>34</sup> Article 16 of the Children's Act.

<sup>35</sup> Article 19 of children's Act.

<sup>36</sup> Article 17(2) of Children's Act.

<sup>37</sup> Article 38(3).

The National Education System Act (Lei do Sistema Nacional de Educação) makes further provision for compulsory and free primary basic education for all. Under the law primary education is understood to include the first seven grades running from grade 1 to 7. Whilst the minimum age of enrolment in school was set at 6 years there is no age limit to complete primary universal education.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Article 121 of the Constitution affords children the right to protection from the family, from the society and from the State. This provision also affords protection to vulnerable groups of children including orphaned, disabled and abandoned children. In addition, Article 6 of the Children's Act provides that no child shall be subjected to negligent, discriminatory, violent and cruel treatment and it states that any violation of these principles is punishable by law.

In 2009, Mozambique adopted an Act on Prohibition of Human Trafficking and Particularly the Trafficking of Women and Children.<sup>38</sup> The Act imposes heavy punishment including lengthy measures of imprisonment for perpetrators.

Refugee children may also enjoy of the application of the *principles* set out in the Children's Act.<sup>39</sup> However, it is not clear if refugee children may enjoy the rights enshrined in the Act as well. Whereas courts have not been approached to interpret this provision, making reforms to the law

would give an opportunity to allow refugee children to be afforded with all other rights enshrined in the Children's Act.

Mozambique ratified the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. In line with the obligations emanating from this instrument the minimum age for recruitment to the military services is set at 18 years.

The economic exploitation of children, including child labour is prohibited.<sup>40</sup> Working children falling within the legally permitted age range are also protected and afforded with special rights, including protection from undertaking work during night shifts and the right to have a remuneration calculated on the basis of the amount of work and time the child spends at work. In addition, children shall not be paid less than the minimum wage and their remuneration shall not be less than two thirds of the amount paid to adult persons undertaking the same activity.<sup>41</sup>

Article 6 of the Children's Act provides that no "child shall (...) be subjected to negligent, discriminatory, violent and cruel treatment (...) and any such act constituting a violation of the principles set out hereto is punishable by law." This provision is complemented by the Domestic Violence Act which, particularly, prohibits violence against the girl child. In spite of internal regulations of the Ministry of Education prohibiting corporal punishment, it continues to be inflicted on children by teachers and parents throughout the State party.<sup>42</sup> In addition every citizen as well as public and private institution is responsible to ensure that the rights of the child contained in the Children's Act are not threatened or breached.<sup>43</sup>

<sup>38</sup> Act No. 6/2009, dated 9 July 2009.

<sup>39</sup> Article 2(2) Children's Act.

<sup>40</sup> Article 121 of the Constitution.

<sup>41</sup> See Article 47 of Children's Act of 2008.

<sup>42</sup> Concluding Observation to the second state party report to the CRC Committee 2009

<sup>43</sup> Article 48(10) Children's Act.

The Penal Code contains provisions punishing female rape and engaging in sexual intercourse with a girl below the age of 18 years. However, the Penal Code has no provisions regulating male rape and sexual offences committed against the boy child. Available data indicates that the country is in the process of reforming its penal legislation. It is hoped that the review process will take into account these fundamental issues affecting children's interests.

The Human Trafficking Act<sup>44</sup> contains provisions protecting everyone, including children, from being trafficked within and outside the country. This instrument also incorporates very strong punishment measures for perpetrators, including fines, arrest, and imprisonment for lengthy periods.

The Human Trafficking Act complements Article 62 of the Children's Act which requires the State to adopt special administrative and legal measures to avoid and to punish the abduction,

sale and the trafficking of children. However investigation and prosecution levels for trafficking offences in the country is limited.

Generally, there is no legislation or policies specifically catering for children living in the streets and street children. However it is a concern that the Penal Code provides for the arrest and detention of vagrant children (as a form of a "status offence") which may include this specific group of children in the streets.

Children in conflict with the law are subjected to specialised jurisdiction of the *Tribunal de Menores* (children's court) which have powers to apply criminal prevention measures.<sup>45</sup>

Whilst Mozambique has many different tribes the question of minorities has not been considered. Neither the Constitution nor the domestic instruments have any provisions dealing with the rights of minority groups.

<sup>44</sup> See Law No. 6/2009, dated 9 July 2009.

<sup>45</sup> See Article 27(e) and (j) of Jurisdiction of Minors Act of 2008.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
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Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 09/12/2005
Convention on the Rights of the Child (CRC), 1989	Ratification, 26/04/1994
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 15/07/1998
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 06/03/2003
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Accession, 30/01/2012
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 16/06/2003
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 16/06/2003
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	21 June 2000	26 Feb 2008	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Mozambique**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Save the Children Norway Mozambique Programme	September 2001	-

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC	UN Committee
None	None

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN NAMIBIA

## COUNTRY BRIEF

### ABSTRACT

Colonial era laws that were mainly inherited from South Africa still continue to operate in Namibia. These laws predate the CRC and the ACRWC and other relevant international instruments for children's rights. Although there has been some progress in recent years in harmonising laws relevant for children's rights, the Child Protection and Welfare Bill has still not yet been finalised. Once this draft is enacted, it will significantly accelerate Namibia's harmonisation efforts.

### 1. INTRODUCTION

Namibia has inherited the colonial legacy of Apartheid from South Africa, which brought significant hardship, racial discrimination, poverty, war, social inequalities and other injustices. The past situation created a torn apart society where family structures were disrupted and divided. Children were among the society that had been most adversely affected by the former regime.

Since independence in 1990, the Government of the Republic of Namibia has committed itself to address children's situation in a comprehensive manner. The Namibian Constitution (adopted 9 February 1990) that came into force on the country's independence is the supreme law of the country. The Constitution is committed to the preservation of human rights and freedoms. Hence, one of the strong elements of the

Namibian Constitution is its justiciable Bill of Rights which indicates that any person who alleges that his or her human rights has been violated or are likely to be violated may seek redress in the High Court.<sup>1</sup>

Namibia ratified the Convention on the Rights of the Child in 1990 and the African Charter on the Rights and Welfare of the Child in 2004. Amongst others, the Optional Protocol on the Involvement of Children in Armed Conflict is ratified in 2004 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography was ratified in 2002. Article 144 of the Constitution states that unless provided by the Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under the Constitution shall form part of the law of Namibia.

The Children's Act (No. 33 of 1960) still remains the main child rights law in the country. The Act addresses several issues such as protection of infants, prevention of neglect, ill-treatment and exploitation as well as rules pertaining to children in need of care and certain other children. However, despite the wide coverage of the Act, it still reflects the precepts of the old regime such as "black"<sup>2</sup> and "black children court".<sup>3</sup>

There are a number of other laws, such as the Children's Status Act (No. 6 of 2006), that address the rights of children. For instance, the Children's Status Act addresses custody, guardianship, access and inheritance in respect of children born outside of marriage, and provides a new administrative procedure for the appointment of

<sup>1</sup> Article 25(2) of the Constitution.

<sup>2</sup> See Section 1 of the Children's Act No 33 of 1960.

<sup>3</sup> As above.

guardians for any child who has no parent or guardian.

The Children's Act of 1960 remains the main law on children in Namibia because the Child Care and Protection Bill 2009 is a comprehensive proposed piece of legislation for protecting and promoting children's rights, although it has not been enacted. It deals with protective measures in the context of consent to medical intervention and surgical operation; HIV-testing; Child-headed household; harmful social, cultural and religious practices; Corporal punishment; Coercing, allowing, inducing or encouraging children to take liquor or other substances; Children lacking identification documentation; Refugee and migrant children; and Child labour and exploitation of children. The Child Care and Protection Bill was reviewed by a task force convened by the Ministry of Gender Equality and Child Welfare (MGECW), and is expected to be tabled in Parliament in 2012.

## 2. GENERAL MEASURES OF IMPLEMENTATION

The Ministry of Gender Equality and Child Welfare (MGECW) is currently the main government organ in charge of children's issues. The mandate of the Ministry includes service delivery, advocacy, and work on law reform as well as co-ordination of government's efforts in the move towards the realisation of children's rights in the country. The main programme of the Ministry, which is the Child Welfare Programme, aims to provide appropriate services and to protect children, particularly for Orphans and Vulnerable Children (OVCs). Within the MGECW, the Directorate of Child Welfare (DCW) is directly responsible for children's welfare.

While MGECW remains the main Government ministry in charge of children's issues, while the

Ministry of Justice is responsible for the general promotion, protection and compliance of human rights on behalf of the Government and for coordinating the Inter-Ministerial Committee on Human Rights and International Humanitarian Law (IHL). It is this same Committee that is responsible for the drafting of all the reports that are required according to human rights treaties that Namibia has ratified.

The Office of the Ombudsman, which was established by the Constitution and the Ombudsman Act (No. 7 of 1990), has also become an important component of Namibia's legal system, by addressing a number of human rights issues in the country. It is commendable that the Constitution and the Ombudsman Act, Act No 7 of 1990 spells out the key mandate of the Ombudsman with regard to human rights violations. In particular, it is worth mentioning that the Ombudsman established a Human Rights Committee that is composed of civil society including non-governmental organizations to put special emphasis on vulnerable groups such as women and children. It should also be mentioned as a positive move that this Office was accredited in April 2006 by the International Coordinating Committee of the National Human Rights Institutions.

## 3. DEFINITION OF THE CHILD

In Namibia, there is no overarching definition of a child that complies with the general international law and practice. Article 15 of the Constitution defines childhood as ending at the age of 16 even though this definition is contradicted with subsidiary legislation. For instance, the age of majority is defined by the Age of Majority Act (No. 57 of 1972),<sup>4</sup> which declares that any person below the age of 21 is considered a "minor". This means that, according to this Act, children acquire full legal capacity to act independently only at the age of 21. However Under the common law a

<sup>4</sup> This law too is inherited from South Africa.

minor becomes a major upon marriage regardless of his age while a minor girl who marries falls under the guardianship of her husband until she reaches majority.<sup>5</sup> The Child Care and Protection Bill lower the age of majority from 21 to 18 and repeal the Age of Majority Act.

While legislation is far from satisfactory in this regard, a number of minimum ages for various activities are provided in the legal system in Namibia. For instance, the Combating of Rape Act (No. 8 of 2000), raised the age of sexual consent to 14 for both boys and girls. The Combating of Immoral Practices Act states that the age for sexual consent is 16. Unfortunately, any child over the age of 7 can be convicted of a crime. The Namibian Constitution, in Article 15 protects against economic exploitation and hazardous work (for children under 16 years old), against work in factories or mines (for children under 14 years old) and against forced labour on farms.

**Table showing the definition of a child in Namibia**

Category	Age
Definition of a child	16
Age of majority	21
Minimum age of employment	14
Minimum age of sexual consent	16
Minimum age of marriage	18
Minimum age of criminal responsibility	7
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**Best interests:** The Namibian Constitution, in Article 15, incorporates the best interests of the child that should be included in all legislation. Other laws also incorporate the principle, including the Children's Status Act (No. 6 of 2006) and The Child Care and Protection Bill also fully incorporates the principle. Despite these laws some traditional practices and customary laws compromise children's best interests.

**Non-discrimination:** The Namibian Constitution, in Article 10, ensures equality and freedom from discrimination on any basis (sex, race, colour, ethnic origin, religion, creed or social or economic status) for all persons.<sup>6</sup> A number of other subsidiary laws address specific aspects of discrimination. For instance, the Children's Status Act (No. 6 of 2006) ensures that children born out of wedlock are not discriminated against. In the National Policy on HIV/AIDS (2007), a guiding principle is the reduction of stigma and discrimination against people affected or infected by HIV/AIDS. The Married Persons Equality Act (No. 1 of 1996) provides for joint custody and equal guardianship of children by married parents. It allows both married men and women to have independent legal domiciles. *De facto* discrimination against vulnerable children such as San children, children with disabilities and OVC's however continues unabated.

**The right to life, survival and development:** A number of constitutional provisions and provisions of other laws can be interpreted to provide for the right to life survival and development. For instance, following from the provisions of the Constitution relevant for the right to life, the death penalty is totally abolished in Namibia. Infant and under five mortality are high especially in the northern part of the country. Malaria remains a

<sup>5</sup> Initial State Party Report 1992,CRC/C/3/Add.12

<sup>6</sup> Article 10(1) and (2) of the Constitution.

problem far north and acute respiratory infections are common. The country has a high rate of inequality among regions and high levels of rural poverty. Most children attend school, although attendance is particularly low for Ovahimba and San.

**Child participation:** Legislation in Namibia does not fully and clearly incorporate children's right to participation in accordance with the CRC and the ACRWC. However, there are a number of platforms in Namibia under which children are both encouraged and enabled to voice their opinions. Some of these platforms are supported through legislation. For example, the Education Act (No. 16 of 2001) establishes LRCs at Namibian schools. Others, such as the Youth paper, an insert within a major daily newspaper, are private sector initiatives that improve on the situation of child participation.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Namibian Constitution, in Article 15, deals specifically with children's rights and has provisions on the right to a name and a nationality. The Births, Marriages and Deaths Registration Act (No. 81 of 1963) as amended by Act 5 of 1987 that provides for birth registration has been identified as needing an overhaul in order to cater for different child-naming practices in different cultures. Article 15 also incorporates the best interests of the child that should be included in all legislation, and specifically addresses the child's right to know and be cared for by his/her parents.

Article 4 of the Namibian Constitution confers Namibian nationality on children born to Namibian parent(s), or to permanent residents in Namibia at the time of their birth. Article 15 ensures the right of Namibian children to a name and nationality, and to know and be cared for by their parents.

The Births, Marriages and Deaths Registration Act (No. 81 of 1963) as amended by Act 5 of 1987 provides for birth registration. While there are a number of efforts aimed at improving birth registration in the country, the number of births that go unregistered still remains high.<sup>7</sup>

These efforts include initiatives by the Ministry of Home Affairs and Immigration (in charge of registering births) together with the Ministry of Health and Social Services to expand birth registration points around the country especially at hospitals. In addition, the Ministry of Home Affairs and Immigration set up a satellite office at some State hospitals where registration can be done immediately after birth. In recent years, each of Namibia's thirteen regions managed to establish an office that is responsible for registering births and deaths and issuing birth and death certificates, as well as for processing applications for other national documents.

Article 21 of the Namibian Constitution lists ten fundamental freedoms, including freedom of expression for all persons including children. Articles 19 and 21 of the Namibian Constitution protect the rights of freedom of association and of political views.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Namibian Constitution under Article 14 considers the family to be the natural and fundamental group unit of society. It also indicates that such unit is entitled to protection by society and the State. The Child Care and Protection Bill contains a number of provisions on parental responsibilities, and alternative care related issues.

<sup>7</sup> According to the 2006/7 Demographic and Health Survey (DHS), only 60% of children under the age of five have birth certificates.

Currently, the Children's Status Act (No. 6 of 2006) addresses custody, guardianship, access and inheritance in respect of children born outside of marriage, and provides a new administrative procedure for the appointment of guardians for any child who has no parent or guardian. Married Persons Equality Act (No. 1 of 1996) provides for joint custody and equal guardianship of children by married parents and allows both married men and women to have independent legal domiciles.

The Maintenance Act (No. 9 of 2003) clarifies legal duty of parents to maintain their children and provides for improved enforcement mechanisms for defaulters. The Act stipulates that all parents have a legal duty to maintain their children. Both parents share responsibility for the support of their children, regardless of whether the children are born inside or outside of a marriage. It also provides for retroactive support to cover pregnancy and birth-related medical expenses. While not often used in practice in promoting children's best interests, amongst other measures, this Act also extends powers of courts to assess financial position of responsible parents. The Act also provides improved procedures for courts to attach wages of defaulting supporters and allows caregivers (such as grandparents) to obtain support from absent parents.

The MGECW, in collaboration with partners is making efforts to educate the public on parental responsibilities. For instance, the Day of the Namibian Child was launched on 28 September 2001, as this was the day on which Namibia ratified the CRC. The Day is aimed at educating children on their basic rights and responsibilities. It is also a sensitisation exercise to parents on the importance of protecting and adhering to children's rights.

HIV/AIDS poses a serious threat in Namibia. It is estimated that around 22% of the Namibian population live with HIV. The disease has been the leading cause of deaths since 1996. According to the Ministry of Gender Equality and Child Welfare,

in 2006, there were approximately 114 thousand children in Namibia defined as orphans from which 77 thousand are orphaned by AIDS.

In 2005/06 the Government created a special fund for OVC's to be administered by the MGECW. A special fund is approved by Parliament as a budgetary vehicle for targeted activities. Both the National Policy on Orphans and Vulnerable Children (2004) and the Plan of Action for OVC (2007) ensure that all OVC's will have the same access to basic services as any other child.

The Child Care and Protection Bill will significantly improve Namibia's alternative care and parental responsibilities framework. Amongst others, it provides for adoption, intercountry adoption, and foster care. There are also indications that the Government is at an advanced stage of the ratification of the Hague Convention on Intercountry Adoption.

## 7. HEALTH AND DISABILITY

Article 95 of the Constitution of Namibia on the promotion of the welfare of the people generally promotes the right to welfare and health. This provision places an obligation on the State to take all related measures protecting children from abuse and factors that affect their health and general wellbeing. The annual national budget allocation to healthcare and social support services is the second highest next to the budget on education.

As mentioned above, HIV/AIDS remains a serious health and social problem in Namibia. For instance, the HIV/AIDS pandemic is one cause for the rapid rise in maternal mortality and the dramatic decrease in life expectancy. Since early 1990s, the creation of the Expanded Programme on Immunisation has helped to improve the health of children in the country. Many basic vaccines and antigens were not available to the broader population before this year. By 2007, Prevention of mother-to-child transmission (PMTCT) of HIV

services has been rolled out to 189 out of 331 healthcare facilities (57%; all the 35 hospitals and 153 healthcare centres and clinics)

Namibia ratified the Convention on the Rights of Persons with Disabilities in 2007. In 2004, Namibia's National Disability Council Act (No. 26 of 2004) was passed and it creates a council tasked with monitoring the implementation of Namibia's National Policy on Disability.

In an effort to address inequalities, Government has put in place a number of legislative and administrative measures for persons with disabilities including the National Pensions Act No 10 of 1992, which provides for old age and disability grants to old and disabled persons. Namibia is one of the few African countries that pay social grants of this nature. Maternity benefits as well as other benefits during the period of sickness are paid by Namibia's Social Security Commission.

However, some implementation challenges exist, and while support payments are available to people with disabilities, most do not receive the grant. Part of the problem relates to the fact that the delivery of social welfare services is administered by different ministries, resulting in fragmentation, duplication, confusion regarding roles and responsibilities in the social welfare sector, inefficiency and ineffectiveness in meeting the needs of clients. Lack of concrete statistics on the numbers of children with disabilities, the delayed establishment of the National Disability Council, and limited access for people with disabilities to public services also pose to be challenges.

## 8. EDUCATION

It is Article 20 (1)–(3) of the Constitution of Namibia that provides for the right to education. The Constitution promotes the right to education for all persons and makes primary education compulsory and free of charge, with an obligation

on the State to provide reasonable facilities. It further establishes the minimum age for the required completion of primary education at 16 years old.

Namibia was among the 180 countries that made the promise to ensure education for all by the year 2015. The Namibia Education for All (EFA) programme was launched in all 13 regions of the country in 2003. A National Action Plan was launched by the Ministry of Basic Education and submitted to UNESCO. The Plan was adopted by cabinet. The policy paper was designed to show the Government's commitment to provide universal basic education. Although Namibia has made good efforts in the EFA drive, there are still enormous challenges confronting the country in its efforts to achieve the EFA goals.

In 2001 Parliament passed the Education Act, (Act 16 of 2001) to give effect to the Constitution and other International Human Rights Instruments. The Education Act (No. 16 of 2001) defines the age of compulsory education. The Act allows for schools to establish a school development fund which can be levied at an amount of N\$ 500-00 (US\$ 68.50) and N\$ 250-00 (US\$ 34.24) for secondary and Primary schools respectively. This practice has compromised the Constitution's promise of a free primary education. The Act further provides that no child should be turned away as a result of non-payment of school fees, and provides for exemptions from school fees for those who cannot afford to pay, although these are not always respected at the implementation stage

Namibia has adopted the National Policy Options for Educationally Marginalised Children (Ministry of Basic Education, Sport and Culture, 2000). This Policy aims to ensure access to compulsory education for OVC, and also promotes school enrolment and attendance by girls. A Vocational Education and Training Programme aims to give young Namibians the skills required by the labour market, and also takes into account the needs of vulnerable groups of children.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

The Namibian Constitution, in Article 15 prohibits economic exploitation and hazardous work (for children under 16 years old), against work in factories or mines (for children under 14 years old) and against forced labour on farms. In addition, the Labour Act<sup>8</sup> prohibits child labour under the age of 14 and places restrictions on child labour between the ages of 14 and 16 and increases penalties for illegal use of child labour. Namibia ratified ILO Convention No. 182 on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour.<sup>9</sup>

Namibia's Labour Act goes even further than the Constitution in protecting children against exploitation and hazardous employment. It is illegal under this statute to employ a child under the age of 14 years for any purpose whatsoever.<sup>10</sup> It is illegal to employ any child between the ages of 14 and 16 for certain categories of hazardous work, including employment in mines, factories, electricity works, construction work, or in connection with the installation, erection or dismantling of machinery.<sup>11</sup> Children between the ages of 15 and 16 may not be employed to work underground in a mine. In addition, the Minister of Labour is empowered under the statute to further limit the types of employment which are permissible for children between the ages of 14 and 16. No distinction is made between part-time and full-time employment in the provisions on child labour. It is also illegal under the Labour Act for an employer to establish a scheme whereby an

employee's child is required to perform labour on behalf of his or her parent, where the child is under the age of 18. Violation of this prohibition constitutes a criminal offence.<sup>12</sup>

Article 8 of the Namibian Constitution recognises the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The law in Namibia does not prohibit corporal punishment in all settings. However In 1991 the Supreme Court of Namibia ruled that the constitutional guarantee of human dignity precludes the possibility of corporal punishment for both adult and juvenile offenders as well as the use of corporal punishment in schools.<sup>13</sup> Apart from that corporal punishment is prohibited in state schools through the Education Act (No. 16 of 2001). Moreover, in Namibia, the age for voluntary recruitment into armed forces is 18, and recruits are required to provide certified copies of identity documents and birth certificates before they are accepted.<sup>14</sup> The Refugee Recognition and Control Act of 1999 give effect to international standards and contain provisions that promote children's access to asylum procedures.

While child marriage is prohibited by law it still continues to be practiced in Namibia. Female Genital Mutilation, while rarely practiced, is not eliminated. In practice, there are some other harmful practices that discriminate against children but are however under reported.

In May 2009, the government enacted the Prevention of Organized Crime Act (POCA) of 2004, which explicitly criminalizes all forms of trafficking. The Act defines "trafficking" broadly.<sup>15</sup> The word "exploitation" is defined to include, the

<sup>8</sup> No. 11 of 2007.

<sup>9</sup> Ratified in 2000.

<sup>10</sup> See Section 3(2) of the Labour Act.

<sup>11</sup> See Section 3(3) of the Labour Act.

<sup>12</sup> See sections 42 and 108 of the Labour Act.

<sup>13</sup> Initial State Party Report 1992, CRC/C/3/Add.12

<sup>14</sup> Coalition to Stop the Use of Child Soldiers. 2008. *Child Soldiers Global Report 2008 – Namibia*.

<sup>15</sup> See Section 15 of the Act.

exploitation or the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". The Act prescribes stringent penalties (imprisonment for up to 50 years) on persons who participate in trafficking offenses or aid and abet trafficking offenders. There is also a separate law on trafficking named Prevention of Trafficking in Persons Act 2004. Government has ratified the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>16</sup>

The Combating of Immoral Practices Amendment Act (No. 7 of 2000) addresses a number of violence against children related issues. In particular, child prostitution is prohibited by this Act. Combating of Domestic Violence Act (No. 4 of 2003) Protects children against broadly-defined forms of domestic violence, including situations where a person perpetrates domestic violence on a third party in front of a child.

The Combating of Rape Act No 8 of 2000 provides an extensive definition of rape that focuses on acts of coercion (force) used by the perpetrator. According to this Act, the age for sexual consent remains at 14. For a child of 14 years to 16 years, rape is coercive if the perpetrator is three or more years older than the victim and coercive rape draws a harsher punishment. Apart from imposing stringent penalties on violators, the Act respects the privacy rights of victims. As a result, the Act requires that rape cases must be heard in closed court and prohibits publications of the information which could reveal the identity of the rape victim.

In Namibia, the crime of abduction is defined as unlawfully taking a minor (a child under the age of 21) out of the control of his or her custodian with the intention of enabling someone to marry or

have sexual intercourse with that minor.<sup>17</sup> Kidnapping, another common-law crime, consists of unlawfully and intentionally depriving a person of liberty of movement, or depriving the custodians of a minor of control of that minor. While kidnapping does occur in Namibia, it sometimes occurs in the context of a divorce or separation of the parents where one parent fails to comply with a court order awarding custody to the other parent, and is usually resolved without the need for police intervention.

The Child Justice Bill is still in draft form. It aims to regulate the juvenile justice system and ensure that children and young people in conflict with the law have access to diversion programmes. A Child Justice Task Force has been established to monitor legal issues relating to children. There are currently 15 WCPU's across Namibia. The staffs at these centres are police officers with additional training in counselling, case management and the prevention of family violence, amongst other things.

Children under the age of 7 years are not legally/criminally liable, while those between the ages of 7 and 14 years may be convicted of a crime or incarcerated, except under compelling circumstances. Children under the age of 18 are tried in special, closed courts, though they can be incarcerated if found guilty of a crime. The Child Justice Bill makes provisions for compensation based on restorative justice. The Namibian Constitution, in Article 15, provides for the protection of children under 16 years against detention. Criminal Procedure Amendment Act (No. 24 of 2003) classifies children as vulnerable witnesses and provides for special provisions such as the use of intermediaries and testimony via closed-circuit television to reduce the trauma of court appearances.

<sup>16</sup> Both ratified in 2002.

<sup>17</sup> See Section 19(2) (3) of the Children's Act, No 33 of 1960.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 23/07/2004
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 11/08/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 30/09/1990
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 23/07/2004
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Ratification, 16/04/2002
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 04/12/2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Ratification, 04/12/2007
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 15/11/2000
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 15/11/2000
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

## 2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

Committee	Initial Report	Second and Third
ACERWC	-	-
UN Committee	21 Dec 1992	6 Nov 2009

## 3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Namibia

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)	African Committee of Experts on the Rights and Welfare of the Child
None	None

## 4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC	UN Committee
None	None

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>

# HARMONISATION OF CHILDREN'S LAWS IN RWANDA

## COUNTRY BRIEF

### ABSTRACT

Rwanda has made significant progress in the harmonisation of children's laws in the last decade. This is evidenced not only through the Constitution of 2003, which specifically mentions the Convention on the Rights of the Child (CRC) in its Preamble, but also through a number of subsidiary laws notably the recently enacted Law No. 54/2011 Relating to the Rights and Protection of the Child in Rwanda. Other statutes include Law No.27/2001 of April 2001 on the Rights and Protection of the Child against Violence; Law No.22/99 of November 1999 complementing the First Book of the Civil Code and Law No.42/1988, just to mention a few. Some of these laws also establish the necessary institutional frameworks for the coordination, monitoring and evaluation of the implementation of children's rights in Rwanda.

### 1. INTRODUCTION

Rwanda is a landlocked country located in Central Africa with the size of 26,340 square kilometres and 11 million inhabitants. According to the National Institute of Statistics of Rwanda, Rwandan population was estimated to be 10,412,820 in the year 2010 whereas in the year 2011 the number was expected to be 10,718,379. The population below 15 years of age constitutes 42.3% of the general population.<sup>1</sup>

As far as the rights of the child are concerned, it is worth noting that amongst other instruments, Rwanda has ratified the CRC, the African Charter on the Rights and Welfare of the Child (ACRWC), ILO Conventions 182 and 138 on the Elimination of Worst Forms of Child Labour and Minimum Age of Employment, respectively, and the Hague Convention on Intercountry adoption. With regard to the legal status of ratified conventions within the Rwandan legal system, it should be noted that Article 190 of the Constitution of Rwanda provides that treaties ratified and published in the official gazette are part of the domestic law of Rwanda and are superior to the Acts of Parliament and thus can be invoked before the courts of law.

### 2. GENERAL MEASURES OF IMPLEMENTATION

The Constitution of 2003 of Rwanda, under Article 28, provides that 'every child has the right to special protection that his conditions might require from his family, the society and the State'. In its preamble, the Constitution refers to the Convention on the Rights of the Child. A number of rights enshrined in the Constitution that are accorded to everyone also apply to children.

As far as subsidiary domestic laws that have an impact on the rights of the child are concerned, Rwanda has undertaken a number of legislative measures. In June 2012, Rwanda adopted a comprehensive legislation on children, Law No. 54/2011 of 14/12/2011. Other laws on children include Law No. 01/2007 of 20/01/2007 relating to protection of persons with disabilities; Law No.

<sup>1</sup> National Institute of Statistics of Rwanda Population Statistics available at [http://statistics.gov.rw/index.php?option=com\\_content&task=view&id=152&Itemid=318](http://statistics.gov.rw/index.php?option=com_content&task=view&id=152&Itemid=318)

13/2009 of 27/05/2009 regulating labour relations in Rwanda; Law No. 18/2008 of 23/07/2008 relating to the punishment of the crime of genocide ideology (Official Gazette No. 20 of the 20<sup>th</sup> October 2008); Law No.27/2001 of April 2001 on the Rights and Protection of the Child against Violence; and Law No.22/99 of November 1999 complementing the First Book of the Civil Code, the Law No.42/1988. Although the Decree No.21/77 of 18 August 1977 of the Penal Code was adopted before adoption of the CRC and ARCWC, it should be noted that it has some relevant provisions as far as the rights of the child are concerned. Rwanda is currently reviewing its Penal Code.

The Ministry of Gender and Family Promotion (MIGEPROF) that has the mandate to develop policies and programmes for children and to oversee their implementation is the main ministry in charge of children's affairs. The MIGEPROF thus coordinates the different activities executed by various partners be it governmental or parastatal bodies, civil society or private sector, United Nations agencies or decentralised structures or in some circumstances children themselves. It is reported that placing the MIGEPROF in the Prime Minister's Office in 2005 solved the problem of cyclical transfer of child issues from one Ministry to another.

With regard to the protection and promotion of the rights of children, the National Commission for Human Rights (NCHR) plays a critical role. Article 177 of the Rwandan Constitution states that the NCHR is an independent institution mandated (1) to raise awareness and train people on human rights issues; (2) to consider violations of human rights; and (3) to initiate legal proceedings, if necessary. Within the NCHR, there is a Unit dealing with children's rights. The NCHR, which is said to be independent and permanent (Article 3

of Law No. 30/2007), has the mandate to deal with children's rights.

Furthermore, Rwanda has adopted a law establishing the National Commission for the Child (known as Law No. 22/2011 of 28/06/2011) and determining its mission, organisation and functioning (published in the Official Gazette No. Special of 12/07/2011). The missions of the National Commission for Children are provided under Article 7 of Law No. 22/2011 of 28/06/2011. It has general and specific mandates to promote and protect the rights of children in Rwanda. It should be noted that the National Commission for the Child has not been operational since the Executive Secretary as well as the members of the National Commission for the Child have not yet been appointed.<sup>2</sup>

There are other public institutions whose mandates deal with children in one way or another. These institutions include the National AIDS Control Commission (NACC); the National Youth Council; and the Rwanda Demobilisation and Reintegration Commission (RDRC).

### 3. DEFINITION OF THE CHILD

The new Law on the Rights and Protection of the Child defines a child as any person below the age of 18 years while Law No. 27/2001 of 28 April 2001 Relating to Rights and Protection of the Child against Violence defines a child as anybody aged below 18 years with the exception of what is provided for in other laws. Law No. 13/2009 of 27/05/2009 regulating labour in Rwanda also defines a child as any human being below the age of 18 years and specifies in its Article 4, Paragraph 1 that it is prohibited to employ a child in any company, even as apprentice, before the age of 16. Under the Organic Law No. 30/2008 relating to Rwandan nationality, majority age is 18

<sup>2</sup> It cannot be predicted with accuracy the date when the appointment will be made.

years of age (Article 4). The minimum age of marriage is 21 but on serious grounds, a waiver of age can be granted by the Minister of Justice if the person involved is 18 years old (Article 171, Civil Code).

As far as military service is concerned, the Presidential Order No. 72/01 of 08/07/2002 establishing the Army General Statutes lays down the requirements for recruitment into Rwanda Defence Forces, among others, the fact of being voluntary and being at least of 18 years of age (Article 5). Article 19 of Law No. 27/2001 of 28 April 2001 relating to Rights and Protection of the Child against Violence prohibits military service for children aged below 18 years. The minimum age of criminal responsibility is 14 years (Article 77 of the Penal Code).

Even though even though the minimum age for performing an act may vary depending on the type of the action, the new Law addresses all existing contradictions and harmonises the definition of a child.

**Table showing the definition of a child in Rwanda**

Category	Age
Definition of a child	18
Age of majority	18
Minimum age of employment	16
Minimum age of sexual consent	18
Minimum age of marriage	21
Minimum age of criminal responsibility	14
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The best interests of the child principle is recognised in the Constitution in its Article 28, which provides that every child has a right to special protection from his/her family, the society and the state that her/his conditions require. In addition, Article 9 of Law No. 27/2001 of 28 April 2001 related to the rights of the child and protection against violence clearly stipulates that in all decisions affecting the child, the primary consideration should be given to his/her best interests. Different provisions of the Civil Code (such as Articles 248 and 249 of the Civil Code) and the Draft Bill provide for the best interests of the child.

**Non-discrimination:** Article 11 of the Constitution of June 4, 2003 prohibits discrimination of any kind. This prohibition can be applicable as far as the enjoyment as well as the protection of children's are concerned. In addition, Article 16 of the Constitution provides that all citizens shall be equal before the law. They have a right, without any discrimination, to an equal protection by the law. The broad interpretation of Article 16 of the Constitution includes children.

In addition, Law No. 27/2001 of 28 April 2001 broadly refers to the word 'child' without any distinction based on sex, religion, wealth, to name a few. Furthermore Articles 323, 326 and 331 of Law No. 42/1988 of 27 October 1988 promulgating the introduction to Book 1 of the Civil Code, which provides that all children are equal whatever the circumstances of birth. They specify that legitimated children, acknowledged children and children whose paternity or maternity has been established by the law, have the same rights and obligations as children born in wedlock.

Articles 4 and 5 of the Law on the Rights and Protection of the Child respectively provides for equality between children without any form of discrimination and the prohibition of discrimination

between legitimate and illegitimate children. With regard to inheritance, Rwanda has made efforts to combat discrimination between boys and girls; between men and women. Indeed, the Law No.22/99 of 12 November 1999 was adopted to supplement Book 1 of the Civil Code on Matrimony, Donation and Succession and allows both boys and girls to inherit. Furthermore, Law No. 01/2007 of 20/01/2007 relating to protection of persons with disabilities in general is also relevant since its Article 3 provides for equal rights which entail freedom from discrimination for both adults and children.

**The right to life, survival and development:** Article 12 of the Constitution of Rwanda provides for the right to life. No one shall be deprived of his life arbitrarily. In addition, in 2007, Rwanda abolished the death penalty. Decree No. 21/77 of 18 August 1977 promulgating the Rwandan Penal Code criminalises infanticide as murder or homicide, depending on the circumstances, of a child at the time of his birth or immediately afterwards (Articles 311 and 312). Article 314 of the Penal Code provides for life imprisonment in case of infanticide. In addition, Article 8 and 10 of the Law provides for the rights to life, survival and development of the child.

**Respect for the views of the child:** Article 33 of the Constitution provides for freedom of thought, opinion, conscience, religion, belief and public demonstration. This constitutional right is also applicable to children. In addition, Article 9 of Law No. 27/2001 on the rights and protection of the child against violence provides that a child has the right to freely express his view on any matter concerning him and that he must be heard in any judicial or administrative procedure concerning him, either directly or through his representative. With regard to adoption, the prior consent of the child who is the subject of an adoption process or

application is required. If, however, the child has not yet reached the age to give judgment, his parents should give their consent on his behalf (Article 340 of Law No. 42/1988 of 27 October 1988 containing the Introduction and Book 1 of the Civil Code). Children are also given an opportunity to express their views during the National Children's Summit which is held annually.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Law No. 27/2001 28 April 2001 relating to Rights and Protection of the Child against Violence provides in its Article 5 that; "Every new born child must be given a name and be registered according to the provisions of the law". So the right to a name is addressed by this provision.

Article 8 of Law No. 14/2008 of 04/6/2008 governing registration of the population and issuance of national identity card (Official Gazette Special Number of 16/07/2008) provides that "[a]ny person shall be ordered to register the birth of his or her child within a period not exceeding thirty (30) days from date of birth". The failure to register a child within the above mentioned period is punishable by the law. Although 82% of under-five children were registered in 2010, non-registration of children at birth continues to be an obstacle to the protection and respect of the fundamental rights of the child.

Article 6 of the Organic Law<sup>3</sup> No. 30/2008 of 25/07/2008 relating to Rwandan nationality (Official Gazette No Special of 05/09/2008) provides that anyone who has one of the parents as Rwandan can acquire Rwandese nationality. It also has some tailor-made provisions in order to ensure that at least no child born in Rwanda is stateless.

<sup>3</sup> The word Organic Law is the mere translation from French *Loi Organique* which is a Statute Act in Commonwealth Countries.

In respect of preservation of identity, it is worth mentioning that the Civil Code, Book One, provides that in matters of adoption, adopted children keep ties with their natural families and retain all their rights and duties (Article 336). Furthermore, the adopted child retains his/her birth surname and first names (Article 337). Efforts towards reunification of children with their families, for instance in the context of separation as a result of genocide or armed conflict, are undertaken in order to prevent the identity of children.

Even though in its Article 34 the Constitution provides that freedom of the press and freedom of information are recognised and guaranteed by the State, this recognition needs to be exercised without compromising some rights- for instance the protection rights of children. The right to freedom of thought, opinion, conscience, religion, and worship is set forth under Article 33 of the Constitution. The right of the child to express his/her opinion freely is also set forth under Articles 9 and 11 of Law No. 27/2001 of 28 April 2001 relating to rights and protection of the child against violence. Article 12 of Law No. 27/2001 of 28 April 2001 relating to Rights and Protection of the Child against Violence, it specifies that the child has the right to the freedom of peaceful assembly. It is also envisaged by law that Government and Rwandan society should encourage and support child-oriented media, as well as writing and publishing books and journals for children (Article 11 Law No. 27/2001 of 28 April 2001 relating to Rights and Protection of the Child against Violence).

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT, AND ALTERNATIVE CARE

The child's right to know his or her parents and be brought up by them as much as possible is provided for under Article 7 of Law No 27/2001

of 28 April 2001 relating to rights and protection of the child against violence. It is also provided that when it is not possible to live with his/her parents, the child has a right to obtain necessary assistance from them for his/her welfare, and to visit his/her parents wherever the child wishes to in cases where this does not compromise his or her best interests.

The right to live and grow in a family environment (as much as possible) is also alluded to in Article 24 of the Law No.27/2001 of 28 April 2001. Article 25 provides for the family role and parental orientation. Article 26 imposes an obligation upon the State in establishing mechanisms aimed at providing assistance to indigent parents or guardians in order to enable them in their role in upbringing a child subject to the Government's available resources. Should these provisions be successfully implemented, issues such as those related to children in street situations will be addressed.

With regard to child placement, Article 27 sets out the reasons for placement of a child. Besides the conditions set out for the placement of a child, the law sets out some safeguards in order to ensure that the best interests of the child are upheld in a placement. Indeed, Article 28 states that anyone including the child has the obligation to report to the nearest administrative authorities of cases related to abuse or ill treatment of children. Upon reporting the ill-treatment, the Law on Child Protection provides for administrative investigations (Article 30). While investigations are taking place, the Law provides for urgent and provisional measures (Article 29) to be taken. The Law emphasises on the consideration to be given to the opinion of the child in placement procedures (Article 31) as well as the monitoring and follow up measures (Article 32).

The Child Protection Law also provides for appeal against the decision on placement (Article 33); contact between the child who is put in placement with family members (Article 36); Government

support to the child in placement (Article 37). The Law also provides for placement of a child deprived of his/her family in an alternative family (Article 38); adoption of a child deprived of natural family (Article 39); and placement in a social welfare institution (Article 40). With regard to the right to health, the obligation is imposed upon the State to ensure the right to health of orphaned and vulnerable children (OVC) in Article 41. Lastly, the Child Protection Law provides for protection of children with disabilities (Article 42).

Under Article 8 of Law No. 27/2001 of 28 April 2001 relating to rights and protection of the child against violence, every orphan must have a guardian, an adoptive parent or be under the care of a specialised institution. The State is responsible for any child having neither a guardian nor an adoptive parent. The conditions to be fulfilled by child care institutions are determined by a Decree issued by the Minister having the Social Affairs in his/her attributions.

Rwanda has developed, amongst others, the Strategic Plan of Action for OVC 2007-2012 (adopted in September 2006 by the Ministry of Local Government) which aims at implementing the National Policy for OVC. The implementation of the Plan holds the potential to addressing the issues faced by OVCs.

The law in Rwanda also regulates domestic and intercountry adoption. In 2008, Rwanda ratified the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1993. Law No. 001/2008 of 14/01/2008 authorises the accession to this Convention.

Finally, Article 25(2) of the Law No. 38/2006 of 25/09/2006 establishing and determining the organisation of the National Prisons Service provides that any infant whose mother is incarcerated shall be entitled to adequate

nutritional food as required for infants and shall be given to his/her family at three years of age. In addition, it is also provided that in the absence of any family to receive and look after such a child, the State shall provide a place where s/he shall be catered for.

## 7. HEALTH AND DISABILITY

While laws pertaining to the right to access to health care in Rwanda are limited, a number of policies and plans exist. The National Health Policy recognises that the services of reproductive health positively contribute to improving the health of all household members in general and the health of adolescents in particular. A number of programmes and projects that address malnutrition, access to ARVs, addressing malaria, reducing infant mortality and morbidity, immunisation, and so forth were established especially beginning from 2000. It is also reported that since 2006, every health centre in the country has had a mutual health insurance section, where national subsidies to the adherence of the poor, mutual health insurance coverage rose from 7% to 85% between 2003 and 2008.

The new Law on the Rights and Protection of the Child, is the first piece of legislation that specifically deals with HIV/AIDS. Article 55 of the Law on Protection of the Child obliges the State depending on the available resources to provide special protection and support to children affected and infected with HIV or AIDS and also provides that children from the age of 12 years can seek HIV testing without the consent of their parents or guardians.

Law No. 01/2007 of 20 January /2007 relating to Protection of Disabled Persons in general was passed in Rwanda in 2007. This law contains

provisions which, although not specifically designed for children, are also supposed to protect them and the following should be mentioned here:

Article 5 provides that a disabled person has the right to live in the family in the same conditions as others. An orphan with disabilities and who is unable to live on his/her own shall have a guardian or an adopter or a centre or an association that caters for him/her. Under the terms of Article 6, to be a guardian of a related or non-related disabled person; or for a centre to cater for disabled persons, it shall be done in the interest of the disabled person and not on any other interests of the guardian.

## 8. EDUCATION

According to Article 40 of the Constitution of 2003 everyone has the right to education and moreover primary education is compulsory and free of charge in public schools. In addition, Article 10 of the Law No. 27/2001 of 28 April 2001 states that every child has a right to education. Furthermore, Article 47 of the Law on the Rights and Protection of the Child provides for compulsory and free basic education for children in public schools.

Since the school year 2009, Rwanda has introduced a cycle of 9 years so that children who normally follow this cycle complete it at 16 years. It is therefore clear that these are the very children who are of compulsory school age who cannot be employed in any company.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

There are a number of provisions in the Constitution and other subsidiary laws that protect children from different types of violence. In fact, as the title of Law No. 27/2001 indicates, it is mainly focused

on the rights of the child and protection of children against violence.

Rwandan legislation prohibits and punishes child neglect and exploitation. Thus, Articles 43 to 45 of the Law on the Rights and Protection of the Child against Violence provide for a sentence of imprisonment and fine of parents or guardians who expose a child or cause him to be exposed, or neglect a child or cause him to be neglected. Where the neglect or exposure of the child leads to his death, the sentence shall be death penalty. Article 46 lays down punishments for a parent, guardian or director of an establishment with children in its care who fail to perform his obligation to educate the child and protect him against abuse. Sub-Article 2 punishes parents, guardians or directors of establishments with children in their care who lead a child into vagrancy, or knowingly receive funds or share in earnings arising from the child's begging.

Article 18 of Law No. 27/2001 provides that the work performed by a child should not compromise his education, or harm his health or development. The Labour Code according to which minimum age of employment shall be determined as provided under the Law on the Rights and Protection of the Child states no child below the age of 16 shall be engaged in employment. In addition, Article 51 of the Child Law prohibits any form of exploitation, economic included, however the prohibition is only when the economic exploitation is likely to negatively affect the health and education of the child. There is a need to amend this provision since it could be argued that economic exploitation is allowed provided it does not affect the health or education of the child.

Article 42 of the Law No. 27/2001 on the rights of the child and protection of children against violence lays down a sentence of 15 to 20 years of imprisonment and a fine of 100,000 to 200,000 Rwandan Francs for anyone who encourages a child to take drugs, or has used or availed himself the child for trafficking in drugs or

arms or for fraud. Article 51 of the Law on the Rights and Protection of the Child prohibits any form of economic exploitation, including involving children in illegal drug trade.

Article 32 of Law 27/2001 of 28 April 2001 on the rights and protection of the child against violence punishes anyone who inflicts cruel, inhuman or degrading treatment or punishment. With regard to corporal punishment, it should be noted that there has been a decline of the practice in school settings but this type of punishment is still in practice in many households especially since the law does not prohibit it in the home setting.

With regard to Female Genital Mutilation (FGM), it is reported that female genital cutting does not exist in Rwanda. Nevertheless, female genital elongation is practiced in some parts of Rwanda. However, the classification by the WHO of the elongation of the *labia minora* as a type of female mutilation has been challenged by some researchers arguing that this practice should not be considered a form of female genital mutilation since it is meant to increase female pleasure.<sup>4</sup>

Article 33 of the Law No.27/2001 on the Rights and Protection of the Child against Violence defines broadly the crime of rape. It stipulates that any sexual relations with a child or any sexual act with a child, whatever the means or methods used, are considered as rape.

Article 38 of the Law on the rights and protection of the child against violence criminalises the incitement of a child to sexual activity or prostitution whereas Article 39 sets out the penalties for anyone financing a children's brothel or receiving monies from child prostitution or using or availing himself of children to exploit them for the purpose of producing shows intended for prostitution or pornographic materials. Articles 363, 364, 365, 369, 372, 373 and 380 of Decree

No. 21/77 of 18 August 1977, promulgating the Penal Code, prescribe a fine and imprisonment for offenders exploiting child prostitution.

Article 41 of the Law on the Rights and Protection of the Child against Violence provides for imprisonment from five years to life of anyone found guilty of abduction, sale or trafficking of a child.

The Presidential Order No. 72/01 of 08 July 2002 establishing the Army General Statutes lays down the requirements for **recruitment** into Rwanda Defence Forces, and outlaws child recruitment. A new law on local defence forces has been established, i.e. Law No. 25/2004 of 19 November 2004 establishing and determining the organisation and functioning of the local service in charge of assisting in maintenance of security referred to as "Local Defence Force". In its Article 9, this law provides that the person selected (by the Cell Council as set forth under Article 8 of the same law) to be a member of Local Defence shall be at least of 18 years of age.

Article 77 of the current Penal Code and Article 58 of the Law on Child Protection sets the minimum age of criminal responsibility at 14 years of age but emphasises on lesser penalties for offenders under the age of 18 years. However, it should be deplored that the minimum age of criminal responsibility has been lowered for the prosecution of the crime of genocide ideology. Article 9 of the Law No. 18 /2008 of 23 July 2008 relating to the punishment of the crime of genocide ideology provides with regard to sentences that:

In case a child under twelve years (12) of age is found guilty of a crime of genocide ideology, he or she shall be taken to a rehabilitation centre for a period not exceeding twelve (12) months. ...

<sup>4</sup> See Marian Koster and Lisa Leimar Price *Rwandan female genital modification: Elongation of the labia minora and the use of local botanical species*.

In case a child who is found guilty of the crime of genocide ideology is between twelve (12) and eighteen (18) years, he or she shall be sentenced to a half of the penalty referred to in Article 4 of this Law, without prejudice to the possibility that a part or whole of the sentence may be served in the rehabilitation centre.

The Law on the Rights and Protection of the Child lowers criminal liability to 12 years of age. Lastly, with regard to child justice, it should be noted that

Article 75 of the Organic Law No. 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdictions of courts (Official Gazette of 10 September 2008), provides that minors accused of any offence shall be tried on the first instance only by a specialised juvenile chamber of the intermediate court whereas Article 76 provides that the juvenile chamber shall in addition to sentencing juvenile offenders, ensure appropriate measures for their safety, support, supervision and education of such children.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 17/05/2001
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 25/06/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 26/01/1991
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 11/05/2001
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 14/03/2002
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 15/12/2008
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Ratification, 15/12/2008
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 15/04/1981
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 23/05/2000
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	Ratification, 28/03/2012
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

Committee	Initial Report	Second	Third and Fourth
ACERWC	24 Apr 2006	-	-
UN Committee	30 Sep 1992	27 June 2002	21 Jan 2011

3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Rwanda

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	NONE
The Coalition to Stop the Use of Child Soldiers (report on the OPAC)	February 2004	

4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC		UN Committee
Name	Term of service	
Mrs. Muhimpundu Félicité	2010-2015	-
Mr Straton Nsanzabaganwa	2001-2005	

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>

# HARMONISATION OF CHILDREN'S LAWS IN SOUTH AFRICA

## COUNTRY BRIEF

### ABSTRACT

South Africa has undertaken a comprehensive review of its laws that are relevant for the realisation of children's rights. This review process has led mainly to the adoption of two laws: the Children's Act 38 of 2010 (as amended by Act 41 of 2007) which came into operation on 1 April 2010 and the Child Justice Act 75 of 2008. These and other laws, backed by a strong constitutional framework, and institutional arrangements, continue to facilitate the realisation of children's rights in the country.

### 1. INTRODUCTION

South Africa has an estimated population of 50 million people. Out of its total population, 19 million are estimated to be children below the age of 18.

South Africa emerged from 40 years of international isolation with the ending of apartheid in 1994 and the first democratic elections. The government was faced with the twin challenges of establishing an effective democratic system and responding to the enormous economic and social developmental issues within the country.

Ushered in by the interim Constitution of 1993, a process of redrafting of the Constitutional document ensued by a multi party constitutional Assembly, resulting in the finalisation of the Constitution of the Republic of South Africa, Act 108 of 1996. The Constitution contains a Bill of Rights, and recognises that children are particularly vulnerable to violations of their rights and that they have specific and unique interests.

Provision is made in Section 28, therefore, for the protection of specific rights of children. However, they are also entitled to the protection afforded by the Constitution to individuals. In this regard the right to equality, the right to education and the right to personal autonomy constructed from the rights to privacy, freedom of religion, freedom of expression and freedom of association read together, are the most important.

South Africa's "hybrid" legal system consists of an interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system that emanate from indigenous Africans. The co-existence of different systems of personal law having been expressly recognised in the 1996 Constitution, the relevant provision (Section 15) nevertheless provides that the freedom to follow religious and customary law is granted only to the extent that those laws do not conflict with fundamental rights enshrined in the Constitution.

International treaties are, in terms of South Africa law, not generally self-executing, but have to be provided for in domestic law in order to have effect. However, there further considerations which entail that international law are accorded heightened relevance, even when it has not been incorporated in South Africa law. In addition, the Constitution contains specific provisions which require the courts to consider international law in their deliberations. The first of these is sec. 39(1) (b) which provides that the courts 'must consider' international law - binding and non-binding - in interpreting the Bill of Rights. Further, as Section 233 of the South African Constitution instructs courts to afford preference to an interpretation of statutory law that is 'consistent with international law' whenever such an interpretation would be reasonable.

Provisions of international treaties in the sphere of child law that South Africa has ratified Supplement constitutional provisions. Convention on the Rights of the Child (CRC), ratified on 16 June 1995 is the first treaty adopted by South Africa after the country rejoined the international community. Second, the Hague Convention on International Child Abduction was ratified and brought into effect in 1996, the African Charter on the Rights and Welfare of the Child (ACRWC) in January 2002, and the ratification of the Hague Convention on Intercountry Adoption, the ILO Convention 182 on the Elimination of the Worst Forms of Child Labour and the UN Protocol on Trafficking of Women and Children provides further instances of South Africa's commitment to children at the international law level.

South Africa has enacted a number of laws that in one way or another harmonise its children's rights obligations. The main instrument that gives this effect is the Children's Act 38 of 2005 (as amended by Act 41 of 2007) which came into operation on 1 April 2010, and is developed "[t]o give effect to certain rights of children as contained in the [South African] Constitution" and specifically recognises that every child has the rights set out in Section 28 of the Constitution. Another child specific legislation worthy of mention is the Child Justice Act 75 of 2008, which governs issues related to children in conflict with the law.

## 2. GENERAL MEASURES OF IMPLEMENTATION

South Africa has established independent institutions that strengthen the democratic processes of the country and promote human rights including children's rights. Examples of such

institutions are the Public Protector; South African Human Rights Commission; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Auditor-General; Commission on Gender Equality; Independent Electoral Commission with the aim of supporting the democratic order.

The Constitutional Court of South Africa is considered (along with other lower courts) one of the main protectors and promoters of children's rights in the country. The Court has consistently interpreted the constitutional provisions on children's rights and other relevant provisions in such a way to promote children's best interests. Many of these decisions have fundamentally advanced children's de jure and de facto best interests.

As a national human rights institution, South Africa has established the South African Human Rights Commission. While the Commission is provided for by the Constitution, it was inaugurated on 02 October 1995 under the Human Rights Commission Act 54 of 1994 and as provided for by the Constitution of the Republic of South Africa Act 200 of 1993. The mandate of the Commission includes the duty to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in the country.<sup>1</sup>

The Commission on Gender Equality, established through the Commission on Gender Equality Act,<sup>2</sup> is one of six independent statutory bodies tasked with supporting constitutional democracy the constitutional mandate is to promote and protect gender equality, as set out in Act 39 of 1996, it has the capacity to address issues of discrimination against children, especially against the girl child.

<sup>1</sup> Section 184 of the Constitution.

<sup>2</sup> Act 39 of 1996.

The South Africa Law Reform Commission also has a significant role in the harmonisation of children's laws in the country. Established by the South African Law Reform Commission Act,<sup>3</sup> it has the mandate to do research with reference to all branches of the law of the Republic and to study and investigate all such branches in order to make recommendations for the development, improvement, modernisation or reform thereof.<sup>4</sup> On a different note, the Public Protector, with the primary mandate to ensure administrative justice, if not directly, indirectly deals with issues that have implications on children's best interests.

The Department of Social Development is the main Government ministry in charge of children's affairs. It has the primary functions of management and oversight over social security, encompassing social assistance and social insurance policies as well as overseeing the development and implementation of developmental social welfare services that provide support to reduce poverty, vulnerability and the impact of HIV/ AIDS through sustainable development programmes.

### 3. DEFINITION OF THE CHILD

The Constitution provides for childhood to end at 18 (Section 28(3)) years. The Children's Act also stipulates in its interpretation part that a "child" means a person under the age of 18 years". Section 28(3) embraces the same definition. Furthermore, Section 17 of the Children's Act provides that "[a] child, whether male or female, becomes a major upon reaching the age of 18 years".

The Child Justice Act contains a minimum age of criminal capacity commencing at 10 years and a child who is 10 years or older but under the age

of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity. The law also empowers the cabinet in the parliament responsible for justice matters to present a proposal for revision of the age of criminal responsibility within five years from the day the Child Justice Act become operational.<sup>5</sup> The previous minimum age of criminal capacity was derived from Roman Law, and it was a low determination: set at 7 years of age. The age at which a child may enter into marriage in terms of civil law is set at 18 years of age (without parental consent).<sup>6</sup> According to the Choice on Termination of Pregnancy Act (92 of 1996), a girl of any age may decide to terminate a pregnancy without parental consent. The statutory age for consent to sexual intercourse for girls is 16 years, and a girl below 12 years is deemed irrebuttably unable to consent to sexual intercourse, meaning that intercourse with a child aged below 12 years is rape. Social grants may, in terms of the Social Assistance Act, 13 of 2004 be paid to children of 16 years who qualify for one of the grants provided – such as the child support grant.

Any adult or another child having sex with a child under the age of 12 is committing the crime of rape or sexual violation under Criminal Law (Sexual offences and related Matters) Amendment Act 32 of 2007. The age at which a child is capable to consent to sex is set at 16 under Section 1(1) (b) of the Criminal Law (Sexual offences and related Matters) Amendment Act 32 of 2007.

A joint reading of Section 17 of the Children's Act with the common law and the provision under Sections 17 and 14 of the Children's Act respectively indicate that the minimum age to enter in to contracts and the age at which a child can litigate in his/her own name is set at 18 years.

<sup>3</sup> 19 of 1973.

<sup>4</sup> Section 4 of the Act.

<sup>5</sup> Art 7(1), No. 75 of 2008, Child Justice Act,

<sup>6</sup> See the Marriage Act of 1961 Section 26(1) read with Sections 17 and 18(3)(i) of the Children's Act 38 of 2005.

While in terms of the Schools Act, the minimum school leaving age is 15 years or the age at the end of grade 9, whichever comes first. The minimum age for alcohol consumption is set to be 18 years under the Liquor Act 59 of 2003 Section 10(1) read with Section 1. A child becomes competent to be a registered voter at the age of 16 as provided under Section 6 of the Electoral Act 73 of 1998 while the voting age is set to be 18 years under Section 1 of the same Act. At the age of 16 years a child becomes capable to apply for an identity document as provided under Section 15 of the Identification Act 68 of 1997.

As per Section 129 of the Children's Act the minimum age to consent to surgical operations is 18 years while the age at which a child may consent to his/her own medical treatment as well as medical treatment for his or her own child is set at 14 years.<sup>7</sup>

**Table showing the definition of a child in South Africa**

Category	Age
Definition of a child	18
Age of majority	18
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	18
Minimum age of criminal responsibility	10
Minimum age of recruitment into the army	18

<sup>7</sup> See Section 129 of Children's Act.

<sup>8</sup> Section 2(b)(iv) of the Children's Act.

<sup>9</sup> Section 6(2)(d).

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** Section 28(2) of the Constitution requires that the best interests of the child be of paramount importance in every decision taken in relation to a child. The Children's Act too provides for general provision for the respect of this principle as well as specific provisions in relation to children's rights related themes. At the general level, one of the objects of the Children's Act is to give effect to the constitutional rights of children, including "... that the best interests of a child be of paramount importance in every matter concerning the child".<sup>8</sup>

**Non-discrimination:** The Constitutional provision on equality applies to promote children's right against discrimination. Section 28 too has relevance for promoting this cardinal principle. In the Children's Act, it is explicitly provided that all proceedings, actions or decisions in a matter concerning a child must, amongst other things, protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child.<sup>9</sup>

**The right to life, survival and development:** According to Section 11 of the Constitution, everyone has the right to life. South Africa has abolished the death penalty. Even though no explicit provision protects the right to life in the Children's Act, it contains a number of provisions that promote the right to life, survival and development.

**Respect for the views of the child:** Section 10 of the Children's Act is specifically dedicated to providing for child participation: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to

participate in an appropriate way and views expressed by the child must be given due consideration". A number of other provisions in the Children's Act and other laws promote children's participation in matters of administrative, civil, and criminal cases that affect their interest.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

According to Section 28(1) of the Constitution, every child has the right "(a) to a name and nationality from birth". Every child's birth must be registered in terms of the Births and Deaths Registrations Act 51 of 1992. If a child's birth is registered his or her name and other relevant particulars are entered into the population register.

This section also affords every child the right to a nationality from birth. The aim of this section is clearly to guard against statelessness with regard to children, rather than to operate as a direct means of acquiring South African citizenship. The South African Citizenship Act, 1995, provides for acquisition of South African citizenship by birth, descent and naturalization. In terms of Section 3 of the Constitution all citizens are equally entitled to the rights, privileges and benefits of citizenship and are equally subject to the duties and responsibilities of citizenship".

Lists of other civil and political rights are provided for children either in the Constitution, the Children's Act or other laws. For instance, like everyone else, children are entitled to the right to privacy (Section 14), the right to freedom of religion, belief and opinion (Section 15), the right to freedom of expression (Section 16), and the right to freedom of association (Section 18) in the Constitution.

<sup>10</sup> Section 18.

<sup>11</sup> See Section 19.

<sup>12</sup> Section 20.

<sup>13</sup> Section 21.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Constitution does not protect the family qua institution. However, a number of provisions, including Section 28, can be interpreted to promote the protection of the family as a fundamental unit of society. Section 28(1) (b) of the Constitution is important in this regard, as it gives every child the right "to family care or parental care, or to appropriate alternative care when removed from the family environment". The right to family care or parental care requires the family or parents of a child, or the State, to provide care to that child.

The Children's Act regulates parental responsibilities and issues related thereto in detail. It is possible to have either full or specific parental responsibilities or rights.<sup>10</sup> Parental responsibilities and rights include the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child and to contribute to the maintenance of the child. The parental rights and responsibilities of mothers,<sup>11</sup> parental responsibilities of married fathers,<sup>12</sup> and parental responsibilities and rights of unmarried fathers are provided for.<sup>13</sup>

The Children's Act provides that an unmarried father can acquire parental rights and responsibilities automatically. This can be done without the need to go to court, provided that he fulfils some conditions as set out in Section 21 of the Children's Act. In this regard, Section 33 is relevant, as it allows for persons who both have parental responsibilities and rights (e.g. a mother and unmarried father who qualifies in terms of Section 21) to enter in to an agreement which sets out in detail what the arrangements will be for the child's upbringing.

Sections 33 and 34 of the Children's Act make provision for "parenting plans". The Plan is a written agreement between co-holders of parental responsibilities and rights outlining in detail their respective responsibilities and rights of care, contact, guardianship and maintenance with regard to a child.

South African families and children are adversely affected by HIV/AIDS, and poverty. This has serious implications on a number of issues including household income security, spending patterns, and the care and family environment of children. As a result, in Chapter 9, the Children's Act gives the procedures and safeguards required in dealing with a child in need of care and protection. The Act outlines several circumstances in which a child may be found to be in need of care, and the necessary measures that need to be undertaken.

The Act has expanded the list of circumstances under which a child is considered to be in need of care and protection to include for example, instances where the child has been abandoned or orphaned and is without any visible means of support, or where the child lives or works on the streets or begs for a living.<sup>14</sup> The possibility of removing a child to temporary safe care, with and without a court order, is also regulated by the Children's Act.<sup>15</sup>

The Children's Act identifies three forms of alternative care namely foster care, Child and Youth Care Centres, and temporary 'safe' shelters. A dedicated chapter in the Children's Act deals with the placement of children in alternative care, which must be read together with the chapter on Child and Youth Care Centres (CYCCs) to

understand how the Act regulates CYCCs and the children placed at such facilities. The Children's Act also allows for the legal recognition of child-headed households by the provincial Head of Social Development (HSD)<sup>16</sup>

Children's Courts where children in need of care and protection and their families, social workers, and magistrates get together to work out the best solution for the child are also provided. Prevention and early intervention services aimed at supporting families and responding to situations of risk before the child falls into the statutory care system are also regulated by the Act.

The Children's Act also regulates adoption and intercountry adoption in detail. Chapter 15 is dedicated to the former while Chapter 16 addresses the latter. As a Contracting State to the Hague Convention on Intercountry Adoption of 1993, the rules in Chapter 16 domesticate this Convention into South Africa's law.

Access to social assistance for those who are unable to support themselves and their dependents is a constitutional right in South Africa.<sup>17</sup> Moreover, Section 28(1) (c) of the Constitution affords every child the right "to social services". Social grants were regulated in terms of the Social Assistance Act 59 of 1992 until the coming into force of a new Social Assistance Act (Act 13 of 2004) which was enacted in 2004. Child related grants consist of the child support grant, the foster child grant and the care-dependency grant. It is well known that South Africa has the largest social grant system in Southern Africa. Child grants alone were estimated at 11 million children in 2011 across the nine provinces of South Africa.

<sup>14</sup> Section 150.

<sup>15</sup> See Sections 151 and 152.

<sup>16</sup> Section 137 of the Children's Act.

<sup>17</sup> Section 27(1)(c) read with (2).

## 7. HEALTH AND DISABILITY

The Constitution of South Africa is explicit on the right to health care of children in the country. It provides that “[e]very child has the right... to basic nutrition, shelter, basic health care services and social services”.<sup>18</sup> Moreover, Section 27(1) (a) provides for the rights of everyone to have access to health care services, including reproductive services. This right, as with other socio-economic rights formulations in the Constitution, is to be implemented progressively and subject to available resources. Section 27(3) further provides for everyone’s rights of access to emergency medical treatment. Some other laws and policies, such as the National Health Act No 61 of 2003 (NHA), which is regarded as one of the most progressive legislation globally as it entrenches values of equity and social justice, promotes children’s access to basic health care services.

The Children’s Act provides a dedicated provision, Section 13, entitled “Information on health care”. This provision complements children’s right to have access to health care services. It provides that “[e]very child has the right to - (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction” as well as the right to “(c) have access to information regarding the causes and treatment of his or her health status”.<sup>19</sup>

Early on in the post apartheid period, President Nelson Mandela announced a policy that primary health care for pregnant mothers and for children under the age of 6 years would be free. This position still prevails, and substantial transformation of the

health care sector has taken place to shift the delivery of health care services from predominantly (expensive and inaccessible) tertiary health care services, to rolling out more accessible primary health care services.

There are few judicial decisions, some from the Constitutional Court, on the right to health. For instance, in the early case of *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>20</sup> the Constitutional Court asserts in relation to the interpretation of Section 27(3) of the Constitution that “emergency medical treatment” refers to the treatment that is available in emergency situations, and is necessary to stabilise the patient and to avoid harm. *An emergency medical situation* is defined as a situation where a sudden catastrophe immediately endangers the life of a patient. But due to the ongoing jurisprudential development in the area of access to health generally, and children’s rights to basic health care services specifically, it is not possible to conclude definitively that the principles of CRC and ACRWC have been adequately assimilated in South African law and policy.

South Africa has taken a number of measures to address issues pertaining to children with disabilities, including ratifying the Convention on the Rights of Persons with Disabilities. The Children’s Act as well dedicated provisions for children with disabilities. Section 11(1) of the Act, amongst other things, addresses the right to parental care, family care or special care as well as the need to provide these group of children with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.

<sup>18</sup> Section 28(1)(c).

<sup>19</sup> Section 13(1).

<sup>20</sup> 1997 (12) BCLR 1696 (CC).

## 8. EDUCATION

Education under apartheid was a prime cause of political activism. Transformation of this sector since 1996, the creation of national norms and standards, and the improvement of the quality of outcomes in the education system, are indeed an ongoing project, as is the elimination of discriminatory practices in the education system and the reduction of violence against girls in the school system. The main features of the apartheid education system were huge inequality in the financing of education, different curricula for different race groups and restricted access of black learners to higher education.

The Constitution enshrines education rights in a dedicated section (Section 29), and not in the children's rights section as these rights are conferred not only upon children but upon everyone. Section 29 contains the right to education including adult basic education; and the right to further education that the State must make progressively available and accessible through reasonable measures. However, it has been noted that an important feature of the right to basic education is that it is an unqualified socio-economic right. It is therefore different to the qualified socio-economic rights, such as the rights to health, housing, food, water and social security.

The procedure to be followed by schools when adopting its school fee and exemption policy is set out under Section 39 of the South African Schools Act 84 of 1996.<sup>21</sup> Schools are therefore allowed to charge school fees to add to the government funding. The effect of this system of funding is that schools in wealthier communities, mainly the historically advantaged white schools, charge higher school fees and maintain a high standard of education with sufficient numbers of teachers and good teaching facilities. Many schools in poor

areas, predominantly African schools, cannot generate high school fees and therefore continue to deteriorate.

Despite the provisions of the CRC and the African Charter, primary education in South Africa is not yet genuinely free. Compulsory education from the age of 7 until the age of 15 (9 years of schooling) is provided for in the South African Schools Act 84 of 1996. Given the need for implementation of this constitutional right, the South African State has tried to meet its duties to provide basic education by making the phases grade 1 – 9 (for children aged 7 – 15 years) the *compulsory* phase of education, and by prioritising this phase in policy, planning and spending. In 2006, the South African Schools Act was amended to provide (for the first time) for changes to school fee laws which will make some schools 'fee free'. The provisions will affect the 40% poorest schools in the country (i.e. the most disadvantaged schools). However, those schools may continue to charge school fees in Grades 9–12. The 1996 South African Schools Act also abolished corporal punishment in schools. Section 10 of this Act provides that no person may administer corporal punishment at a school to a learner, and provides further for a criminal offence should corporal punishment be administered in breach of the above section.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Violence against children continues to be a widespread practice in South Africa. A number of provisions of the South African Constitution aim to protect children against violence. As a result, the Constitution protects children from neglect,

<sup>21</sup> The other principle legislative enactment in the Education sphere is the Education Policy Act 27 of 1996.

maltreatment, abuse and degradation,<sup>22</sup> provide for the right not to be treated or punished in a cruel, inhuman or degrading way,<sup>23</sup> and provide that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>24</sup>

The Children's Act too has a number of provisions that prohibit violence against children. For instance, Section 7 of the Children's Act provides that the protection of the child from any physical or psychological harm must be considered when the best interest of the child standard is applied. The Children's Act also specifically prohibits or regulates certain harmful practices that are entrenched in South African customary or religious practice.<sup>25</sup> Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to well-being of the child such as FGM that is prohibited under the Child Act. In order to protect children from harm, particularly sexual violence, the Children's Act establishes a National Child Protection Register.<sup>26</sup> It also addresses child trafficking<sup>27</sup> and child abduction.<sup>28</sup>

The Sexual Offences Act, which has broadened the definition of rape and is inclusive of a wide range of crimes that commonly occur against children (sexual grooming, sexual exploitation, use of and exposure to pornography). Sexual offences against children are also prohibited in terms of the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007). Crimes including rape, compelled rape, sexual assault, incest, acts of consensual sexual penetration with certain children (statutory rape), statutory sexual assault, sexual exploitation of children, sexual grooming of children, and using children for and benefitting from child pornography are covered by this Act.

Establishment of Family Violence, Child Protection and Sexual Offences Units of the Police, and specialised individuals policing crimes against children are commendable measures that help to address violence against children issues. Sexual Offences Courts are available across the country, which reduce further traumatising of victims by employing victim-friendly practices and including a monitoring and reporting system. Thuthuzela Care Centres are found across the country, which aim to provide woman and child victims of sexual offences with better, humane treatment by reducing secondary victimisation.

Through the Film and Publications Act,<sup>29</sup> children are offered strong protection banning the creation, possession and distribution of child pornographic images. The Act prohibits the possession of child pornography, and also rightly regulates Internet Service Providers and requires them to take measures to prevent access to child pornography.

According to Section 28(1) (e) and (f) of the Constitution, every child has the right "to be protected from exploitative labour practices" and "not to be required or permitted to perform work or provide Services" that, by taking into account the age of the child, are inappropriate or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development. Furthermore, The Basic Conditions of Employment Act prohibits the employment of children below the age of 15.

South Africa's domestic legal framework provides various avenues by which refugee children can achieve legal status, be protected from abuse and exploitation, and receive humanitarian assistance and services. Specifically, the South African

<sup>22</sup> Section 28 (1)(d) of the Constitution.

<sup>23</sup> Section 12(1)(e) of the Constitution.

<sup>24</sup> Section 10 of the Constitution.

<sup>25</sup> See, for instance, Section 12.

<sup>26</sup> See Sections 111-128.

<sup>27</sup> Chapter 17 of the Act.

<sup>28</sup> Chapter 18 of the Act.

<sup>29</sup> Act 65 of 1996.

Constitution, Immigration Act, 13 of 2002 (as amended by Act 19 of 2004), the Refugees Act, 130 of 1998 (as amended by Act 33 of 2008), and the Children's Act, 38 of 2005 (as amended by Act 41 of 2007) all contain provisions that would allow for the protection of refugees within South Africa. Section 28(i) of the South African Constitution, which provides that children under the age of 18 years are "not to be used directly in armed conflict" and are "to be protected in times of armed conflict," protects children against the harms suffered during apartheid. In the past, according to the Defence Act, the minimum age for cadet training and for membership in the South African Defence Force was twelve, and the minimum recruitment age for military service was set at 17 years of age.<sup>30</sup>

Section 294 of the Criminal Procedure Act 51 of 1977 initially provided for corporal punishment for juvenile delinquents. This provision, however, was declared unconstitutional on the basis that it was cruel, inhuman and degrading in *S v Williams*.<sup>31</sup> Following this decision, Parliament passed the Abolition of Corporal Punishment Act 33 of 1997. The South African Schools Act of 1996, Section 10, outlaws corporal punishment at schools. Corporal punishment is not prohibited in the home environment.

Section 28(1) (g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and used for the shortest appropriate period of time. Further, children should be kept separately from adults in detention and treated in a manner, and kept in conditions that take account of the child's age. According to Section 28 (1) (h), it is every child's right "to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". Of relevance to child justice is Section 35 of the Constitution

which deals with the rights of arrested and detained persons and although not limited to children, applies equally to them as it does to adults. Some of the rights contained in Section 35 include the right to remain silent, the right to a fair and speedy trial, and the right to a legal representative and if an accused cannot afford one, the right to be assigned one by the State if substantial injustice would otherwise result.

Implementing these provisions in detail is the Child Justice Act.<sup>32</sup> The Child Justice Act seeks to provide a separate juvenile justice system for children below 18 years, with a minimum age of criminal capacity commencing at 10 years. It generally establishes a criminal justice process for those children accused of committing offenses, and includes a focus on procedures for individualized assessment and preliminary inquiry, diversion and restorative justice. It sets norms and standards for diversion, legal representation, and sentencing, to name a few.

Section 9 of the Act sets out the applicable procedures for children below the age of 10 years at the time of the commission of an offence while the rest of the Act regulates children above the age of 10. Two critical pre-trial processes that the Act provides for are the preliminary enquiry and assessment that are both intended to promote children's best interests. Diversion, which also has received judicial approval in South Africa, is also provided for in the Act. Diversion can occur in three ways namely prosecutorial diversion, diversion at the preliminary enquiry stage, and diversion before the finalisation of the case by the child justice court. Detention of children is also addressed by the Act, and in fact, presiding officers faced with a decision to release or detain a child are given guidelines by Section 24(3) of the Act. In general, this Act brings South Africa's child justice law much closer to compliance with its international law obligations.

<sup>30</sup> Defence Act 44 of 1957, Section 3(a) and (b).

<sup>31</sup> 1995 3 SA 632 (CC).

<sup>32</sup> Act 75 of 2008.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 07/01/2000
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 17/12/2004
Convention on the Rights of the Child (CRC), 1989	Ratification, 16/06/1995
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 07/01/2000
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 30/06/2003
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 30/11/2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Ratification, 30/11/2007
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 30/03/2000
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 07/06/2000
Hague Convention on International Child Abduction, 1980	Accession, 08/07/1997
Hague Convention on Inter country Adoption, 1993	Accession, 21/08/2003
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second
ACERWC	-	-
UN Committee	4 Dec 1997	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Zimbabwe**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	None
National Children's Rights Committee (NCRC)		

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC		UN Committee	
Name	Term of service	Name	Term of service
Dr Lulu Tshiwula		Ms Esther queen Mokuane	1991-1995
Prof. Judith Sloth-Nielsen	January 2016		

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clar/vol2](http://www.africanchildinfo.net/clar/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>

# HARMONISATION OF CHILDREN'S LAWS IN SWAZILAND

## COUNTRY BRIEF

### ABSTRACT

The last decade witnessed a number of achievements in the area of children rights laws in Swaziland. In particular, the drafting and adopting of the Constitution of Swaziland (adopted in 2005 and came into force in 2006) that contains provisions relevant to children's rights has been considered as a positive development in the right direction. However, the absence of a comprehensive children's law continues to be a shortcoming in the harmonisation of children's laws in Swaziland.

### 1. INTRODUCTION

With a population of around 1.2 million people, Swaziland's child population (those below the age of 18) is estimated to be more than 50%.<sup>1</sup> HIV/AIDS and poverty pose the biggest challenges to the realization of children's rights in the country.

Swaziland is an absolute monarchy, and King Mswati III has ultimate authority over the cabinet, legislature, and judiciary. Like many other countries in the region, Swaziland operates a dual legal system with Roman-Dutch common law on one side, and Swazi customary law on the other. Moreover, as far as the incorporation of international instruments in domestic legal systems is concerned, Swaziland is a dualist State which means that international instruments Swaziland signs and ratifies do not automatically

become part of domestic law unless enacted into law by parliament. In terms of Section 238 of the Constitution an international agreement becomes binding on Swaziland by an Act of Parliament or a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament. The law of Swaziland consists of Statutory Law, Roman Dutch Common Law as applicable to Swaziland since 22 February 1907 and the principles of Swazi customary law (Swazi Law and Custom).

The Government of the Kingdom of Swaziland ratified the Convention on the Rights of the Child (CRC) on 07 September 1999, and made a declaration at the time of ratification of the CRC that the implementation of its obligations in relation to the right to education must be achieved progressively and that Swaziland would strive for full compliance as soon as possible. However, Swaziland has not yet ratified the African Charter on the Rights and Welfare of the Child (ACRWC), although there are indications that such ratification is well underway. In 2011, it was also reported that the ratification process of the two CRC Optional Protocols (on child soldiers, and child sale, pornography and prostitution), the Convention on the Rights of Persons with Disabilities, and the Hague Inter-country Adoption Convention have already cleared the House of the Assembly after deliberations but the parliament went on recess before the House of Senate had its debate of these instruments. Swaziland is already a party to few other relevant international instruments such as ILO Convention Nos 138 and 182.

<sup>1</sup> According to the 2007 Population and Housing Census, there are 481,945 children below the age of 18 and they comprise 47% of the population.

The adoption of the Constitution (Act of 2005), which encompasses a Bill of Rights that protects a number of fundamental rights and freedoms of the individual, and in particular provides for specific children's rights, has been a welcome development for child rights. There are a number of subsidiary laws that are currently in progress that will have significant positive impact on children's rights. These include the Children's Bill and Sexual Offences Bill. These Bills are intended to address all aspects that deal with the protection and welfare of children, in particular, their protection from sexual offences and other forms of abuse. The latter is expected to address the outdated nature and inadequacy of Girls and Women's Protection Act of 39 of 1920. The same applies to the Children's Bill, which will comprehensively address issues pertaining to the rights of the child and has a wide-ranging scope and is intended to address most issues that affect the development of children and their protection within communities.

In 27 October 2011, the country's lower house of parliament, the House of Assembly, passed two legislations that are very important for children and women- namely the Children's Protection and Welfare Bill 2010 and the Sexual Offences and Domestic Violence Bill 2009. What remains to be done now is for the upper house, the House of Senate, to endorse the two Bills for signing into law by the King. The absence of a comprehensive children's rights law that comprehensively harmonises the CRC and the ACRWC continues to be a shortcoming.

## 2. GENERAL MEASURES OF IMPLEMENTATION

The Constitution of Swaziland was enacted by parliament in 2005<sup>2</sup> and became operational in 2006. As mentioned above, the relevance of the Constitution for children's rights is significant, not

only because of its Bill of Rights section, but also because of its specific provisions on children's rights<sup>3</sup> and its role as the main determinant of the nature of rights that any social group will have/enjoy (or not).

In 2009 the Government adopted the National Children's Policy which seeks to promote, protect and fulfil the rights of all children and ensure their full development and long-term welfare including their physical and psychosocial development. The successful application of this Policy will indeed significantly help the realisation of children's rights in the country.

The Cabinet of the Government of Swaziland approved the legislation and establishment of the Child Coordinating Unit and its implementation by the Ministry of Health and Social Welfare. Even though this was established in 2002, it was only gazetted in July 2006. This Unit is responsible for integrating and coordinating all legislations, policies, plans, projects and programmes developed by government and NGOs to promote the rights of the child. It also assists in the implementation of social welfare programmes, also housed within the Deputy Prime Minister's Office. Despite these, a number of shortcomings have been aired about the effectiveness (as well as delay in becoming fully operational) of the Unit.

The Constitution establishes an independent Commission on Human Rights and Public Administration in Section 163. The Commission has powers to investigate complaints concerning alleged violations of fundamental rights and freedoms. Since November 2011, there have been conversations on establishing a Children's Rights Office in the country's Human Rights and Public Administration Commission. On a different note, one recurring limitation in the legal system has been the lack of an independent mechanism with a specific mandate to regularly monitor and evaluate progress in the implementation of the

<sup>2</sup> Act No. 001 of 2005 (hereinafter "the Constitution).

<sup>3</sup> See Section 29.

CRC, and which is empowered to receive and address individual complaints on behalf of, or from, children. There are no concrete activities or initiatives being made to rectify this situation.

Other important developments include the establishment of the Ministry of Regional Development and Youth Affairs in April 2006; the National Plan of Action for Children 2011-2015, Social Development Strategic Plan 2011-2015; and the Guidelines and Standards for Alternative Care, Strategy and Action on Violence Against Children.

### 3. DEFINITION OF THE CHILD

Unfortunately, the Constitution does not provide for an overarching definition of a child. There is also no consistent and overarching definition of a child both under common law and customary law. In 2006, the United Nations Committee on the Rights of the Child (UN Committee) expressed concern “at the lack of clarity under the common law and the customary law in the State party regarding the definition of the child and regarding the minimum age for marriage”.

The legal age of marriage is 18 years for both men and women. However, with parental consent and approval from the Deputy Prime Minister girls can marry at the age of 16.

Under customary law maturity or childhood is not determined by age but by puberty, which is very subjective and depends from one child to another. Another limitation that puberty has as the determinant factor for defining a child relates to

its inherently discriminatory tendencies as puberty differs between girls and boys.

In practice, this has resulted in minor girls as young as 13 years being married under customary law. Most of these young girls do not give their consent to the customary marriages as they are given out by their families under the custom of *kwendzisa*. This is in clear contravention of Section 28 of the Constitution which provides that a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.<sup>4</sup>

Table showing the definition of a child in Swaziland

Category	Age
Definition of a child	-
Age of majority	21
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	16 for girls and 18 for boys
Minimum age of criminal responsibility	7
Minimum age of recruitment into the army	18

<sup>4</sup> See Times of Swaziland, 15 September 2010, *15 year-old girl forced to marry a 60 year-old man*.

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The Constitution does not explicitly refer to the best interest principle, even though some of its provisions can be interpreted to have been provided in order to promote children's best interests. The best interests of the child also finds little space in a customary set up that often believes children should be seen and not heard. This is much more pronounced at the family level, especially within the family council (*Iusendvo*) that determines issues affecting children's welfare at the internal domestic level. As a result, the UN Committee has aired concern that "the principle of the best interests of the child is not given adequate attention in national legislation and policies and that awareness of its significance is low among the population".

**Non-discrimination:** Section 29(4) of the Constitution mainly conforms to the requirements of Article 2 of the CRC. In particular, Sections 29(4) and 31 of the Constitution outlaw the status of "illegitimacy" of children. These provisions recognize that children whether born in or out of wedlock shall enjoy the same protection. In customary law and in the larger society, children born out of wedlock are still regarded as illegitimate. This is further exacerbated by the customary practice of requiring that the father of such children should pay a fine to legitimise his children. Until such fine is paid, such children remain illegitimate, with the attendant denigration of status in society.

Discrimination in acquiring citizenship still continues under the Constitution. The situation of *de facto* discrimination for instance against girls, in particular adolescent girls who suffer marginalization and gender stereotyping, compromising their

educational opportunities and who are more vulnerable to sexual violence, abuse and HIV/AIDS is another issue that needs clear and explicit regulation through a non-discrimination provisions or law.

On a different note, the laws governing inheritance are the Administration of Estates Act<sup>5</sup> and the Intestate Succession Act<sup>6</sup> are discriminatory in relation to children, as only legitimate children can inherit from the estate of both their father and mother. Illegitimate children are only entitled to inherit from the estate of their mother.

**The right to life, survival and development:** Swaziland is not a state party to the Second Optional Protocol to the ICCPR and retains the death penalty. The death penalty is not mandatory and it may only be imposed on adults convicted of murder without extenuating circumstances and treason. The Child Survival and Development (CSD) programme aims to strengthen and scale up health and nutrition interventions, PMTCT and paediatric AIDS care. For children who are HIV positive, the programme seeks to improve home and community care practices, and increase access to safe water and sanitation.

As regards areas other than health, which are usually considered as forming part of the child's right to survival and development, survival and development concern education and social assistance. It appears that there is no system of social security that exists in Swazi law. It is clear that a comprehensive system of social security for children (and the progressive realisation thereof) as envisaged by the CRC is not catered for in Swazi national legislation, which has definite implications particularly for orphaned and vulnerable children (OVC's).

<sup>5</sup> 28 of 1902.

<sup>6</sup> 3 of 1953.

**Respect for the views of the Child:** There is no right to child participation that is explicitly provided for in law and complies fully with Article 12 of the CRC. This should be addressed not only in the overall context of child law, but more particularly participation rights in areas like adoption and court proceedings (civil, welfare and criminal proceedings) should be carefully articulated.<sup>7</sup>

However, Chapter III of the Constitution guarantees the right to freedom of expression, and freedom of thought, freedom of association and assembly to everyone. The first youth parliament, initiated in 2005, was held with 65 Swazi children nominated from their constituencies to trade places with members of the House of Assembly.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

Chapter IV of the Constitution Act of 2005 recognizes the protection of a child's name and identity as basic rights. The basic right of citizenship, for example, is premised on identity.

In terms of the Constitution, children can only acquire citizenship from their fathers. Women cannot pass citizenship onto their children, except for cases where the mother is a Swazi citizen and the father a foreigner and the father has denounced the child. This goes against the equality provisions of the Constitution.

Under the Constitution, children derive citizenship from the father, unless the birth occurred outside marriage and the father does not claim the child, in which case the baby acquires the mother's citizenship. Birth registration is not automatic as a result it may result in denial of public services.

Discrimination in acquiring citizenship still continues under the Constitution. The situation of

*de facto* discrimination for instance against girls, in particular adolescent girls who suffer marginalization and gender stereotyping, compromising their educational opportunities and who are more vulnerable to sexual violence, abuse and HIV/AIDS is another issue that needs clear and explicit regulation through a non-discrimination provisions or law.

Chapter III of the Constitution guarantees the right to freedom of expression, freedom of thought, freedom of association and assembly, protection of privacy and freedom of conscience and religion. These rights apply to "everyone" and children benefit from their application. The Constitution also guarantees the rights of children and every other individual to freedom of religion.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Constitution provides for the protection of the family as an important unit of society. One in four adults in Swaziland is infected with HIV, and annual AIDS-related deaths are estimated at 10,000 out of a population of slightly more than 1 million.<sup>8</sup> As a result, the HIV/AIDS pandemic in Swaziland poses the highest threat to children's rights in general, and their right to grow up in a family environment in particular. Government efforts to protect children's rights and welfare were inadequate, due in part to the growing number of orphans and vulnerable children (OVC), which made up an estimated 10 percent of the population.

Swaziland has adopted the National Plan of Action (NPA) for Orphans and Vulnerable Children for 2006-2010. The Plan seeks to ensure that children have access to shelter and are protected

<sup>7</sup> Another area for consideration is in the context of OVC's where the child participation study showed a lack of participation by the children in planning and preparing for their futures.

<sup>8</sup> UNAIDS, *2007 AIDS Epidemic Update*, UNAIDS, Geneva, 2007, p. 16, <[http://data.unaids.org/pub/EPISlides/2007/2007\\_epiupdate\\_en.pdf](http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf)>, (accessed 12 September 2011).

from abuse, violence, exploitation, discrimination, trafficking and loss of inheritance; support vulnerable individuals and households to enable them to produce or acquire sufficient appropriate food to meet short and long term nutritional needs; improve access to basic health care services for the most vulnerable children; and achieve universal primary education and provide support to OVC's in secondary schools.

There are also a number of social services aimed at the most vulnerable children groups in the country which include Child Support Grants that are allocated to orphanages around the country and neighbourhood Care Points (NCP) that are service delivery points at community level. Efforts are also being made by the State party at chiefdom and local levels to provide care and support for vulnerable families and children, including through the establishment and construction of "Kagogo" centres ("granny's place"), which are commendable initiatives to address the issue of children being deprived of their family environments.

Children who fall under the category of OVC's have for the past years benefitted from a school fund run by the government. However, in recent years, there have been instances where this fund was abused by those administering it, to the detriment of deserving children. Further, the State often defaults in its payment of school fees for OVC's, leading to school principals sending those children home. According to the Swaziland Millennium Development Goals Progress Report, produced by the Ministry of Economic Planning and Development, funding for the OVC initiative has increased from E16 million in 2002 to E123 million in 2010.

The maintenance of children is governed by the Maintenance Act 35 of 1970. This provides for

procedures to secure the payment of maintenance, which includes the appointment of maintenance officers, investigations and also governs the payment of maintenance arising from customary marriages. An outdated study was undertaken by WILSA into maintenance in Swaziland, the findings of which still remain mainly relevant, indicated that although maintenance of children problems are widespread most women do not do anything to solve the problem.<sup>9</sup> The Report goes on to give reasons for this inaction,<sup>10</sup> which include lack of knowledge of the law, practical difficulties in bringing a case to court, and attitudes that influence maintenance law- social pressures against bringing a man to court, fear of violence, fear that the man will take the child, fear of witchcraft that will harm the child and a lack of confidence in the court system.

Swaziland also does not have specialised maintenance courts with well-trained officers to deal with cases where claims are made for the maintenance and welfare of children. There is a need for the establishment of maintenance courts. Further, there is a need to dispense with the requirement of legal representation in maintenance matters in order to allow the large majority of indigent women whose children are not being maintained to sue for maintenance.

Swaziland also does not have a specialized or designated court to deal with child welfare and protection issues. And the existing Child Care Service Order has not been put into operation.<sup>11</sup> This Order establishes a 'Child Care Service' which is a department in the Ministry of Home Affairs and Section 4 of the Order sets out the general functions of the Service which includes making provision for orphaned, destitute, homeless or abandoned children and protecting children from abuse or ill-treatment.

<sup>9</sup> 1992, "Maintenance in Swaziland", Women and Law in Southern Africa Research and Educational Trust, January 1992, p. iii (hereafter referred to as WILSA Maintenance Report).

<sup>10</sup> At p. iii.

<sup>11</sup> No. 30 of 1977.

## 7. HEALTH AND DISABILITY

Swaziland delivers health care services using the Primary Health Care Approach. This is outlined in the National Health Policy of 2007, which is operationalised by the Health Sector Strategic Plan 2001–2013. Specific developments directed to increasing access to health include free primary health care services for the country and highly subsidised secondary and tertiary health care services. While the country has embraced the move towards the Elimination of Paediatric AIDS by 2015 including initiatives like male circumcision that has been integrated into the national HIV prevention package, with the pace of current progress in addressing the epidemic, the Plan seems to be overly ambitious.

Children's Centre Clinical Excellency – which is a special health facility for children infected with HIV/AIDS, was established in 2005 and has increased children's access to services that promote their right to health. However, the UN Committee has raised concerns at the insufficient availability of basic health-care services and shortage of staff in health-care facilities in the State party. Access to clean water, poor sanitation facilities and the problem of child nutrition remain among the major challenges.

The Disability Profile of 2011 which was taken from the 2007 census data estimates, that persons living with disabilities constitute 17% of the population. The Constitution has no specific provisions dealing with children with disabilities as required by Article 23 of the CRC, except in Section 30 that covers all persons with disabilities. The Constitutional provision does not differentiate between physical and mental disabilities and requires Parliament to enact relevant implementing legislation. The Deputy Prime Minister is responsible for upholding the law. However, Parliament had not passed laws to prohibit discrimination against persons with disabilities in employment or to provide access to health care or other state services by year's end. The State has also not

ratified the Convention on the Rights of Persons with Disabilities. There is a Public Assistance Fund (PAF) that provides, amongst others, wheelchairs and ad hoc cash grants. While there are specialized schools for the deaf and programmes for the visually impaired which include the provision of Braille text books, braille machines and the establishment of two resource centres for special needs children where teachers and pupils will access teaching and learning materials, children with disabilities continue to be one of the most marginalized groups.

Part VII of the Children's Bill provides for the compulsory immunisation of children 5 years of age and below. The parent, guardian or custodian of the child has the responsibility to ensure that immunisation occurs and ethnicity, race, custom, culture, gender, religion and age cannot be used as a reason for not immunising such a child. However, the Bill goes further and states that a child will not be admitted to a learning institution, which includes pre-school or crèche, without documentary evidence of immunisation. While this can be seen as a means to encourage immunisation, it runs contrary to the right of the child to education. Perhaps, the Bill should then rather place the duty on the learning institution to ensure that there is compliance with immunisation practices within a particular period of time.

Part X of the Bill deals with infant nutrition, and provides that every infant (child under 7 years) shall have an enforceable right to be fed and nourished with infant food including breast milk by its mother, custodian or guardian. The bill then goes on to create an offence for failure to do so. In addition, Section 101 places a compulsory duty on a mother to breastfeed her children for a period of at least six months, dependant on her health status. Surprisingly, where an infant refuses or rejects its mother's milk, the mother must provide documentary proof of that fact from a health officer in order to excuse her from this duty. Part V is more problematic as it criminalises the transmission of a sexually transmissible disease

as this is a very controversial issue, particularly in relation to the HIV/AIDS as it relates to the continuing stigmatisation of persons with the disease. It is expected that, if the Bill is passed in its current form, it will help to improve children's right to health in Swaziland.

## 8. EDUCATION

The Constitution of Swaziland provides that, every Swazi child shall have access to free primary education, beginning with the first grade.<sup>12</sup> The section however does not make such education compulsory as per the requirements of Article 28(a) of the CRC that requires that all state parties "Make primary education compulsory and available free to all".

However, when the Free Primary Education Act was enacted in 2010 to give effect to the constitutional right to free primary education, Section 10(1) provides for a mandate to compel parents to send their children to school on pain of prosecution. In the grades where Free and Primary Education has not yet been introduced, the Ministry of Education continues to provide free text and workbooks, free stationery, free school furniture and free exercise books.

Despite a constitutional mandate that children be provided free primary education by 2009, the government had not completely complied. The Government claimed it could not afford to enact free primary education immediately; however, after a 2009 lawsuit brought by the Ex-Miners' Association to obtain free primary education on behalf of the country's children, the government began to implement the mandate gradually and in 2010 government provided tuition, fees, and books for first and second grade students. To further improve access to primary education, the Government introduced the provision of free

stationery, school furniture, feeding programmes and improved infrastructure. However, unfortunately, the adverse effects of the HIV/AIDS epidemic in Swaziland has taken an extreme toll on the country's education system and has had severe consequences on the ability of orphans and other vulnerable children to realize their rights to education.

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Swaziland's 2008 national survey established that violence against children is a major public health and social problem. Section 29 of the Constitution protects a child from engaging in work that constitutes a threat to the education, health or development of the child. All children have the right to be properly cared for and brought up by parents or other lawful authority. Section 29(1) of the Constitution also partially satisfies the requirements of Article 32 of the CRC that requires state parties to recognize "the right of the child to be protected from economic exploitation"

Corporal punishment is widespread, and is meted out by parents, guardians, and teachers. The fact that the practice is traditionally accepted coupled with the absence of prohibition of the act in all settings and the Constitution's explicit incorporation of the concept of "moderate chastisement" further exacerbates the problem.

The Prevention of Peoples' Trafficking and People Smuggling (Prohibition) Act was passed by parliament in October 2009.<sup>13</sup> This Act intends to give effect to the UN Convention against Transnational Organised Crime that Swaziland ratified. The Act criminalises both smuggling and trafficking and prescribes a sentence of a period

<sup>12</sup> Section 29(6).

<sup>13</sup> This legislation became effective in March 2010, after its publication in the government's official gazette.

of imprisonment not exceeding 18 years for both offences. The Act prescribes up to 25 years' imprisonment for the trafficking of children.<sup>14</sup>

Despite this progress, there is no law that specifically prohibits child prostitution.<sup>15</sup> Even with the coming into force of this Act, Swaziland does not comply with the minimum standards for the elimination of trafficking. The formation and training of trafficking-specific emergency response teams will help to boost the effort of Government in addressing this problem.

As far as child labour is concerned, the Constitution and the Employment Act encompass provisions against it. Accordingly hiring a child younger than 15 years old in an industrial undertaking is prohibited. The only exception for this, are cases where only family members were employed in the firm, or in technical schools where children worked under supervision. Despite these laws, weak law enforcement and especially the non-enforcement of these laws in the informal sector, still continue to contribute to the child labour problem in the country.

The Reformatories Act<sup>16</sup> provides for juveniles (under 16 years) and juvenile adults (between 16 and 21 years) to be detained in reformatories in terms of a court order. The sentence would be not less than 2 years and not more than 5 years.<sup>17</sup> Furthermore, the period for which the juvenile would be detained in the reformatory expires on or before the date on which he attains the age of 18 years, but this does not apply to juvenile

adults. However, it has been noted that this Act has never been put into operation, at least fully.

The Criminal Procedure and Evidence Act is the main piece of legislation dealing with children in conflict with the law.<sup>18</sup> However, it should be noted that this is not a separate child specific law, but rather applies to adults and children alike. It does distinguish between adults and children in certain limited respects, for instance, in relation to sentencing. While the Act provides for the death penalty, it prohibits the imposition of this sentence on children under the age of 18 years.<sup>19</sup> In addition, the Act provides that no child under the age of 14 years shall be subject to a sentence of imprisonment.<sup>20</sup> The Act also provides for certain alternative sentences for children such as placing the child in the custody of a suitable person.<sup>21</sup> In addition, it also provides for sentences to be suspended or postponed with certain conditions attached thereto.<sup>22</sup> The minimum age of criminal capacity in Swaziland is 7 years of age. The amendment of the Criminal Procedure and Evidence Act, Section 223, has facilitated for the establishment of the Intermediary Service and Children's Court. The Children's Court is a facility to obtain evidence during criminal trials in sexual offences involving young children. It is clear that while Swaziland has a functioning criminal justice system, it does not comply with the requirements contained in Article 40 of the CRC in relation to the creation of a separate criminal justice system for children, including the promotion of diversion.

<sup>14</sup> Section 13 of the Act.

<sup>15</sup> The law sets the age of sexual consent at 16 years old.

<sup>16</sup> Act 82 of 1921.

<sup>17</sup> Section 3(1).

<sup>18</sup> Act 67 of 1930.

<sup>19</sup> Section 296(1).

<sup>20</sup> Section 296(2).

<sup>21</sup> Section 305.

<sup>22</sup> Section 313.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Signature, 30/07/2005
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Signature , 07/12/2004
Convention on the Rights of the Child (CRC), 1989	Ratification 07/09/1995
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	-
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	-
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Signature, 25/09/2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Signature, 25/09/2007
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 23/10/2002
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 23/10/2002
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	30 Nov 2005	-	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Swaziland**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Child Helpline International	May 2006	<b>None</b>
Global Initiative	May/June 2006	
The Lutheran World Federation	September 2006	
The OVC Network Shadow Reporting Core Team	July 2005	

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC	UN Committee
-	-

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>

# HARMONISATION OF CHILDREN'S LAWS IN TANZANIA

## COUNTRY BRIEF

### ABSTRACT

Tanzania has made significant progress in the harmonisation of children's laws in the last three years. This is evidenced by the enactment of the Law of the Child Act of 2009 applicable in Tanzania Mainland and the Children's Act of 2011, applicable in Zanzibar. These two statutes bring Tanzania close to fully domesticating its obligations under international law that are relevant for children's rights. The realisation of children's rights in the country now mainly depends on the extent to which these and other laws are implemented, and poverty and marginalisation are addressed.

Tanzania ratified the Convention on the Rights of the Child (CRC) in 1991. It ratified to the Optional Protocol on the Involvement of Children in Armed Conflict in 16 March 2003 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in April 2003. It ratified ILO Convention No. 182 (1999) on the Worst Forms of Child Labour in 2001, ILO Convention No. 138 (1973) on the minimum age Convention in 1983, and the African Charter on the Rights and Welfare of the Child (ACRWC) in March 2003.

As far as subsidiary laws on children are concerned, the Government has recently enacted two comprehensive child laws: that is, the Law of the Child Act (2009)<sup>3</sup> applicable in Tanzania Mainland and the Children's Act (2011)<sup>4</sup> applicable in Zanzibar. These two statutes bring Tanzania close to fully domesticating its obligations under international law that are relevant to children's rights.

There are also a number of other subsidiary laws that the Government has enacted, that have relevance to children's rights in Tanzania. For instance, in Zanzibar, the Person with Disabilities (Rights and Privileges) Act (2006), has been enacted to give legal effect to the efforts of the State Party in combating, promoting and protecting the rights and welfare of persons with disabilities, particularly children.

## 1. INTRODUCTION

Tanzania had a projected population of 43 million people in 2011.<sup>1</sup> Around half of Tanzania's population are children-by definition persons under the age of 18 years.<sup>2</sup>

Both the Tanzanian Constitution (1977) and the Zanzibar Constitution of 1984 contain a Bill of Rights. On both the Mainland and Zanzibar, the Bills of Rights enlist basic rights and fundamental freedoms to which every person is entitled. Notably, Zanzibar underwent some political reforms in 2010 through the 10<sup>th</sup> amendment to the Zanzibar Constitution, which has not affected the bill of rights.

<sup>1</sup> This projection is based based on the 2002 Census.

<sup>2</sup> See the 2002 Tanzanian census that was conducted in August 2002 by the National Bureau of Statistics (NBS) of the Government of Tanzania.

<sup>3</sup> Act No. 21 of 2009. This law was passed by Parliament on 4<sup>th</sup> November 2011.

<sup>4</sup> Act No. 6 of 2011. This law was passed by the Zanzibar House of Representatives on 30 March 2011.

## 2. GENERAL MEASURES OF IMPLEMENTATION

Section 4 of the Basic Rights and Duties Enforcement Act provides that if “any person” alleges that any of the provisions of Sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress. Reference to “any person” implies that every person, including a child, may bring a petition to the High Court for redress in the event that any of the basic rights and fundamental freedoms enlisted in the Bill of Rights is violated or is about to be violated. In Zanzibar, cases of violations of the basic rights and fundamental freedoms enlisted in the Bill of Rights are lodged in the Zanzibar High Court, whereby any person, including a child, can petition the Court for redress.

The Government has set up the Commission for Human Rights and Good Governance (CHRAGG), which is the national human rights institution established in 2000. This was done through the 13<sup>th</sup> Amendment to the 1977 Constitution of Tanzania. It became operational in 2001 following the enactment and the coming into force of its founding statute, the Commission for Human Rights and Good Governance Act<sup>5</sup> (henceforth, the founding legislation). CHRAGG now has offices in both Zanzibar and Tanzania Mainland. The main mandate of CHRAGG is to promote, protect, and preserve human rights and duties. This is stipulated in Article 130 (1) of the Union Constitution as well as in Section 6(1) of its founding legislation.

The Ministry of Community Development, Gender and Children (MCDGC) is the main ministry in

charge of the coordination of children’s issues in mainland Tanzania. In Zanzibar, the Ministry of Social Welfare, Youth, Women and Children Development (MSWYCD) is the coordination body for the implementation and supervision of all affairs concerning children. However, other responsible Government institutions such as the Ministry of Labour Employment and Youth Development, Ministry of Health and Social Welfare, Ministry of Education and Vocational Training, Ministry of Home Affairs, Ministry of Constitutional Affairs and Justice, Chief Justice, Tanzania Commission for Aids, must clearly set out a clear demarcation of who does what in relation to children’s rights and be coordinated properly.

Tanzania adopted its latest the Child Development Policy in 2008. The Policy formed the basis for the enactment of the Law of the Child Act in 2009. There is also a National Costed Plan of Action 2007-2011 for Most Vulnerable Children that has been adopted and is being implemented in Tanzania Mainland. Government also adopted, in July 2011, the Costed Operational Plan for the Implementation of the U5NBR.<sup>6</sup>

In Zanzibar, a National Gender Based Violence Committee (GBV Committee) has been established. This was set up in order to foster the responses of the State Party in cases of domestic abuses faces children and women.

## 3. DEFINITION OF THE CHILD

In the past, the legal system in the mainland and in Zanzibar consists of different sources of law with varying definition of the child. Under customary and Islamic legal systems, a child is defined in relation to the age of majority (puberty). In Zanzibar, legislation related to children’s rights defined a

<sup>5</sup> Cap. 391 R.E. 2002. This Act was amended by Act No. 16 of 2001. The Act came into force on 9<sup>th</sup> May 2001 vide Government Notice No. 67 of 4<sup>th</sup> May 2001.

<sup>6</sup> This is an abbreviation of the words: “Under 5 National Birth Registration System.” See, United Republic of Tanzania, “The Costed Operational Plan for the Implementation of the U5NBR.” Dar es Salaam: Ministry of Constitutional Affairs and Justice/Registration Insolvency and Trusteeship Agency (RITA), July 2011.

child according to particular purpose and context. Consequently, a person may be considered a child in one context and not a child in another.

With the enactment of the Law of the Child Act (2009), which applies in Tanzania Mainland, and in the Children's Act (2011), which applies in Zanzibar, the law now defines a child as any person below the age of 18 years.<sup>7</sup> These laws have also amended several other laws that used to define a child differently.

The Law of Marriage Act <sup>22</sup> provides the age of marriage to be 15 years for girls and 18 years for boys. It is argued that this minimum age is maintained because it touches on certain religious beliefs, which needs the public to be consulted and agree on a common minimum age. Minimum age of criminal responsibility in Main Land Tanzania is 10 while in Zanzibar it is provided to be 12.

**Table showing the definition of a child in Tanzania**

Category	Age
Definition of a child	18
Age of majority	18
Minimum age of employment	14
Minimum age of sexual consent	14
Minimum age of marriage	15 for girls and 18 for boys
Minimum age of criminal responsibility	10 and 12 for sexual offence by boys
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** Tanzania has enacted specific provisions recognizing and protecting the best interests of the child in the Law of the Child Act and the Zanzibar Children's Act. In particular, Section 4(2) of the Law of the Child Act (2009) requires the best interests of the child to be a primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies. In a more elaborate manner, Section 4 of the Zanzibar's Children's Act (2011) sets out factors to be taken into account in determining the best interests of the child, including the nature of the personal relationship between the child and the parents, or any specific parent; and the child and any other care-giver or person relevant in those circumstances.

Apart from being entrenched in the child-specific laws as set out above, the State Party has also embedded the principle of the best interests of the child in other laws that touch on children's welfare. For instance, in Zanzibar the State Party has also enshrined the principle in the Spinsters and Single Parent Children Protection Act (2005).

**Non-discrimination:** The principle of non-discrimination and equality has been domesticated in Tanzania. This is entrenched in the Constitution. The Constitution of the United Republic of Tanzania (1977) and the Constitution of Zanzibar (1984) prohibit discrimination of any kind in Articles 13(5) and (6) and Article 12(4) and (5), respectively. Discrimination of persons, including children, is also prohibited by various policies relating to children. In Tanzania Mainland, the Tanzania Child Development Policy (2<sup>nd</sup> edition, 2008) also prohibits discrimination of children.<sup>8</sup> In Zanzibar the Child Survival and Development Policy of 2001 prohibits discrimination of children on any of the listed grounds. Section 31 of the HIV/AIDS

<sup>7</sup> See Section 2 of the Zanzibar Children's Act (2011); and Section 4(1) of the Law of the Child Act (2009).

<sup>8</sup> Paragraph 32 of the Tanzania Child Development Policy.

(Prevention and Control) Act (2008) prohibits any kind of stigma and discrimination against any person on actual, perceived or suspected HIV/AIDS status.

In accordance with Section 5(1) of the Law of the Child Act and Section 6(1) of the Zanzibar Children's Act, a child shall have a right to live free from any discrimination. In a similar way, the two sections enlist the grounds of discrimination against the child as gender, race, age, religion, language, political opinion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, being a refugee or of other status.<sup>9</sup>

**The right to life, survival and development:** The right to life is found in the Tanzania and Zanzibar Constitutions. Article 13 of the Constitution of Zanzibar (1984) and Article 12 of the Constitution of the United Republic of Tanzania (1977) provide for this right. Based on this constitutional foundation, both the Zanzibar Penal Code (2004) and the Tanzania Mainland's Penal Code prohibit death penalty to be imposed on children.

In Zanzibar, Young Child Survival Protection and Development (YCSPD); Integrated Management of Child Illness (IMCI); Expanded Programme on Immunization (EPI); Community Based Rehabilitation (CBR); Prevention of Mother to Child Transmission Programme (PMTCT); Nutrition Programme, Reproductive Child Health (RCH); and the Zanzibar Basic Education Improvement Programme (ZABEIP).

**Respect for the views of the child:** Article 18 of the Constitution of the United Republic of Tanzania and the Zanzibar Constitution provide for the right

to freedom of expression. In addition, and more directly, the Zanzibar Children's Act (2011), in Section 5, requires the State Party to ensure that "views expressed by the child be given due consideration". In terms of Section 11 of the Law of the Child Act (2009), a child has the "right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being".

At the practical level, Government has established children's councils in every municipal, which are represented in the National Children Council. Child participation was also ensured during the drafting process of the Law of the Child Act in Tanzania mainland and the Children's Act in Zanzibar.<sup>10</sup>

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Law of the Child Act provides for the child's right to a name, nationality and to know his biological parents and extended family.<sup>11</sup> In fact, the law has also extended this principle to include prohibition on a person to deprive a child of the right to a name, nationality and to know his biological parents and members of extended family subject to the provisions of any other written laws.<sup>12</sup>

In Mainland Tanzania, the Births and Deaths Registration Act<sup>13</sup> is the main legislation on birth registration. Section 11 in particular provides that parents, guardians, or any other person in charge of a child has to ensure the registration of the child within 3 months. In Zanzibar, the Birth and Death Registration Act of 2006 that, *inter alia*,

<sup>9</sup> See Section 5(2) of the Law of the Child Act; and Section 6(1) of the Zanzibar Children's Act.

<sup>10</sup> See particularly Revolutionary Government of Zanzibar, *Capturing Children's Views on the Children's Bill 2010*. Zanzibar: Ministry of Social Welfare, Youth, Women and Children/Save the Children, 2011. This report was prepared in the context of the National Child Consultation Programme in Zanzibar).

<sup>11</sup> Section 6(1) of the Law of the Child Act.

<sup>12</sup> Section 6(2) of Law of Child Act; and Section 7 of the Zanzibar Children's Act.

<sup>13</sup> Cap. 108 R.E. 2002.

requires a child to be registered within 42 days after birth. The Zanzibar Children's Act (2011) also has provisions which require a child to be registered immediately after birth in line with the CRC and the ACRWC. The law also compels the health authorities or any other relevant agency for birth registration to assist in child registration. This is, in particular, provided in Section 8(1) of the Children's Act, which states that: 'Subject to the provisions of the Birth and Death Registration Act, No. 10 of 2006 every child shall be registered upon birth.' Sub-Section (2) of this Section provides that: 'The health authorities and any other relevant person or agency shall co-operate with the Registrar of birth in measures to secure the registration of all births'.

The State Party has enacted in Section 11 of the Law of the Child Act the child's 'right to opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being.' Section 8 of the Zanzibar Children's Act provides for a similar right.

In Tanzania children have the right to freedom of association and peaceful assembly. In order to effectively guarantee this freedom, Government has constitutionalised it. Fortunately, this right forms part of the enforceable parts of both the Zanzibar Constitution and the Constitution of the United Republic of Tanzania.<sup>14</sup>

As part of the general right to privacy, the law also regulates the publication of material about children that affects their best interests. For instance, Sections 33 and 48 of the Zanzibar Children's Act (2011) and Section 33 of the Law of the Child Act (2009) all prohibit publication of any information relating to children who have been accused or are victims of any act. In a similar

wording, Sub-Sections (2) of Sections 33 of the two laws make it an offence to publish the prohibited information.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The need for children to grow up in a family environment is emphasised by the provisions in the Law of the Child Act for mainland Tanzania and the Children's Act for Zanzibar. These laws provide for a protection for families, including children, and also emphasise the responsibility of parents/guardians to care and protect their children. In case the biological parents of a child are deceased, parental responsibility may be passed to a relative of either parent or a custodian by way of court order or any traditional arrangement.<sup>15</sup>

According to Section 8 and 16 of the Law of the Child Act and Section 10 of the Zanzibar Children's Act (2011) parents have a common responsibility for taking care and protection of a child through provision of food, shelter, clothing, education, medical care, liberty and right to play and leisure. The best interest of the child is expected to be the main concern of parents and guardians in taking care of their children.<sup>16</sup>

Policy documents that emphasise parental responsibility include the Child Development Policy (2008) for mainland Tanzania and Child Survival Protection and Development Policy (2001) for Zanzibar. In addition, In MKUZA II, Cluster II (Social Wellbeing and Quality Social Services), under 2.6, strives to improve safety nets and social protection for the poor and vulnerable groups, which include children.<sup>17</sup>

<sup>14</sup> Article 20 of the Constitution of the United Republic of Tanzania (1977).

<sup>15</sup> Section 9(1)-(4) of the Law of the Child Act (2009) and Section 12(1)-(3) of the Zanzibar Children's Act (2011).

<sup>16</sup> Section 9 (3) of the Law of the Child Act (2009) and Section 12 (2) of the Zanzibar Children's Act (2011).

As a rule, separation of children from their parents is prohibited. However, as an exception, in order to promote the best interests of the child, separation may be ordered.<sup>18</sup> For instance, according to Section 9(3) of the Zanzibar Children's Act, where a Children's Court determines that it is in the best interests of a child to separate him from his parents, the best substitute care available shall be provided for the child. The Law of the Child Act and the Zanzibar Children's Act also provide for the payment of maintenance. These laws provide that an application for maintenance may be made against any person who is eligible to maintain the child or contribute towards the welfare and maintenance of the child.<sup>19</sup>

According to the Child Development Policy, the government created a special Ministry to coordinate all activities and programmes relating to child development including the establishment of centres for children in difficult circumstances such as HIV orphans, special schools and institutions to cater for the children with particular problems. The Commission for Social Welfare is a legally designated authority to licensing and supervising of orphanages and special schools.<sup>20</sup>

In compliance with Article 20 of the CRC, the Law of the Child Act and the Zanzibar Children's Act provide for various alternative care measures. These include alternative or substitute care as foster placement<sup>21</sup>; *kafalah* in the context of Islamic law applicable in Zanzibar<sup>22</sup>, adoption<sup>23</sup> and placement in suitable institutions<sup>24</sup> for the

care of children who have been deprived of a family environment. In respect of Tanzania Mainland, the procedure for applying for an adoption order is set out under Section 54 of the Law of the Child Act. However, in Zanzibar, as per Section 76(1) of the Zanzibar Children's Act, adoption does not apply to persons subscribing to the Islamic faith.

## 7. HEALTH AND DISABILITY

In Tanzania the right to health is provided for under Article 11(1) of the Constitution of the United Republic of Tanzania as amended.<sup>25</sup> But this right falls outside the enforceable provisions of the Constitution and therefore it is not enforceable. The Law of the Child Act, 2009<sup>26</sup> on the other hand imposes a duty and responsibility upon parents to provide health facilities and services to the child. The Zanzibar Health Policy of 2009 is one of the State Party's tools, which aim at addressing the issues pertaining to health.

In so far as initiatives to cater for child protection are concerned the Health Policy on Children confers to all pregnant mothers and children under 5 years free health services.<sup>27</sup> Secondly; all children below 18 years are subject to free health services for chronic diseases such as AIDS, cancer, tuberculosis, epilepsy and diabetes. There is also a project where the government offers medicine to pregnant mothers who are HIV positive free of charge.

<sup>17</sup> Revolutionary Government of Zanzibar, *MkakatiwaKukuzaUchumi Zanzibar (MKUZA II)*, Goal 2.6.

<sup>18</sup> Section 9 of the Zanzibar Children's Act and Section 26 of the Law of the Child Act.

<sup>19</sup> Section 42(2) of the Law of the Child Act and Section 64(2) of the Zanzibar Children's Act.

<sup>20</sup> Child Development Policy 2000

<sup>21</sup> Part IV (Sections 27-33) of the Law of the Child Act; and Part 7 (Sections 72-74) of the Zanzibar Children's Act.

<sup>22</sup> Section 75 of the Zanzibar Children's Act.

<sup>23</sup> Sections 76-96 of the Zanzibar Children's Act; and Part VI (Sections 52-76) of the Law of the Child Act.

<sup>24</sup> Sections 133-146 of the Law of the Child Act; and Part 12 (Sections 123-134) of the Zanzibar Children's Act.

<sup>25</sup> Constitution of the United Republic of Tanzania, 1977 as amended.

<sup>26</sup> Section 9(1).

<sup>27</sup> Tanzania Health Policy.

In the context of disabilities, the Persons with Disabilities Act (PDA) was enacted by Parliament in April 2010 in order to give legal effect to the National Policy on Disability and the UN Convention on Persons with Disabilities. It strives to make provisions for the health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment or work, promotion of basic rights for the persons with disabilities and to provide for related matters. Under Section 27, every child with a disability shall be provided with appropriate disability-related support services or other necessary learning services from a qualified teacher or a teacher assigned for that purpose. In Zanzibar too there is specific law on disability of 2006, which aims at addressing the issues such as education, family and employment. It also emphasises on mechanisms involving employment of persons with disabilities.

## 8. EDUCATION

The Law of the Child Act and the Zanzibar Children's Act has made it clear that the primary responsibility to maintain a child by providing him or her with, *inter alia*, education and guidance rests on a parent, guardian or any other person having custody of a child.<sup>28</sup> Article 28 of the Constitution of Zanzibar recognises the right of the child to education, with a view to achieving this right progressively and on the basis of equal opportunity.

The Zanzibar Education Policy (2006) provides that “[p]rimary school is part of universal free basic education offered to all children within the age group of 7-13 years”.<sup>29</sup> The Zanzibar Education Policy (2006) aims at providing quality

education at all levels from Pre-Primary to adult Education. However, parents contribute a little amount of money for their children's education, which could be challenged as being not compliant with the free and compulsory primary education requirements of the CRC and the ACRWC.

In Mainland Tanzania, the National Education Act provides that it shall be compulsory for every child who has attained the age of 7 years but has not attained the age of 13 years to be enrolled for primary education. And it is upon the parent or parents of every child compulsorily enrolled for primary education to ensure that the child regularly attends the primary school at which he is enrolled until he completes primary education.<sup>30</sup> School fees for primary education were abolished in the year 2002.<sup>31</sup>

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Tanzania is one of the first few countries in Africa to undertake A National Study on Violence against Children – for the first time measuring all forms of violence (sexual, physical and emotional) amongst girls and boys and giving national estimates of the prevalence of violence. Preliminary results from this national study on violence against children (2010/11) in Tanzania, show that nearly one out of three females and one out of six males experience sexual abuse prior to the age of 18. The study<sup>32</sup> has also revealed that the number of children living in difficult conditions in the country is increasing due to socio-economic problems and lack of parental care. Based on this and other studies, Zanzibar published its National Plan to

<sup>28</sup> Section 8(1)(e) of the Law of the Child Act (2009); and Section 12(1) of the Zanzibar Children's Act.

<sup>29</sup> According to clause 4.2.2.

<sup>30</sup> The National Education Act Art 35.-(1)

<sup>31</sup> Concluding Observation, Second Periodic Report to the CRC, CRC/C/TZA/CO/2, 21 June 2006

<sup>32</sup> The study was launched at the high profile meeting of the UN Agencies, Diplomatic Corporations and Ministries which were required to make public commitments to combating violence against children.

Respond to Violence against Children (2011-2015). Mainland Tanzania is currently developing its own plan.

Both the Children's Act of Zanzibar and the Law of the Child Act in Tanzania prohibit a child from being subjected to any inhuman treatment.<sup>33</sup> An explicit prohibition of subjecting a child to "torture, or other cruel, inhuman punishment or degrading treatment" is found in Section 13(1) of the Law of the Child Act and in Section 14(1) of the Zanzibar Children's Act.<sup>34</sup> The law of the Child Act in addition provides that no correction of a child is justifiable which is unreasonable in kind or in degree according to the age, physical and mental condition of the child and no correction is justifiable if the child is by reason of tender age or otherwise incapable of understanding the purpose of the correction.

The National Defence Act provides that "[n]o person under the apparent age of 18 years shall be enrolled without the consent in writing of one of his parents or guardian or, where the parents are dead or unknown, by the District Commissioner of the District in which that person resides".<sup>35</sup> The two child laws prohibit forced labour for children<sup>36</sup> as well as employing a child in exploitative labour,<sup>37</sup> and as a result, the relevant provisions of the National Defence Act need to be implemented in such a way that they complement these laws.

Tanzania enacted the Sexual Offence (Special Provision) Act (Act no 4 of 1998) which prohibits and criminalises,<sup>38</sup> *inter alia*, female genital mutilation (FGM). The Act stipulates that FGM on anyone under the age of 18 is illegal. Apart from

this Act, both the Law of the Child Act and the Zanzibar Children's Act prohibit harmful traditional practices to children.<sup>39</sup> The Zero Tolerance to FGM Day (which falls on 6<sup>th</sup> February every year), the National Plan of Action to Combat Female Genital Mutilation (2001-2015), and the National Secretariat on Elimination of FGM, the Secretariat of which is coordinated by the Ministry of Community Development, Gender and Children are measures that support the implementation of the legislative framework.

The provisions of Section 110(2) of the Zanzibar Children's Act (2011), *inter alia*, has protected the children from accessing pornographic information and materials that are injurious or harmful to the child's well-being. In an effort to combat child sexual abuse, Tanzania has adopted a definition of sexual abuse of children which covers more than non-consensual activities, including sexual activities with children below the age of consent, whether or not they appeared willing or even initiating partners. Thus, again, the Sexual Offences (Special Provision) Act criminalises anyone having sexual intercourse with a child. The Law of Marriage Act of 1971 also protects children from sexual abuse by setting up the sexual relation age. That is the age of marriage which is 18 years for boys and 15 years for girls.<sup>40</sup>

The Penal Code on the other hand provides for punishment for the act of sexual intercourse with a girl under the age of 14 years provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause

<sup>33</sup> See Section 13(1) of the Law of the Child Act.

<sup>34</sup> According to Sub-Section (3) of Section 13 of the Law of the Child Act, the term "degrading treatment" as used in this section "means an act done to a child with the intention of humiliating or lowering his dignity".

<sup>35</sup> Section 29(6)

<sup>36</sup> Section 80 of the Law of the Child Act; and section 102 of the Zanzibar Children's Act.

<sup>37</sup> Section 78 of the Law of the Child Act; and Section 99 of the Zanzibar Children's Act.

<sup>38</sup> Section 169 A (1) of the Act.

<sup>39</sup> Section 13 (1) of the Law of the Child Act; and Section 14 (1) of the Zanzibar Children's Act.

<sup>40</sup> Section 13(1) of the Law of Marriage Act No. 5 of 1971.

to believe and did in fact believe that the girl was of or above the age of 14 years. And 'when the victim is married to the perpetrator the latter will be liable for a criminal offence for having sexual intercourse with the former that is under the age of 12 years'.<sup>41</sup>

There are a variety of problems relating to the whole procedure of handling child sexual offences from the beginning to the end. The Tanzania Police Form No.3 popularly known as PF.3 is a medical examination report issued by the Police to a Medical Officer which requires examining the nature and extent of injury before the matter is taken to the police for prosecution. This form does not contain any part which refers to sexual injuries. As it is not possible to examine the extent to which a child has suffered both physically and psychologically.

The Zanzibar Penal Decree, the Penal Code, through the Sexual Offences (Special Provisions) Act of 1998 (applicable in Tanzania Mainland), the Anti-trafficking in Persons Act, the Zanzibar Children's Act and the Law of the Child Act have all criminalised acts relating to the sale of children, child prostitution and child pornography in the same context as in the Optional Protocol.

Tanzania enacted the Anti-trafficking in Persons Act in 2008 (Act No. 6 of 2008). This Act applies to both Tanzania Mainland and Zanzibar.<sup>42</sup> The Act proscribes both internal and external illicit transfer or trafficking in persons including children. The provisions of Section 110(2) of the Zanzibar Children's Act (2011), *inter alia*, protect children from accessing pornographic information and materials that are injurious or harmful to the child's well-being.

In Zanzibar, the Government also enacted the Employment Act in 2005<sup>43</sup>, which protects children from child labour, worst forms of child labour, and sets conditions for the employment of the child, which, together with the Children's Act, requires that a child's right to work should be subject to the need to promote and safeguard his best interests. The Employment and Labour Relations Act, defines a child to mean a person under the age of 14 years; provided that for the employment in hazardous sectors, child means a person under the age 18 years.<sup>44</sup> The Act expressly prohibits employment of a child under the age of 14 years but allows a child of 14 years to be employed to do light work.<sup>45</sup> The Law of the Child Act and the Children's Act set the minimum age of employment at 14 in Mainland Tanzania and 15 years in Zanzibar, respectively. Furthermore, the Sexual Offences (Special Provision) Act of 1998 Act provides that children under 18 years of age cannot be employed in a mine, a factory or as a crew on a ship.<sup>46</sup> The Act however allows a child under the age of 18 years to work on board a training ship or in a factory or a mine as part of the child's training.<sup>47</sup>

In relation to corporal punishment, the concept of reasonable chastisement is incorporated by law in Tanzania. Section 13(2) of the Law of the Child Act provides that "[n]o correction of a child is justifiable which is unreasonable in kind or in degree according to the age, physical and mental condition of the child and no correction is justifiable if the child is by reason of tender age or otherwise incapable of understanding the purpose of the correction". Section 14(2) of the Zanzibar Children's Act allows parents to discipline their children "in such a manner which

<sup>41</sup> Penal Code Art 136 and 138

<sup>42</sup> See Section 2(1).

<sup>43</sup> Act No 11 of 2005.

<sup>44</sup> See Section 4 of the Employment and Labour Relations Act, Act No.6 of 2004.

<sup>45</sup> See the Employment and Labour Relations Act 2004 Section 5(1).

<sup>46</sup> Section 5(2).

<sup>47</sup> Section 5(3).

shall not amount to injury to the child's physical and mental well-being".

The Law of the Child Act, 2009 is the main legislation in administering justice to the children in Tanzania. The Act has repealed the Children and Young Persons Ordinance Cap 13 which was the law relevant for child rights and protection up to 2009. Part IX of the Law of the Child Act covers a child in conflict with the law. It has four components namely Juvenile Court, a child as a witness, custodial sentence and alternative sentences.<sup>48</sup> Regulations on Juvenile Justice are yet to be formulated hence the old ones are effective until replaced by the new ones. In Zanzibar the Children's Act, 2011<sup>49</sup> establishes the juvenile court. It is very pertinent to stress at this juncture that the Children's Act of Zanzibar is more child friendly than that of the mainland.<sup>50</sup>

The Law of the Child Act as well as the Law of Child Decree of Zanzibar establish the juvenile court which shall be required to sit in a different building or at different times from which the ordinary sittings of the court are held<sup>51</sup> and are closed to the general public unless the child is charged with an adult person.<sup>52</sup> Despite the legal requirements that children's cases be heard in juvenile courts, there is only one juvenile court that exists in Mainland Tanzania.

In Mainland Tanzania, the Criminal Procedure Act of 1985 (Cap 20) applies also in juvenile cases in conjunction with the Law of the Child Act. This conjunction denies the benefit of special safeguards available in international instruments dealing with the administration of justice. In

Zanzibar the situation is different as the Criminal Procedure Decree<sup>53</sup> stipulates clearly that the provisions of the decree do not apply in Criminal matters under the Approved Schools Decree 1945 Cap 59, and the Law of the Child Decree 58.<sup>54</sup>

The jurisdiction of juvenile courts on the mainland and Zanzibar is very wide and extends to any offence other than homicide.<sup>55</sup> According to the Law of the Child Act, jurisdiction of this court extends to non-criminal cases of children under the age of 16 who are in need of protection discipline. This refers to the children who are uncontrollable, parentless, deserted, destitute, vagrant beggars or children who fall into bad associations. This group of children in need of protection and care cases, who have been abandoned, abused and neglected by their families and the second, is the children in need of protection and discipline who are delinquents.

The Law of the Child Act provides for a variety of correctional measures, including alternatives to institution care. For the protection or discipline, cases can be disposed by ordering release to a parent or guardian directly or through repatriation order, committal to the care of a fit person or an approved voluntary institution, placement under supervision of an approved officer or a probation officer, or committal to an approved school.

For the criminal cases the disposition may be done by ordering discharge probation corporal punishment<sup>56</sup> under Corporal Punishment Act, Cap 17 of 1930, committal to the care of a fit person or an approved voluntary institution, committal to an approved school and committal to adult prison but should not be allowed to associate with adult

<sup>48</sup> Together these runs from Section 97 through to Section 120.

<sup>49</sup> See generally Part 5 to the Children's Act of Zanzibar 2011.

<sup>50</sup> The Zanzibar statute provides in great details matters relating to Diversion and others which are not provided for by the Law of the Child Act in the mainland.

<sup>51</sup> Cap. 58 of 1952.

<sup>52</sup> Cap 3 of 1923.

<sup>53</sup> Section 99, the Law of the Child Act.

<sup>54</sup> Section 100, *id*

<sup>55</sup> Cap14 of 1934.

<sup>56</sup> See Law of the Child Act part III under Care and Protection.

prisoners, and payment of a fine or compensation. Furthermore according to the Law of the Child Act criminal offenders who are under the age of 12 and 16 years are to be kept in Remand Homes, if they fail to get bail. Thereafter, children may be committed by courts to approved schools.

There are few alternatives to custodial sentences – the Law of the Child Act provides Courts with the options of conditional sentencing, fines for the child or parent, and supervision orders. The Law of the Child Act does not prohibit corporal punishment as a sentence. The Children's and Young Persons Act did not separate procedures for children in conflict with the law and those for children in need of care and protection, which made the provision of care and justice difficult. The Law of the Child Act 2009, which replaced it, does make this distinction, through the use of

supervision and care orders for protection. The minimum age of criminal responsibility at 10 years remains very low. Further, children aged 16-18 years are tried through the adult system. When it comes to sexual offences, a boy under the age of 12 years is considered not to have the capacity to carnal knowledge.<sup>57</sup>

The Law of the Child Act<sup>58</sup> and the Zanzibar Children's Act<sup>59</sup> provide for special measures to be undertaken for children that are imprisoned with their parents/mothers. These measures include protection measures as well as provision of nutrition, vaccination and so forth that are necessary for children.

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<sup>57</sup> Penal Code 1981, Art 15 & the Sexual Offences Special Provisions Act 1998 Section 4

<sup>58</sup> Section 144(1) , the Law of the Child Act.

<sup>59</sup> Section 19(2)(d) of the Zanzibar Children's Act.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 16/03/2003
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 03/03/2007
Convention on the Rights of the Child (CRC), 1989	Ratification, 10/06/1991
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 16/03/2003
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 24/04/2003
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 10/11/2009
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Ratification, 10/11/2009
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 16/03/1984
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 12/09/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

Committee	Initial Report	Second	Third
ACERWC	Dec 2006	-	-
UN Committee	20 Oct1999	20 Oct 2004	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Tanzania**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	None
Child Helpline International and Member Helplines	November 2005	
Kuleana Center for Child Rights, The National Network of Organisations Working with Children (NNOC), the Youth Culture and Information Center (YCIC) , PLAN International and Save the Children (SC-UK)	November 2000	
Child Helpline International	May 2008	
Global Initiative (report on the OPAC)	July 2008	
The National Network of Organisations Working with Children (NNOC)	December 2005	
The National Network of Organisations Working with Children (NNOC) (report on the OPAC)	May 2008	
The National Network of Organisations Working with Children(NNOC) (report on the OPSC)	May 2008	
Statement by Mr. Adam Kuleit OLE Mwarabu an INDIGENOUS Youth Representative from Tanzania	September 2003	

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC		UN Committee
Name	Term of service	
Mr. Clement Julius Mashamba (Rapporteur)	July 2010 – July 2015	-

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clar/vol2](http://www.africanchildinfo.net/clar/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>

# HARMONISATION OF CHILDREN'S LAWS IN UGANDA

## COUNTRY BRIEF

### ABSTRACT

Uganda embarked on a law reform process in the area of children's rights even before its ratification of the Convention on the Rights of the Child (CRC). The reform process, which was conducted in a consultative and participatory manner, resulted in the promulgation of the Children's Act in 1996, which incorporates the standards of the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC). The last decade has resulted into a number of achievements in the area of children's rights in Uganda. The most noticeable achievement has been the promulgation of a number of laws with a direct impact on the enhancement of the protection of the rights of the child. Laws have been adopted to stem child trafficking and child sacrifice, deter sexual exploitation; stop FGM; protect children with disabilities, provide for the rights of refugee children and protect children against domestic violence. Unlike the case before, legislation and policy formulation in Uganda is increasingly adopting a human rights based approach. This has been done by defining and conferring rights and identifying rights and duty bearers. This is in addition to emphasising the principles of the best interests of the child and non-discrimination.

### 1. INTRODUCTION

In mid-2010, the Uganda National Bureau of Statistics (UNBOS) estimated Uganda's population to be 31.8 million,<sup>1</sup> a figure that was estimated to have moved to 33 million by the end of the year. Children below the age of 18 years constitute 56% of the total population.

Uganda is a follower of the dualist doctrine, which asserts that international law is not applicable in domestic jurisdictions unless provision is made for this by domestic law.<sup>2</sup> The Constitution of the Republic of Uganda, 1995 enjoins parliament to make laws to govern the ratification of international treaties, conventions and agreements.<sup>3</sup> With this mandate parliament in 1998 promulgated the Ratification of Treaties Act.<sup>4</sup> This Act provides for domestication of international treaties after incorporation by an Act of Parliament.

Uganda has ratified and domesticated all major treaties protecting children's rights. Uganda ratified the CRC on 16 August 1990, less than a year after its adoption. Uganda ratified the *African Charter on Human and Peoples' Rights* (ACHPR) on 10 May 1986 and the African Charter on the Rights and Welfare of the Child (ACRWC) on 17 August 1994.<sup>5</sup> The country has also ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*<sup>6</sup>(OPSC)<sup>7</sup> and the *Optional Protocol*

<sup>1</sup> See Uganda National Bureau of Statistics *2010 Statistical Abstract*.

<sup>2</sup> See Brownlie, I., *Principles of public international law* (1990) Oxford University Press, at pp 32 – 33.

<sup>3</sup> Article 123(2).

<sup>4</sup> Act No. 5 of 1998.

<sup>5</sup> Charter of Ratifications: OAU/AU human rights treaties, position as at December 2003, available at: <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 13 June 2006).

<sup>6</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

<sup>7</sup> Acceded on 30 November 2001.

to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict<sup>8</sup>(OPAC).<sup>9</sup>

The Constitution is the supreme law of the country and any law inconsistent with it is void to the extent of its inconsistency.<sup>10</sup> In 1996, Uganda became one of the first countries in Africa to harmonise child related laws with international standards by promulgating the Children's Act.

## 2. GENERAL MEASURES OF IMPLEMENTATION

Uganda embarked on a law reform process in the area of children's rights even before its ratification of the Convention on the Rights of the Child (CRC). In June 1990 the Ugandan government commissioned the Child Law Reform Committee (CLRC), which was mandated to review all the existing laws concerning child welfare and to propose appropriate legislation, consistent with international standards, for the benefit of disadvantaged and children in conflict with the law.<sup>11</sup> This process was given impetus with the country's ratification of the CRC only three months after the appointment of the Child Law Reform Committee. The reform process, which was conducted in a consultative and participatory manner, enjoyed political support and resulted in the promulgation of the Children's Act in 1996. The Children's Act is the most comprehensive piece of legislation protecting children's rights that the country has had so far. The Act incorporates the standards of the CRC

and the African Charter on the Rights and Welfare of the Child (ACRWC) in a comprehensive way. In spite of this, the Act does not purport to be exhaustive of children's rights and leaves open the application of the rights in the CRC and ACRWC not expressly protected by it.

The Children's Act was initially called the Children's Statute but revision of Uganda's laws in 2000 renamed the statute the Children's Act.<sup>12</sup> This Act was promulgated within one year of adopting its Constitution in 1995 which also makes extensive provision for the protection of children's rights.

The 1995 Constitution protects a number of children's rights; children are guaranteed parental care and protection is extended to vulnerable children including orphans. The Children's Act incorporates the principles of the best interests of the child and has extensive provisions on juvenile justice which view detention as a matter of last recourse. Separate courts are established to try juvenile offenders and community participation in child welfare and all decisions touching on children. The country's recent adoption of the Refugee Act, 2006 is commendable; in its terms the Refugee Act guarantees refugee children the same protection and extends to them the same rights as Ugandan children.

A review process aimed at addressing some of the gaps in the Children's Act which was started over seven years ago has culminated into a proposed Draft Amendment Bill for the Children's Act (2010), adopted by the Law Reform Commission (as of April 2011). The

<sup>8</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 12 February 2002.

<sup>9</sup> Ratified on 06 June 2002.

<sup>10</sup> Article 2.

<sup>11</sup> Perry-Williams, J., 'Legal reform and children's rights in Uganda – some critical issues' in (1993) 1 *The International Journal of Children's Rights*, As cited in Christopher Mbazira, Harmonisation of National and International Laws to Protect Children's Rights the Uganda Case Study (2006 – 2011), the African Child Policy Forum, 2011

<sup>12</sup> Chapter 59 Laws of Uganda, Volume III.

Amendment Bill seeks *inter alia* to amend Sections 7, 67,8,46,56,73,94 and106 of the Act. Another critical issue sought to be catered for by the Bill is the prohibition of corporal punishment in schools and home environments as well as other institutions. This is proposed to be done by amending Section 106 of the Act. In this regard, the government could be applauded for having taken a step towards the elimination of corporal punishment through the 2007 Amendment Act of the Penal Code that expressly abolished corporal punishment.

While the Uganda Human Rights Commission continues to be a critical institution for the realization of children’s rights, concern has been expressed in the past on the absence of a special desk within the Commission to deal with children’s rights and the lack of adequate human resource and budgetary allocations for this organisation. In the context of coordination, the National Council for Children remains a central organ for the coordination of various government bodies, Ministries and Local Councils involved in the implementation of children’s rights, at both national and local levels.

### 3. DEFINITION OF THE CHILD

Both the Constitution and the Children’s Act define a child consistently with international law as a person below the age of 18.<sup>13</sup> However, the Constitution restricts its protection of children from social or economic exploitation and prohibits their employment in ways that would interfere with their education or be hazardous to their health, spiritual, moral or social development to

16 years.<sup>14</sup>The minimum age of marriage is 18, for both girl and boys, as per Article 31 of the Constitution.

Table showing the definition of a child in Uganda

Category	Age
Definition of a child	18
Age of majority	18
Minimum age of employment	12
Minimum age of sexual consent	18
Minimum age of marriage	18
Minimum age of criminal responsibility	12
Minimum age of recruitment into the army	18

### 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** Consistent with the CRC and the ACRWC,<sup>15</sup> the Constitution requires that laws be enacted to further the best interests of the child.<sup>16</sup> The Children’s Act, under Section 3, uses the phrase ‘welfare of the child’. However, when one pursues this phrase as used and

<sup>13</sup> Article 257 of the Constitution and Section 2 of the Children’s Act.

<sup>14</sup> Article 34(4) and (5).

<sup>15</sup> Article 3 of the CRC and Article 4 of the ACRWC.

<sup>16</sup> Article 34.

elaborated, it means the same thing as the best interests of the child.

The First Schedule compliments Section 3 by requiring that whenever the state, a court or local authority or any person, determines any question with respect to the up-bringing of a child, administration of a child's property and in all matters relating to a child, regard shall be had to the welfare of the child principle.<sup>17</sup>

**Non-discrimination:** Both the Constitution of Uganda and the Children's Act<sup>18</sup> provide for provisions that prohibit discrimination. The Constitution of the Republic of Uganda (Article 21) provides for equality before the law and protects all persons against discrimination on grounds of sex, race, colour, ethnic origin, tribe, creed, religion, social or economic standing or political opinion. However, Government is aware that discrimination against certain groups of children in practice still exists, such as discrimination of children with disabilities and the exclusion of girls from school for various reasons including taking care of children or due to pregnancy.

**The right to life, survival and development:** In order to address children's right to life, survival, and development, the laws and policies of Uganda have made a number of provisions. For instance, the right to life, survival and development is reflected in the Uganda National Plan of Action for Children, whose goal is to establish and achieve survival, protection and development targets related to children and women that build on existing government policies, structures and sectoral plans. Efforts to improve child survival and development include measures that have been taken to improve the quality of and accessibility to health-care services; immunization;

morbidity; child mortality; and efforts to coordinate and integrate primary health-care programmes in all health centres.

**Respect for the views of the child:** There are no formal structures envisaged by the law to facilitate child participation in the processes of decision-making. However, one sees instances in which children may participate in decisions that affect them. Examples include instances in which children's views are considered in the various court processes, ranging from adoption to custody proceedings.

To facilitate participation in the policy and legislative formulation processes civil society organisations established a parliamentary forum for children. In November 2009, children were facilitated by the Uganda Child Rights NGO Network (UCRNN) to hold a debate with members of Parliament.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

Neither the Constitution nor the Children's Act makes provision for the protection of the child's right to a name.

Akin to the right to a name is the right to be **registered at birth** as guaranteed by the ACRWC and the CRC.<sup>19</sup> This right appears implicit in the Constitutional obligation on the state to register every birth, marriage and death.<sup>20</sup> Parliament has also made provision for the registration of births and deaths.<sup>21</sup> Failure to register a child's birth may impair his or her capacity to enjoy some of the rights and protections accorded by law. A birth certificate could be prerequisite for

<sup>17</sup> Paras 1 and 2.

<sup>18</sup> Section 5(2) of the Children's Act provides that 'any person having custody of a child shall protect the child from discrimination, violence, abuse and neglect.

<sup>19</sup> ACRWC, Article 6 and CRC, Article 7.

<sup>20</sup> Article 18.

<sup>21</sup> *The Birth and Death Registration Act, 1970*, amended by Decree No. 3 of 1974.

access to social services; 'establishing a birth registration system ... may over time improve children's access to health care and education.'<sup>22</sup> It will also be easy to protect children from exploitative activities like sexual abuse and child labour if their age is easily ascertainable.

In the child justice system, the failure to ascertain the proper age of a person may deny that person the benefit of being treated as a child, estimates based on size or level of intelligence may prove inadequate. The CRC Committee in its concluding observations to Uganda's initial report in 1997 expressed concern with the absence of implementation of birth registration laws in the rural areas.<sup>23</sup> The government has indicated that the CRC Committee's recommendations in this regard have not been implemented fully. In 2006, birth registration rate stood at 4 percent.<sup>24</sup>

Like the right to a name, there are no express provisions protecting the right to acquire nationality as protected by the CRC and the ACRWC.<sup>25</sup> However, this right can be deduced from the provisions of the Constitution relating to citizenship. These provisions accord automatic citizenship to people whose parent(s) or grandparent(s) is Ugandan.<sup>26</sup> The Constitution also makes a presumption that any child under the age of five years, and one whose parents are unknown, is Ugandan.

The Constitution provides that children have the right to know and be cared for by their parents.<sup>27</sup> The Constitution also provides that '[i]t is the

right and duty of parents to care for and bring up their children.'<sup>28</sup>

The Children's Act puts in place structures that could enable the state to supervise and oversee care for children, whether within or outside their families.

The Constitution in Article 29 provides for the right of every person to freedom of speech and expression. Article 41 also provides all citizens with the right of access to information. The Constitution, in Articles 29 and 37, provides that every person (which includes children) has a right to belong to and profess any religion in community with others that is consistent with the manner of the Constitution. Freedom of assembly is provided in Article 29 of the Constitution, while the Children's Act provides for the child's right to privacy in judicial proceedings (Section 103).

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The responsibility of parents and their rights to take care of their children are expressed in Section 6 of the Children's Act. It is observed that the welfare principle, which embodies the principle of the best interests of the child, underlies the responsibilities of parents towards their children.

The Constitution, in Article 31 (4), provides that it is the right and duty of parents to care for and bring up their children. The Constitution also

<sup>22</sup> Article 40 'A children's law reform process in South Sudan' available at <[http://www.communitylawcentre.org.za/children/2005art40/vol7\\_no1\\_sudan.php#sudan](http://www.communitylawcentre.org.za/children/2005art40/vol7_no1_sudan.php#sudan)> (accessed on 23 June 2006).

<sup>23</sup> Concluding Observations (1997).

<sup>24</sup> See Ministry of Gender, Labour and Social Development at <[http://www.mglisd.go.ug/ovc/downloads/Policies\\_12.pdf](http://www.mglisd.go.ug/ovc/downloads/Policies_12.pdf)>.

<sup>25</sup> Article 7 of the CRC and Article 6 of the ACRWC.

<sup>26</sup> Article 10.

<sup>27</sup> Article 34(1).

<sup>28</sup> Article 31(4).

<sup>29</sup> Para 20.

provides, under Article 31(5), that children may not be separated from their families or the persons entitled to raise them up against the will of their families or those persons, except in accordance with the law.

The Children's Act provides for the maintenance of a child where one or both parents neglects to provide for maintenance irrespective of whether the parents are married, staying together, separated or divorced. The Children's Act also protects the interests of the child in the award of maintenance orders.

In the context of children deprived of their family environments, the Children's Act provides the legal framework regarding adoption, and inter-country adoption. Placement of children in institutions is also provided for but emphasis is placed on the family unit as it is often the best environment for a child.

On the issue of adoption, it is worth mentioning that the rising number of applications for legal guardianship of children and the reduced number of applications for adoption has been highlighted as a concern by the CRC Committee. The concern is related to the fact that this may be aimed at circumventing the regulations which apply to adoption and result into practices contrary to the Optional Protocol.<sup>29</sup> In this regard, the CRC Committee has recommended that the State party stringently scrutinises applications for legal guardianship of children in order to avoid practices contrary to the Protocol. Furthermore, the Committee recommends that the State party ratifies the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.<sup>30</sup>

## 7. HEALTH AND DISABILITY

Though the Constitution does not expressly prescribe the children's right to health, this right could be deduced from Article 34(3), which prohibits deprivation of children of medical treatment on the basis of religion or other beliefs. The Children's Act also compels the parents to provide for the immunisation and medical care of their children.<sup>31</sup> The Act also proscribes subjection of children to social or customary practices that are harmful to their health.<sup>32</sup> Many children have been orphaned by the HIV/AIDS epidemic resulting from the loss of one or both parents.

Unsafe abortions also continue to claim the lives of many women, including children who become pregnant under various circumstances.<sup>33</sup> There is also a high rate of infant mortality that stands at 76 per 1000 births.<sup>34</sup> This is associated to inadequate human resource for maternal health specifically midwives and doctors, frequent stock-outs of essential drugs for maternal health and lack of Emergency Obstetric Care (EmOC) Services at HC III, IV and hospitals and this infringes the mother's and the child's right to life guaranteed under Article 22 of the Constitution.<sup>35</sup> The problem of high maternal and child mortality has attracted litigation which has been instituted in the Constitutional Court. In the case of *Centre for Human Rights, Health and Development & Ors v Attorney General*,<sup>36</sup> where the Petition alleged that the current state of maternal health in the country is a violation of the Constitution.

<sup>30</sup> Para 21.

<sup>31</sup> Section 5.

<sup>32</sup> Section 8.

<sup>33</sup> Singh Set al., *Unintended Pregnancy and Induced Abortion in Uganda: Causes and consequences* (2006) Guttamacher.

<sup>34</sup> Constitutional Petition 61 of 2011.

<sup>35</sup> Constitutional Petition 61 of 2011.

<sup>36</sup> Constitutional Petition No. 61 of 2011.

In the area of disability, Article 35(2) of the Constitution obliges Parliament to enact laws appropriate for the protection of PWDs. It is in the discharge of this obligation that Parliament in August 2006 adopted The Persons with Disabilities Act (PWD Act).<sup>37</sup> The Act guarantees PWDs in Uganda a number of rights, including: right to education;<sup>38</sup> right to health;<sup>39</sup> measures of rehabilitation;<sup>40</sup> employment related rights;<sup>41</sup> right to accessibility;<sup>42</sup> and a number of other rights including privacy;<sup>43</sup> and family rights.<sup>44</sup> The Children's Act<sup>45</sup> also has provisions relevant to the protection and promotion of the rights of children with disabilities. Section 9 requires both the parents of children with disabilities and the state to take appropriate steps to see that those children are: (a) assessed as early as possible as to the extent and nature of their disabilities; (b) offered appropriate treatment; and (c) afforded facilities for their rehabilitation and equal opportunities to education. The Act also requires all local government councils to keep a register of disabled children within its area of jurisdiction and give assistance to them whenever possible in order to enable those children to grow up with dignity among other children and to develop their potential and self-reliance.<sup>46</sup> As a matter of fact however, there is no evidence on ground to show that the local councils have discharged this obligation.

## 8. EDUCATION

The Constitution guarantees the right of everyone to education; this right is guaranteed to adults and children alike.<sup>47</sup> There is however a much stronger guarantee for children, they are entitled to basic education, which is a responsibility of the state and the parents.<sup>48</sup> Implementation of the policy began in 1997, leading to an increment in enrolment in primary schools by more than 2 million pupils; by 2003 the total enrolment was at 6.2 million.<sup>49</sup> It has also been acknowledged that the rate of dropouts, especially of the girls, still continues. This is because some parents and communities still consider education of a girl as a waste of time.<sup>50</sup>

In 2008, Parliament adopted the Education (Pre-Primary, Primary and Post-Primary) Act,<sup>51</sup> thereby repealing the 1970 Education Act.<sup>52</sup> The Purpose of the 2008 Education Act is to amend, consolidate, and streamline the existing law relating to the development and regulation of education and training.<sup>53</sup>

The Act has provisions directed at ensuring that primary education is free and compulsory. Universal primary education (UPE) is defined to mean the State funded universal primary education programme where tuition fees are paid

<sup>37</sup> Act No. 20 of 2006.

<sup>38</sup> Section 5.

<sup>39</sup> Section 7.

<sup>40</sup> Section 10.

<sup>41</sup> Part III.

<sup>42</sup> Part IV.

<sup>43</sup> Section 35

<sup>44</sup> Section 36

<sup>45</sup> Chapter 59, Laws of Uganda.

<sup>46</sup> Section 10.

<sup>47</sup> Article 30.

<sup>48</sup> Article 34(2).

<sup>49</sup> See Committee on the Rights of the Child, *Consideration of reports submitted by states parties under Article 44 of the convention, second periodic report for Uganda*, 3 August 2003, CRC/C/65/Add.335 November 2004, para 171 [Hereinafter referred to as the Second Report (2003)].

<sup>50</sup> Second Report (2003), para 174.

<sup>51</sup> Act No. 13 of 2008.

<sup>52</sup> Chapter 127, Laws of Uganda.

<sup>53</sup> Long title to the Act.

by Government, where the principle of equitable access to conducive, quality, relevant and affordable education is emphasized for all children of all sexes, categories and in special circumstances.<sup>54</sup> The Act prohibits, and makes it an offence, the levying of any charge in schools implementing UPE. Although voluntary contributions are not prohibited, the Act provides that no child shall be sent away from school for failure to pay such contribution.<sup>55</sup> In line with international human rights law, the Act makes primary education universal and compulsory for children above the age of 6.<sup>56</sup> It is also indicated that all children of school going age shall enter and complete the primary education cycle of 7 years.<sup>57</sup>

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

In Uganda, there are a number of laws and policies that protect children against violence, and provide them with special protection measures. For instance, the Constitution provides that the law shall accord special protection to orphans and vulnerable children.<sup>58</sup> In 2003 the Ministry of Gender, Labour and Social Development (MGL&SD) established the Orphans and other Vulnerable Children Secretariat (OVC's) within the ministry. In 2004, the Ministry adopted the National Strategic Programme Plan of Intervention for Orphans and other Vulnerable Children, Fiscal Year 2005/6 – 2009/10 (the NSPPI).<sup>59</sup>

There is no specific mention of street children in provisions of the Children's Act, but they can be

dealt with using some of the provisions of the Act and the Constitution. In its concluding observations to Uganda's initial report, the UN Committee on the Rights of the Child expressed concern with the increasing number of children living and working on the streets and the absence of measures to provide for their socio-economic needs.<sup>60</sup>

In May 2011, the government came up with a second National Strategic Programme Plan for Intervention for Orphans and other Vulnerable Children (NSPPI-2) 2011/12-2015/16.

In May 2006 Parliament adopted a new refugee law, the Refugee Act, 2006. This Act makes extensive provision for the protection of refugees and guarantees them a number of rights. Refugee Children under the Act are entitled to the enjoyment of the rights and freedoms contained in the Children's Act, ACRWC, the CRC and the Geneva Convention.<sup>61</sup>

In 2010, Parliament adopted the Domestic Violence Act (Act No 3 of 2010) as a response to the increasing cases of violence in the domestic context. The Act has a wide scope of application, which is established from its definition of "domestic relationship", which means a family relationship, a relationship similar to a family relationship or a relationship in a domestic setting that exists or existed between a victim and a perpetrator and includes a relationship where: (a) the victim is or has been married to the perpetrator; (b) the perpetrator and the victim are family members related by consanguinity, affinity or kinship; (c) the perpetrator and the victim share or shared the same residence; (d) the victim is employed by the perpetrator as a domestic worker or house servant and the victim does or does not

<sup>54</sup> Section 2.

<sup>55</sup> Section 9.

<sup>56</sup> Section 10(3).

<sup>57</sup> As above.

<sup>58</sup> Article 34(7).

<sup>59</sup> Available at <[http://www.mglsd.go.ug/ovc/downloads/Policies\\_12.pdf](http://www.mglsd.go.ug/ovc/downloads/Policies_12.pdf)> (accessed on 21 June 2006) [Hereinafter referred NSPPI (2004)].

<sup>60</sup> Concluding Observations (1997), paras 12 and 23.

<sup>61</sup> Section 32(2).

reside with the perpetrator; (e) the victim is an employer of the perpetrator and does or does not reside with the perpetrator; or (f) the victim is or was in a relationship determined by the court to be a domestic relationship.<sup>62</sup> This definition obviously applies to children.

The Act imposes obligations on a police officer to whom a case of domestic violence is reported, which includes assisting the victim, including giving assistance or advice in obtaining shelter; where signs of physical or sexual abuse are evident, ensuring that the victim undergoes a medical examination and receives medical treatment; advising the victim of the right to apply for relief under the Act and the right to lodge a criminal complaint; and offering procedural guidance and any assistance as may be necessary to ensure the well being of the victim, the victim's representative and other witnesses.<sup>63</sup>

The Prevention of Trafficking in Persons Act, No 7 of 2009 has the purpose of prohibiting trafficking in persons, creating offences, and prosecuting and punishing offenders. This is in addition to preventing the vice and protecting the victims of trafficking.<sup>64</sup> In some circumstances, trafficking in children attracts a maximum punishment of death. The circumstances are detailed in Section 5 of the Act.<sup>65</sup>

In the past, the absence of a National Plan of Action to combat the violations of trafficking, child prostitution and child pornography, especially in

view of the high incidence of sale of children, child prostitution and child pornography, has been highlighted as a shortcoming in Uganda by the UN Committee.<sup>66</sup>

As to FGM, The Prohibition of Female Genital Mutilation Act, 2010 has the purpose to set out the prohibition of FGM, the offences, prosecution and punishment of offenders and the protection of victims as well as girls and women under the threat of female genital mutilation.<sup>67</sup> The offence is also committed by any person who carries out FGM on herself.<sup>68</sup>

In the area of child justice, to begin with, the Constitution provides that a child offender who is kept in lawful custody or detention shall be kept separately from adult offenders.<sup>69</sup> This requirement is re-affirmed by the Children's Act.<sup>70</sup> The Constitution also prohibits the remand of a child in an adult prison.<sup>71</sup> Special protection is also extended to female children, who while in detention, must be under the care of a female officer.<sup>72</sup> The provisions dealing with juvenile justice in the Children's Act are the most comprehensive of all provisions. The Act makes extensive provision for the age of criminal responsibility, arrest, bailing, trial, sentencing, detention and rehabilitation of child offenders. In addition to the CRC and the ACRWC, the Children's Act draws heavily from the provisions of the *United Nations Standard Minimum Rules for Administration of Juvenile Justice* (Beijing Rules).<sup>73</sup> The age of criminal responsibility is 12 years,<sup>74</sup>

<sup>62</sup> Section 3.

<sup>63</sup> Section 7(2).

<sup>64</sup> Long title to the Act.

<sup>65</sup> Section 5 of the Prevention of Trafficking in Persons Act, No 7 of 2009 provides that 'a person who— (a) does any act referred to under Section 3 in relation to a child; (b) uses a child in any armed conflict; (c) removes any part, organ or tissue from the body of a child for purposes of human sacrifice; (d) uses a child in the commission of a crime; (e) abandons a child outside the country; (f) uses a child or any body part of a child in witchcraft, rituals and related practices; - commits an offence of aggravated trafficking in children and may be liable to suffer death.

<sup>66</sup> Para 9 and 10.

<sup>67</sup> Long title to the Act.

<sup>68</sup> Section 4.

<sup>69</sup> Article 34(6).

<sup>70</sup> Section 90(8).

<sup>71</sup> Section 93(6).

<sup>72</sup> Section 90(9).

<sup>73</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985.

having been increased from 7 years upon promulgation of the Children's Act.

Uganda has a decentralised system of governance; representative administrative units are established at all levels of society—from the village, parish, sub-county, county, to district levels.<sup>75</sup> The Children's Act recognises and makes use of this very important administrative structure. The Act expressly grants the Local Council (LC 1) some form of criminal jurisdiction in cases involving children.<sup>76</sup>

The involvement of the communities in the resolution of criminal offences involving children is also commendable. This is in line with the principles of community empowerment and up-stream enforcement of human rights standards. Commission of offences by children occurs within the 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. In addition to familiarising the local communities with the rights of children, community resolution of criminal disputes helps foster reconciliation between the victim and the perpetrator and their respective families. The system also helps to promote the principles of restorative and community justice.<sup>77</sup> This system has also been applauded as promoting a form of diversion, since it allows children to be tried outside the formal system, and as making justice

easily accessible.<sup>78</sup> Resolution of crime by children using informal institutions of this nature has been endorsed by international standards.<sup>79</sup>

In relation to the Uganda Peoples Defence Forces Act,<sup>80</sup> reference needs to be made to Section 52(2), which among others, provides that only persons above the age of 18 qualify to join the UPDF. The Act also requires intending recruits to get recommendations from lower government councils.<sup>81</sup> This is viewed as a procedural measure that could help detect under-aged intending recruits.<sup>82</sup> The committee also regretted that Uganda's Penal Code Act lacked provisions which criminalize recruitment of children. It noted that this may perpetuate an environment of impunity and lack of accountability among the Ugandan armed forces.<sup>83</sup>

The Child Protection Recovery Strategy for Northern Uganda 2009 – 2011<sup>84</sup> has been adopted within the context of the Peace, Recovery and Development Plan (PRD). The Policy aims at enhancing child protection interventions in a coordinated, harmonized and standardized manner. The target of the Policy is “all children in the conflict affected sub-regions of Northern Uganda, who are at the risk of or experiencing violence, abuse, neglect, and exploitation, and are entitled to timely, child-friendly and effective support”.<sup>85</sup>

<sup>74</sup> Section 89.

<sup>75</sup> See Chapter 11 of the Constitution and the Local Government Act, 1997.

<sup>76</sup> Section 93(2).

<sup>77</sup> Matshego B, 'Best practices in the institutional and community-based treatment of young offenders' (2001) 3(3) *Article 40* available at <[http://www.communitylawcentre.org.za/children/2001art40/vol3\\_no3\\_best.php#best](http://www.communitylawcentre.org.za/children/2001art40/vol3_no3_best.php#best)> (accessed on 23 June 2003).

<sup>78</sup> Christopher Mbazira, Harmonisation of National and International Laws to Protect Children's Rights the Uganda Case Study (2006 – 2011), the African Child Policy Forum 2011

<sup>79</sup> See *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, Commentary at para 14

<sup>80</sup> 2005.

<sup>81</sup> UPDF Act, Section 51(3).

<sup>82</sup> Para 16, 17 and 32

<sup>83</sup> Para 27.

<sup>84</sup> Ministry of Labour, Gender and Social Development *The Child Protection Recovery Strategy for Northern Uganda 2009 – 2011* (September 2009).

<sup>85</sup> As above, at xo.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 17/08/1994
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 22/07/2010
Convention on the Rights of the Child (CRC), 1989	Ratification, 17/08/1990
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 06/05/2002
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 30/11/2001
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 25/09/2008
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Ratification, 25/09/2008
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 03/05/1979
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 21/06/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

**2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child**

Committee	Initial Report	Second	Third
ACERWC	November 2007	-	-
UN Committee	1 Feb 1996	2 Aug 2003	-

**3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Uganda**

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	None
Child Helpline International and the members of Child Helpline	May 2008	
Coalition to Stop the Use of Child Soldiers	April- January 2005	
Forest Peoples Programme, United Organisation for Batwa Development in Uganda (UOBDU)	31 May 2005	
Global Initiative (report on the OPAC)	June 2008	
Human Rights Watch Children's Rights Project and Human Rights Watch/Africa	Sept/ Oct 1997	
Human Rights Watch	March 2005	
Human Rights Watch	March 2003	
Human Rights Watch	May 2005	
Uganda Child Rights NGO Network (UCRNN)	April 2005	
Uganda Child Rights NGO Network (UCRNN)	2000	
Uganda Child Rights NGO Network (UCRNN)	Sept/Oct 1997	
Uganda Child Rights NGO Network (UCRNN) (Report on the OPAC)	March 2007	
Uganda Child Rights NGO Network (UCRNN) (Report on the OPSC)	March 2007	

**4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child**

ACERWC	UN Committee	
-	Name	Term of service
	Mr. Awich Pollar)	2001- 2013

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



# HARMONISATION OF CHILDREN'S LAWS IN ZAMBIA

## COUNTRY BRIEF

### ABSTRACT

Zambia's general development aspirations are hampered by challenges such as the AIDS pandemic. The laws relating to children are provided for in the Constitution, enabling legislation and customary laws, which are sometimes conflicting. Zambia doesn't have a consolidated children's statute nor does it have an overarching definition of a child. As a result there are some gaps in the legal protection of children in Zambia.

### 1. INTRODUCTION

Zambia has an estimated total population of 12 million. An estimated 51% of the population is below the age of 18 years.

The Zambian Constitution is the supreme law of the land. Constitutional development in Zambia spurns over four decades and has always included a Bill of Rights. The Constitution, as the supreme law in Zambia, provides for the care of institutions, procedures processes and functions of state and government organs, functionaries and institutions. Article 2 of the current Constitution provides protection for the fundamental rights and freedoms of all Zambians. Article 24 of the Constitution contains direct provisions relevant for "young persons".

It is worth noting that international instruments are not self-executing and require legislative implementation to be effective in Zambia as law. Nevertheless, courts in Zambia have in appropriate cases given judicial notice to international

instruments which Zambia has ratified or acceded to even though these have not been reduced into domestic legislation. Amongst other relevant international instruments, Zambia is a State Party to the Convention on the Rights of the Child (CRC), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000, the African Charter on the Rights and Welfare of the Child (ACRWC), ILO Convention No. 182 (1999) on the worst forms of child labour in 2001, ILO Convention No. 138 (1973) on the minimum age Convention in 1983.

Zambia has a plural legal system as a testament of the colonial era. This is a very important issue to take cognisance of when dealing with the legal position in Zambia. English law was imposed in such a way as not to oust indigenous laws. Therefore tribe specific, customary laws and the Statute Laws are recognised under the Zambian legal system, this can affect the rights of the child depending on the choice of law. This discussion is important to the discourse of children's rights since whether a matter is dealt with in accordance with tribe specific laws or received law may have a significant impact on the nature and the remedy for violation of children's rights.

The Zambian Government, through the Ministry of Community Development and Social Services (MCDSS) has embarked on a law reform process to comprehensively review various aspects of child related legislation. Despite the fact that law reform has been a topic that dogged the Government for a long time, there is as yet no comprehensive children's Act. However, there are a number of pieces of legislation that cover matters related to children. Some of these laws include the Affiliation and the Maintenance of Children Act, the Penal

Code Act 2005,<sup>1</sup> the Adoption Act,<sup>2</sup> Juveniles Act, Employment of Young Persons and Children Act, Apprenticeship Act, Penal Code, Wills and Administration of Testate Estate Act, Intestate Succession Act, Zambia Police Act,<sup>3</sup> Defence Act, Births and Deaths Registration Act, Day Nurseries Act, Probation of Offenders Act, Liquor Licensing Act; Anti Human Trafficking Act 2008 and Termination of Pregnancy Act.

## 2. GENERAL MEASURES OF IMPLEMENTATION

There are a number of general measures that the Government of Zambia has undertaken to facilitate the implementation of children's rights in the country.

The Constitution established a Human Rights Commission. The Commission has the mandate to investigate human rights violations and to propose effective measures to prevent human rights violations. While there is a Children's Rights Committee within the Human Rights Commission, its capacity to promote and protect children's rights in the country has been limited as a result of a number of factors including financial resources.

The Constitution also establishes the Commission for Investigations. It is headed by an Ombudsman. The Ombudsman is empowered to investigate and report to the President about complaints related to administrative actions that lead to violations of rights.

The Ministry of Community Development and Social Services (MCDSS) is charged with strengthening the economic coping capacities of families and communities. In the past interventions to address vulnerable people included food and, public works using food for work, cash for work

and food for assets. At present a number of key policy institutions and reforms have been put in place. The reforms focus on a number of issues especially regarding children. One initiative that could work to the advantage of the harmonisation process is the child care upgrading programme – CCUP. Further the MCDSS has the portfolio for managing the Juveniles Act and the Adoption Act.

Other key ministries, in collaboration with the affected communities, in particular, handle some of the interventions that address the challenges of vulnerability, in general, and social protection in particular. These include the Ministry of Education the Ministry of Health the Ministry of Youth Sport and Child Development and Ministry of Justice. Ministry of Finance provides overall policy guidelines using relevant framework, to finance interventions.

The Zambia Law Development Commission was established by an Act of parliament, chapter 32 of the laws of Zambia. The said Act repealed the Law Development Commission and Institute of Legislative Drafting Act No. 5 of 1974. The Commission under Section 4 (1); is required to research and make recommendations on issues including on the socio-political values of the Zambian people that should be incorporated into Legislation; the anomalies that should be eliminated on the statute book; and New and more effective methods of administration of the law and the dispensation of justice that should be adopted and legislated.

## 3. DEFINITION OF THE CHILD

Childhood under the Zambian legislation refers to “a young person,” “infant,” “minor” or “juvenile”. The employment of Young Persons Act defines a “young person” as a person who has ceased to be a child and who is under the age of 18 years”. The

<sup>1</sup> The Penal Code (Amendment) Act 15 of 2005

<sup>2</sup> Chapter 54.

<sup>3</sup> Chapter 107.

Act further defines a child as a person under the age of 14 years. The Juveniles Act, Chapter 53, provides definitions for “child,” “juvenile” and “young person.” A child means a person who has not yet attained the age of 19, and a “young person” means a person who has attained age 16 years but has not attained age 19 years. The Adoption Act refers to ‘a minor’ as a child who is under the age of 21 years.

As stated before Section 25 (2) of the Penal Code, Chapter 87, prohibits the death sentence against a person under the age of 18 and provides “...in lieu thereof the court shall sentence him to be detained during the President’s pleasure and when so sentenced he shall be liable to be detained in such a place and under such conditions as the President may direct.” Although there is no minimum legal age for consent, in practice, no medical treatment or surgery can be done on a person below the age of 21 unless a parent or guardian has given written consent.

The Employment of Young Persons and Children Act, Chapter 274, prohibits employment of children below the age of 16 in an industrial undertaking unless the employment is an enterprise where members are of the same family. The Act also describes a young person as a person below 21 years. The Apprenticeship Act provides for engagement of a person between ages 16 and 21 years, provided the person is under the tutorship of an adult.

The Marriage Act, Chapter 50, stipulates that any person below 21 years requires written consent of a parent or guardian before a marriage is contracted. However, Customary Law allows contracting of marriage after attainment of puberty but with parental consent. There is no

express provision for the age of sexual consent. However, childhood is protected by Section 138 of the Penal Code, Chapter 87, which prohibits defilement of girls below the age of 16 years.

The Wills and Administration of Testate Estates Act, Chapter 60, and the Intestate Succession Act, Chapter 59, define a minor as a person who has not attained the age of 18 years. However, a minor can inherit property but not have legal capacity to conduct property transactions until attainment of 21 years as provided by the Trust Restriction Act, Chapter 63.

The Societies Act requires that a person should not be less than 21 years of age before forming an association. This suggests that a child is free to join associations as long as the requirements for membership are met. The Defence Act, Chapter 106, prohibits the recruitment of persons under the “apparent age of 18 years”. The vague description of who can be recruited can give rise to forcing children into one of the worst forms of child labour. There is a need to raise the minimal age of criminal responsibility, which is presently 8 years old.

Acceptance of a child’s testimony in court for civil and criminal cases is dependent upon the judge’s assessment of the child’s competence. The Judge’s Rules demand that the court should be satisfied that a child understands the meaning of telling the truth. Once this is established, the child’s evidence is admissible in both criminal and civil cases. Anyone below the age of 18 years lodging a complaint or seeking redress must commence proceedings through a ‘next of keen,’ who is understood to be a parent, guardian or court appointed trustee.

**Table showing the definition of a child in Zambia**

Category	Age
Definition of a child	-
Age of majority	- For citizenship 21 years - For National registration card 16 years. - To Vote 18
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	16
Minimum age of criminal responsibility	8
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** Many of the laws that have relevance for children's rights incorporate either directly or through interpretation the best interests of the child principle. For instance, the Termination of Pregnancy Act Cap 304 provides that in the best interests of the unborn child who "[w]ould suffer from mental abnormalities or be seriously handicapped",<sup>4</sup> termination is allowable.

**Non-discrimination:** The Constitution of Zambia defines and prohibits discrimination.<sup>5</sup> However, since the Constitution provides for exceptions to its non-discrimination provision on matters of personal and customary law, there are instances where women's and children's rights are compromised in the application of customary laws. In particular, despite constitutional and legal protections, customary law subordinates women and children with respect to property ownership, inheritance, and marriage.

**The right to life, survival and development:** The right to life is protected and guaranteed under Article 12(2) of the Constitution. Section 25 (2) of the Penal Code, Chapter 87, prohibits the death sentence against a person under the age of 18 and provides "...in lieu thereof the court shall sentence him to be detained upon the President's pleasure and when so sentenced he shall be liable to be detained in such a place and under such conditions as the President may direct." According to the Termination of Pregnancy Act<sup>6</sup> life is considered to start from conception and thus it is prohibited to terminate a pregnancy except as provided for under the law. There are also a number of other laws that support the right to life.<sup>7</sup>

While Survival is not a term that is specifically provided for under the Zambian legal system, many laws exist that promote children's survival and development. For instance, to ensure an adequate standard of living the Maintenance provisions under Subordinate Courts Act and Affiliation and Maintenance of children impose a duty on parents and guardians to provide adequate food. The Juvenile Act and the Penal Code impose a further duty to provide the necessities of life to a child in the failure of which certain punitive sanctions are imposed.

<sup>4</sup> Termination of Pregnancy Act Cap 304

<sup>5</sup> Article 23 (2) of the Zambian Constitution

<sup>6</sup> Cap 304 of the Laws of Zambia.

<sup>7</sup> See Public Health Act, Chapter 295 of the Laws of Zambia; Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia.

**Respect for the views of the Child:** The Constitution of Zambia does not provide for the fundamental right to information and participation of children in matters that affect them. The principle of participation is premised on the fact that participation is necessary for effective implementation of laws at all levels. In order to participate fully children should have access to accurate and reliable information as well as an opportunity to present their views and to question and challenge decisions which affect them.

The Zambian juvenile justice system recognises the child's right to directly participate in the proceeding either by himself and/or with the help of a parent or legal guardian. The Children's Summit held on 16 to 17<sup>th</sup> June, 1994 set the stage for the need for child participation in Zambia. Since then a Youth Parliament has been held each year on the day of the African Child and this offers children an opportunity to participate in matters of the nation. Resolutions made by the children at this Youth Parliament Forum are presented to the President on the day of the African Child in an effort to influence Policy. The UN Committee on the status of Children after noting the establishment of a Youth Parliament recommended that Zambia should develop a systematic approach to increasing public awareness of the participation of children. There is a continuing need to mainstream child participation at all levels of programming and to ensure that such structures as the National Youth Council and Children's Council are used effectively for this purpose.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

The Births and Deaths Registration Act, Chapter 51, provides a uniform law for the registration of all births and deaths in Zambia, without distinction of origin, or descent. Currently not many people register due to the fact that the Registry is centralized and the government imposes prohibitive registration fee of K101, 000.00.<sup>8</sup>

Under the Births and Deaths Registration Act Cap 51 it is mandatory to register all births and deaths without distinction of origin or descent. Under this act the non-marital child is still referred to as 'illegitimate' that is because the law has never been amended since 1973. The amendment of 1994 was only concerned with updating the fees payable by replacing the same with 'penalty units' which term is used to cushion against inflation. UNICEF indicated in 2009 that approximately 16 percent of urban births and 6 percent of rural births in the country were registered.

In the absence of the birth certificate or a baptism certificate a certificate signed by a medical officer as to the age of a person below the age of 18 shall serve as evidence as to age of the person. This is in particular necessary in cases of foundlings.

Under Zambian law, citizenship is derived from one's parents or by birth within the country's territory. Article 6 (1) of the Constitution upholds the need to preserve a child's nationality and identity.

The Constitution guarantees freedom of expression, privacy related rights and other related civil and political rights. Since these rights are provided to everyone, children also have the opportunity to exercise some of these rights. Because no law in Zambia clearly provide for children's civil rights a reliance on the Constitutional provisions is necessary.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Zambia's laws give emphasis to parental responsibilities and the importance of the family environment for children's upbringing. However, challenges posed by poverty, HIV/AIDS, and at times discriminatory customary laws sometimes make it difficult for children to grow up in a family environment free from discrimination.

<sup>8</sup> 33.00 USD.

The Affiliation and Maintenance of Children Act, Chapter 64, provides for court orders where paternity is contested, and consolidates the law relating to the maintenance of children. The Act brings Zambian law into conformity with the CRC in terms of affiliation and maintenance of children and repeals the application of the “Bastardy” laws of England.

The Intestate Succession Act, Chapter 59, provides a uniform intestate succession law that is applicable throughout the country, to cover a situation where a person dies without having made a will. It makes adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate. The essence of this Act is to protect children against property-grabbing and, therefore, preserve sufficient resources for their survival. Children born out of wedlock are recognised for purposes of succession. One interesting feature of the Act is that it abolishes widow inheritance, thus abolishing a harmful cultural practice according to CRC standards.

The Wills and Administration of Testate Estate Act, Chapter 60, provides for the administration of estates of persons, who made a valid will before dying. The Act also provides for adequate financial and other provisions to be made to dependants in a will. The Act permits the Court to vary provisions of a will if it determines that the estate is unreasonably distributed and would result in detriment to children of the deceased.

The Day Nurseries Act, Chapter 313, provides for registration and regulation of day nurseries. However most day nursery school operate without registration.

The 2007 Zambian Demographic and Health Survey has indicated that there were approximately 1.1 million orphaned children under the age of 17. Out of these, approximately 600,000 children are orphaned as a result of HIV/AIDS.

Some innovations with regard to the protection of orphans and vulnerable children are the Child

Justice Administration programmes by UNICEF, United Kingdom and South Africa. These deal with the arrest and detention of the child and diversion from the criminal justice system. With regard to orphans and children deprived of parents the Child Care Upgrading (CCUP) has been set up under the Ministry of Community Development and Social Services (MCDSS) Adoption is the most cost effective model of dealing with orphans which needs to be exploited.

The Adoption Act, Chapter 54, provides for: Creation and registration of adoption orders; Registration and control of adoption societies; Regulation of arrangements made by adoption societies and other persons to adopt children; Supervision of adopted children by the Commissioner for Juvenile Welfare; Protection of the rights of children by the court by ensuring that any adoption order made will be in favour of the child.

According to the Act upon an adoption order being made, all rights, duties obligations and liabilities of the natural parents or guardians of the infant in relation to future custody, maintenance and education of the infant are extinguished and the adopter stands exclusively in the same relation as to the lawful mother and father of the child. The adopter cannot marry the girl child for example and the child can inherit from the estate of the adopted parents.

## 7. HEALTH AND DISABILITY

Legislation on health care and health services is almost non-existent. Most of health related issues are governed by policies, programmes, schemes, and other approaches. For instance, the Fifth National Development Plan 2006-2010 and the Vision 2030 outline programmes in the areas of reproductive health, curative and rehabilitative care and maternal health services, safe motherhood, and the legal and social protection of children and women. Access to health care services has improved through time, especially since Government has a

decentralized approach to planning and provision of health services which broadens the scope for all individuals to access health services.

Government is active in programmes such as Prevention of Mother to Child Transmission of HIV/AIDS (PMTCT). Other priority areas that Government has focused on include increasing child survival and providing better quality of life for men and women, including the use of family planning services. Free services for children below the age of 5 at all Government health centres is an example of emerging good practice. In addition, in an effort to boost immunization of children and to provide free intervention for the prevention of malaria, child health weeks are held every six months.

Legislation that concretely addresses the issue of children with disabilities is also lacking in the country. The law prohibits discrimination in general, but there is no law that specifically prohibits discrimination against persons with physical, sensory, intellectual, or mental disabilities in employment, education, access to health care, or the provision of other state services or in other areas. There is also no comprehensive policy for children with disabilities although there is a general National Policy on Disability.

## 8. EDUCATION

The Constitution, in Part IX, which provides for the Directive principles of state policy and the duties of a citizen caters, albeit briefly, for education. It indicates that “[t]he State shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all”.<sup>9</sup>

Zambia’s education system consists of pre-schooling, basic, secondary and tertiary education.

The system is governed by the Education Act Chapter 134 of the Laws of Zambia which provides for the promotion, development and control of schools, educational institutions and services.

A child has the right to free basic education. Except as provided for in this Act or any other written law, a parent shall enrol a child who has attained the school-going age at an educational institution and shall ensure the child’s attendance at the educational institution. A person who without reasonable excuse-fails to enrol a child of school- going age at an educational institution; or prevents a learner from attending school or withdraws a learner from an educational institution; commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both.<sup>10</sup>

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

The Constitution of Zambia addresses some violence against children related issues. Article 24 of the Constitution protects young people by indicating that “[a] young person shall not be employed and shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education or interfere with his physical, mental or moral developments”.<sup>11</sup> Moreover, “[a]ll young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation”<sup>12</sup> and that “[a] young person shall not be the subject of trafficking in any form”.<sup>13</sup>

The Constitution also prohibits slavery and servitude in absolute terms.<sup>14</sup> Article 14(2)

<sup>9</sup> Article 112(e) of the Zambian Constitution.

<sup>10</sup> Education Act No 10 2011: Art 15 and 17(1,4)

<sup>11</sup> Article 24(1) of the Constitution.

<sup>12</sup> Article 24(2) of the Constitution.

<sup>13</sup> Article 24(3) of the Constitution.

<sup>14</sup> Article 14(1) of the Constitution .

proscribes forced labour, save the exception under the Constitution.<sup>15</sup> The prohibition of torture and inhuman or degrading punishment or other like treatment set forth in the Constitution applies to everyone, including children.

Zambia has ratified ILO Conventions No. 182 and No. 138 in 2001. The minimum age for employment is 15; for hazardous work, it is 18. Among the worst forms of labour prohibited by law are child prostitution, slavery in all its forms, forced military conscription of children, and work that is harmful to the safety, health, or morals of children and young persons. Female Genital Mutilation (FGM) is prohibited under the country's penal code and has rarely occurred in practice.

The law criminalizes child prostitution and child pornography with penalties of up to life imprisonment for perpetrators. Zambia's comprehensive Anti-Human Trafficking Act (No. 11 of 2008) criminalizes all forms of trafficking and prescribes penalties that range from 20 years' to life imprisonment, which are sufficiently stringent and commensurate with penalties prescribed for other serious crimes, such as rape. In the past, the Penal Code fell short of addressing the issue comprehensively. In 2010, the government also amended its Immigration Act, adding additional prohibitions against human trafficking. Zambia is also a State Party to the protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol), supplementing the United Nations Convention Against Transnational Organised Crime (Palermo Convention) in 2005.

The Employment of Young Persons and Children Act, Chapter 274, regulates employment of young persons and children. The Penal Code, Chapter 87, establishes the Code of Criminal Law and has provisions for the protection of children's rights such as the criminalisation of incest rape, defilement, abduction and neglect of children. Zambia's laws also criminalise statutory rape and

provide penalties of up to life imprisonment. The Penal Code (Amendment) Act of 2005 increases the penalties relating to gender based violence. The Act does not conform to the needs of the CRC as the requirements for the protection of the child in view of the cultural or tribe specific laws, and the concept of gender based violence is not incorporated. The law does not even criminalize early marriages for a recent enactment.

Corporal punishment is not prohibited in all settings. However, through amendments to the *Criminal Procedure Code*, the *Penal Code*, and the *Education Act*, the *People Vs John Banda* (HPA/6/1998) provided a landmark decision regarding the prohibition of corporal punishment.

The Probation of Offenders Act, Chapter 93, provides for correction and rehabilitation of juveniles in conflict with the law, and the probation of offenders. The Act is also responsible for the establishment of probation hostels and prescribes the activities of these hostels. Unfortunately detention of children is not used as a measure of last resort, and alternatives to detention, such as rehabilitation measures and diversion, is not adequately applied. The reform of the juvenile justice system, which started in 2000, still needs to bring Zambia's laws and practices in compliance with international standards.

The Zambia Police (Amendment) Act No. 14 of 1999 amended the Zambia Police Act, Chapter 107, and establishes the Victim Support unit, which handles all types of abuse including child abuse, violence against women, property - grabbing and victimization of the elderly. As part of the justice reforms, the Legal Aid Act was amended in 2005 to provide for a legal aid fund and to enable the Legal Aid Board to carry out its operations in an efficacious manner. This is expected to assist children in lodging complaints and seeking redress when their rights are violated.

<sup>15</sup> Article 14(3), which allow for hard labour as a form of punishment.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 17/08/1994
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 02/05/2006
Convention on the Rights of the Child (CRC), 1989	Ratification, 06/12/1991
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	Ratification, 02/12/2008
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Signature, 29/09/2008
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 01/02/2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	-
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 09/02/1976
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 10/12/2001
Hague Convention on International Child Abduction, 1980	-
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
Hague Convention on Child Support and other Forms of Family Maintenance, 2007	-

## 2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

Committee	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	29 Nov 2001	-	-

## 3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Zambia

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	
Children In Need Network (CHIN)	January 2003	None

## 4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC	UN Committee
-	-

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clr/vol2](http://www.africanchildinfo.net/clr/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>

# HARMONISATION OF CHILDREN'S LAWS IN ZIMBABWE

## COUNTRY BRIEF

### ABSTRACT

It is evident that while Zimbabwe has some good laws and policies on children, it has equally immense challenges when it comes to translating these laws into reality and tangible benefits for its children. These challenges arise not only from the economic problems that the country is currently reeling from, but also from the socio-political context. It is noteworthy that in the midst of all these challenges there are over 200 NGOs and other stakeholders working to address the many problems facing Zimbabwe's children.

### 1. INTRODUCTION

Zimbabwe is a country with an estimated population of about 12.5 million people. It is also estimated that around 50% of the population is below 20 years of age.

Zimbabwe is a constitutional democracy. The Constitution of Zimbabwe (2007) is the Supreme Law of the land, and in Section 3, the position of the Constitution as the "parent Act" is reaffirmed. The Constitution contains a Declaration of Rights and Fundamental Freedoms.

Similar to its neighbouring countries, Zimbabwe has a dual legal system. This is provided for in Section 89 of the Constitution. Thus, the legal system is composed of common law (non-

statutory or unwritten Anglo Roman Dutch Law), Legislation Case Law (Precedent), and Customary Law. In terms of Section 111B of the Constitution, international instruments do not automatically form part of the law unless approved by parliament or incorporated into the law by an Act of Parliament. The Constitution was amended after the signing of the Interparty Political Agreement on the 15<sup>th</sup> of September 2008, including on the issue of the attainment and retention of Zimbabwean citizenship and the creation of the Zimbabwe Human Rights Commission.<sup>1</sup>

Zimbabwe ratified the Convention on the Rights of the Child (CRC) in 1990, while the African Charter on the Rights and Welfare of the Child (ACRWC) was ratified on the 19<sup>th</sup> January 1995. It ratified ILO Convention No. 182 on the Worst Forms of Child Labour in 2000 and ILO Convention No. 138 on the Minimum Age of Employment, in 2000.

The main child rights related laws in the country include the Children's Act Chapter 5:06 which provides for protection, adoption and custody of all children and the Guardianship of Minors Act, [Chapter 5:08] (2003) which deals with the guardianship of children. The Children's Act sets up the Children's Court (formerly known as the Juvenile Court) to deal with matters pertaining to children. In addition, mechanisms such as the National Programme of Action for Children (NPAC) facilitate and coordinate the implementation, monitoring and evaluation of the CRC and the ACRWC to ensure survival, development and protection.

<sup>1</sup> Constitutional Amendment (No 19) Act 2008, Act No 1 of 2009

## 2. GENERAL MEASURES OF IMPLEMENTATION

There are some general measures of implementation that the Government of Zimbabwe has put in place. For instance, the independence of the Judiciary is enshrined in Sub-Section (3) of Section 86 and also in Section 87 of the Constitution of Zimbabwe.

Moreover, as mentioned above, in order to enhance the protection and promotion of human rights, Government has, through Constitutional Amendment No.19 of 2009, established the Zimbabwe Human Rights Commission (ZHRC). The ZHRC consists of a chairman and eight other members. The ZHRC's functions are to promote awareness of and respect for human rights and freedoms at all levels of society. It also has the mandate to recommend to Parliament effective measures to promote human rights and freedoms and investigate the conduct of any authority or person, where it is alleged that any of the rights in the Declaration of Rights has been violated by that authority or person.

The Office of the Public Protector is established by the Constitution.<sup>2</sup> The Office has the mandate to investigate any action taken by an officer or person in any Ministry or department where there are allegations that an individual has suffered injustice arising out of that person or authority's action.

Government established the Inter- Ministerial Committee on Human Rights and International Humanitarian Law (IMC) in 1993 to coordinate the human rights functions of Government Ministries, as well as to prepare State Party Reports. The IMC is hosted and coordinated by the Ministry of Justice and Legal Affairs.

## 3. DEFINITION OF THE CHILD

The Children's Protection and Adoption Act defines a child as anyone below the age of 18. The problem comes to legislation such as The Marriage Act [Chapter 5:11], which sets the minimum age of marriage to be 18 for boys and 16 for girls<sup>3</sup>. The Criminal Procedure and Evidence Act permits sexual relations between an adult man and a girl of 17, in effect sexual intercourse between minors and adults is permitted. One very negative manifestation of this legal vacuum is that in terms of the Criminal Procedure and Evidence Act, it is an offence for an adult male to have sexual intercourse with a girl below the age of 16 years.<sup>4</sup> Even when the girl consents to the sexual relations, it is still an offence as she is deemed incapable of consenting. For most offenders, the obvious escape route from a conviction of statutory rape becomes marriage to the minor girl. The Customary Marriages Act [Chapter 5:07] does not provide for a minimum age of marriage.

<sup>2</sup> Article 107 of the Constitution.

<sup>3</sup> Chapter 5:11 Marriage Act, Article 22.

<sup>4</sup> Article 70(3), Criminal Code.

**Table showing the definition of a child in Zimbabwe**

Category	Age
Definition of a child	16
Age of majority	18
Minimum age of employment	15
Minimum age of sexual consent	16
Minimum age of marriage	16 for girls and 18 for boys
Minimum age of criminal responsibility	7
Minimum age of recruitment into the army	18

## 4. THE FOUR GENERAL PRINCIPLES

**The best interests of the child:** The principle of the best interests of the child is a long established and recognised principle of the law in Zimbabwe. Generally speaking, existing legislation dealing with maintenance, divorce, matrimonial causes, adoption, custody, and institutional care are all governed by the principle that the best interests of the child concerned must be paramount. For instance Section 5 of the Customary Law and Local Courts Act [Chapter 7:05] provides for it. The Matrimonial Causes Act [Chapter 5:13], which deals with matters relating to marriages, judicial separation and divorce, provides for it in Section 10.

**Non-discrimination:** The Constitution of Zimbabwe upholds the principle of non-discrimination and equality before the law. Constitutional Amendments

No. 14 of 1996 and 17 of 2005 prohibit discrimination on the grounds of gender and sex respectively. Some non-compliance with the CRC and the ACRWC in relation to non-discrimination however exists. The Administration of Estates Act [Chapter 6:01] which provides for the protection of the inheritance rights of men, women and children has some discriminatory elements. The law in Zimbabwe also allows for discrimination when it comes to Marriage laws. Article 22 of the Marriage Act [Chapter 5:11], sets the minimum age of marriage at 18 years for boys and 16 years for girls. In addition, the application of the principle that guardianship and custody of children born out of wedlock is vested in the mothers of those children, with the fathers being regarded as having no automatic right to custody or access is inherently discriminatory.

**The right to life, survival and development:** In Zimbabwe the right to life is a constitutionally guaranteed right under Section 12 of the Constitution. While the provision does not specifically refer to children, it should be understood as also referring to children since they are also human beings. The right to life of children is therefore guaranteed. Further to this however, while the Constitution states that deprivation of life in relation to the carrying out of a death penalty is allowed in terms of the Constitution, the law in Zimbabwe exempts children from being subjected to the death penalty.<sup>5</sup> The National Programme of Action for Children (NPAC) encompasses Child Survival, Development, Protection and Security. This includes, inter alia, Baby Friendly Initiative and Child Friendly Clinics for provision of comprehensive health care in child friendly environments. Child protection and security mechanisms include, Victim Friendly Units, Victim Friendly Courts and the National Action Plan for Orphans and Vulnerable Children.

<sup>5</sup> Section 338 of the Criminal Procedure and Evidence Act Chapter 9:07

**Respect for the views of the child:** Zimbabwe's laws in respect of child participation are weak. The Children's Act [Chapter 5:06] is silent on the right of children to express themselves in child protection proceedings. But Section 20 of the Constitution provides that no person shall be hindered in the enjoyment of his freedom of expression – that is, freedom to hold opinions. Nonetheless, there are a number of initiatives being undertaken to facilitate child participation. For instance, the National Youth Policy (2000) facilitates the participation of young people in the mainstream development process of the country. The Zimbabwean Government put in place the Legal Aid Act of 1996 that provides for the establishment of a Legal Aid Directorate. Its main function is to provide legal aid to persons who do not have sufficient means to obtain the services of legal practitioners from their own resources and this may also apply to children.

## 5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

In Zimbabwe, birth registration is provided for in terms of the Birth and Death Registration Act which sets out the processes and eligibility for registration. The Act also sets out other requirements for registration and it is important to note that it is in fact a criminal offence in terms of the Act for one to neglect to obtain a birth certificate on behalf of a child. The applications for registration are approved by the Minister responsible for administering the Citizenship Act and in terms of Section 16 of this Act, the Minister is not required to give reasons for his refusal to grant or approve any application in terms of the Act, including applications for citizenship by registration.

Some provisions of the Zimbabwe Constitution have implications for nationality/citizenship. For

instance, Section 7 of Amendment Number 19 provides for citizenship by registration for people who are not Zimbabwean citizens. Section 7 provides that anyone who has been voluntarily and ordinarily resident in Zimbabwe for at least ten years may apply to become a Zimbabwean citizen by registration. In the event that one's application is granted, such a person's child or children will be entitled to be citizens as well but they also have to make applications. Section 7 also provides that where a Zimbabwean citizen legally adopts a child who is not a Zimbabwean, the child shall become a Zimbabwean on the date of adoption.

In Zimbabwe, nearly a third of all children do not possess a birth certificate, thereby having their access to public services restricted. In recent years there has been a pushing for amendments to the Births and Deaths Registration (BDR) Act, arguing that the legislation currently makes for an over-centralised registration system, with overly stringent requirements causing vulnerable children to remain unregistered. This problem is most visible in farming and rural communities as well as for orphans and vulnerable children. One cause of non-registration is that most migrant farm labourers of foreign origin do not possess formal Zimbabwean registration papers.

The Constitution guarantees a number of civil and political rights and freedoms that are of relevance to children. Thus, Section 20 of the Constitution guarantees freedom of expression and the right to receive information.

The right to privacy does not benefit from appropriate coverage in the Constitution. However there are some subsidiary laws that can be interpreted to cater for this right, like the access to Information and Protection of Privacy Act (AIPPA) [Chapter 10:27].<sup>6</sup>

<sup>6</sup> Act No. 5 of 2002

Article 19(1) of the Constitution of Zimbabwe guarantees the enjoyment of freedom of conscience, meaning, freedom of thought and religion, and freedom to change ones religion or belief. These rights can be enjoyed whether alone or in community with others, and whether in public or in private, and everyone including children have the right to manifest and propagate their religion or belief through worship, teaching, practice and observance. Sub-Section 2 provides that unless the consent of a child's parent or guardian is secured, no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

## 6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

There are some laws in Zimbabwe that attempt to guarantee that children grow up in an environment of their family of origin. When this is impossible, these laws attempt to provide for, albeit in a very limited manner, family environments for children including through alternative care. These laws include the Education Act, the Children's Act, the Guardianship of Minors Act, the Maintenance Act and the Sexual Offences Act.

The Matrimonial Causes Act [Chapter 5:13] exhorts judicial officers to ensure that in handing down orders for divorce or judicial separation they make provision for the custody and maintenance of children in that relationship. While the Maintenance Act seeks to ensure that minors are taken care of in terms of their material needs, regardless of whether their parents are married or not.

The Maintenance Act [Chapter 5:09] which provides for the making of orders for maintenance

of persons, the enforcement of maintenance orders and matters incidental to or connected with the foregoing. However, unfortunately there are a number of children in the country that do not benefit from maintenance from either one or both parents as a result of lack of effective enforcement of the Act.

The main challenge that is facing children in Zimbabwe in the context of family environment is the HIV/AIDS pandemic. An estimated 1.1 million children under the age of 15 have been orphaned due to AIDS. In response to this crisis, the Government of Zimbabwe has endorsed the urgent need for coordinated, expanded interventions to strengthen existing work being undertaken by government ministries, non-governmental organisations (NGOs), community-based organisations (CBOs), faith-based organisations (FBOs) and United Nations (UN) agencies. A National Plan of Action (NPA) for Orphans and other Vulnerable Children (OVC) has been developed and continues to be implemented with limited impact.

Programmes for OVC focus on psychosocial and material support, and educational and humanitarian assistance. Other programmes include children's rights, behaviour change, youth programs, life skills training, caregiver training, HIV/AIDS information and health care. Most of these programmes have links with the government of Zimbabwe through the different line Ministries. However, coordination of these programmes still remains a big challenge as they all report to their specific sector ministries.

It is a matter of concern that laws in Zimbabwe either do not regulate, or do not regulate adequately a number of issues related to alternative care. These issues include the periodic review of placement of children in alternative care, registration and supervision of orphanages, and domestic and intercountry adoption.

## 7. HEALTH AND DISABILITY

The challenges that children in Zimbabwe face in the context of their right to health is immense. These health related issues include HIV/AIDS, immunization, malnutrition including stunting and morbidity, and child mortality rates that are very high. Most of these issues are addressed through policies, programmes and schemes as opposed to legislative frameworks. Nonetheless there are some laws that are of relevance for children's right to health and health services in the country.

The Public Health Act provides for immunization of all children even in circumstances where parents object to such immunization on religious grounds. The Minister of Health and Child Welfare has the mandate, in accordance with the Act, the responsibility of promoting public health. Further the Act establishes the Advisory Board on Public Health that advises the Minister on all matters of health. Immunisation programmes have generally been a success in Zimbabwe with the continued assistance of stakeholders such as UNICEF.

The National Health Strategy addresses issues on equity and quality of health across all ages and the location of most health facilities within 5km-8km radius is in accordance with the Primary Health Care Principles. There are policies in place that intend to ensure that people (especially persons below 5 and above 65 years) who cannot afford to pay in public hospitals are assisted. These target children whose parents are not working, orphaned children, the elderly and those affected with HIV/AIDS pandemic. These are given free medical Treatment Orders to present to the Hospitals that receive the money from the department of Social Welfare.

The country has a National HIV/ AIDS Strategic Framework which includes Prevention of Mother to Child Transmission. The National AIDS Coordinating Programme as well as the National AIDS Council (NAC) which is established under the National AIDS Council of Zimbabwe Act [Chapter 15:14] are examples of responses by the

Government in order to address the HIV/AIDS challenge in the country.

In addition the Social Welfare Assistance Act [Chapter 17:06] provides for health and education assistance, maintenance allowances, cash transfers, purchase of assistive technologies, importation of special equipment for the disabled, means tested criteria for assessment of poverty amongst vulnerable groups. Introduction of the National AIDSTrust Fund to mobilise resources for the prevention of infection and care of those infected and affected by HIV/ AIDS remains to be one of the country's positive developments.

The Constitution has been amended (Amendment No. 17) to include disability in the non-discriminatory clauses. The Mental Health Act, 1996 (No. 15 of 1996) provides for the welfare of the mentally ill, including children with mental disabilities. The Disabled Persons Act [Chapter 17:01] that provides for the welfare and rehabilitation of disabled persons gives the Department of Social Welfare the mandate to cater for the welfare and rehabilitation of disabled persons. In the implementation of the Act the Department has two major roles that are coordination and service provision. While according to the Education Act, there should be no discrimination in the provision of primary education in Zimbabwe, the provision of education to persons with disability has been left to be addressed by the Disability Act. In addition, the Government of Zimbabwe has created a Disabled Persons Fund, through which funding is provided to persons with disabilities for various activities.

## 8. EDUCATION

Beginning from the attainment of independence in 1980, Zimbabwe pursued a policy of education for all and children accessed primary education free of charge. This was done despite the fact that no such provision exists in the Constitution. This practice progressed well until the introduction of the Economic Structural Adjustment in the 1990s.

In terms of the Education Act [Chapter 25:04], every child in Zimbabwe has the right to formal education and parents are obliged to send their children to a school of their choice. The Government has also set up a number of tertiary institutions to ensure that higher education is accessible to as many children as possible.

According to Article 5 of the education Act, "it is the objective in Zimbabwe that primary education for every child of school-going age shall be compulsory and to this end it shall be the duty of the parents of any such child to ensure that such child attends primary school".<sup>7</sup> However, education is not free. Article 6 of the Act requires school fees to be maintained at the lowest possible levels. Students are required to pay tuition fees as well as development levies. While tuition fees in government schools have generally been very low, development levies at times have proved to be impediments to the provision of free education. High costs of books and uniforms have led to high drop outs in rural areas.

Since primary education is not free, in practice is not compulsory. In fact, the presence of children on the streets in urban areas is an indictment against any claim that education in Zimbabwe is compulsory.

In 2010, during the 2011 budget statement, the Minister of Finance indicated that there was a dropout rate of 8% in 2010 among children between 6 and 17 years.<sup>8</sup> Given that there are high drop-outs in rural areas, it cannot be said that all children have equal access to primary education.

In Zimbabwe there are two ministries in charge of education- the Ministry of Education, Sport, Art and Culture (in charge of pre-primary to secondary education) and the Ministry of Higher and Tertiary

Education (responsible for post high school education). It is reported that these two Ministries received the highest allocation of Government budget in 2011.<sup>9</sup>

## 9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

To ensure that children are protected from sexual abuse, the Children's Act prescribes deterrent forms of punishment for sexual offenders. The definition of a sexual offender adopted by the Act is a wider one. It includes persons who, although not directly involved, allow the abuse of children, either on their premises or elsewhere.

The Children's Act also explicitly punishes ill-treatment and neglect of children and young persons.<sup>10</sup> The Criminal Law Code also criminalizes sexual abuse of children. Save for the authorized authorities,<sup>11</sup> it is also prohibited to conduct medical and scientific experiments on human beings.

Generally, human trafficking is rife in Zimbabwe, and the country is a source, transit and destination country. However, Zimbabwean law does not prohibit all forms of trafficking in persons. While there is some progress in coming up with a comprehensive anti-trafficking legislation, it still remains in draft form. The Criminal Law (Codification and Reform) Act prohibits procuring a person for unlawful sexual conduct, inside or outside of Zimbabwe, which allows for some possibility of prosecuting trafficking of children. Children are prohibited by the Penal Code from visiting or residing in a brothel, and anyone who causes the seduction, abduction, or prostitution

<sup>7</sup> Education Act [Chapter 25:04] (as amended as at 1st October, 2004).

<sup>8</sup> Biti, T. (2010), The 2011 National Budget Statement.

<sup>9</sup> As above.

<sup>10</sup> Article 7 of the Act.

<sup>11</sup> Such as the Medical Research Council.

of children is to be prosecuted. The Sexual Offences Act too criminalises the transportation of persons across borders for sex. The Child Abduction Act, which is an Act to give effect within Zimbabwe to The Convention on the Civil Aspects of International Child Abduction (1980), and to provide for matters connected therewith or incidental thereto was enacted in 1995, but it relates to international child abduction within the context of custody rights and access rights.

Zimbabwe has ratified both ILO Conventions 138 and 182 that are of relevance for child labour. Therefore, there are a number of provisions of the Labour Relations Amendment Act (No. 17 of 2002) that give effect to the ILO Conventions. The Act also prohibits forced labour and prescribes punishments of up to two years' imprisonment. Moreover, while the Labour Act prohibits employers from hiring a person under 18 to perform hazardous work and the Children's Act makes it an offence to exploit children through employment.

The Domestic Violence Act (Chapter 5:16), passed in 2006, has some relevant provisions on children's rights. For instance, it has a number of provisions relevant for the girl child in the context of physical, sexual and mental injury. It also has provisions addressing harmful traditional practices such as forced virginity testing; or female genital mutilation; or pledging of women or girls for purposes of appeasing spirits.

According to the Constitution of Zimbabwe, "moderate" corporal punishment in the home environment is allowed.<sup>12</sup> Article 7 of the Children's Act also makes an exception to child abuse and neglect by accommodating any parent or guardian of any child or young person who administers a reasonable punishment to such child or young person. The Criminal Law (Codification and Reform) Act of 2004 provides

that "(a parent or guardian shall have authority to administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward".<sup>13</sup> Where a male person under the age of 18 years is convicted of any offence the court which imposes sentence upon him may in lieu of any other punishment; or in addition to a wholly suspended sentence of a fine or imprisonment; sentence him to receive moderate corporal punishment, not exceeding six strokes that should be inflicted in private settings.<sup>14</sup> While there were indications in 2011 of plans to prohibit corporal punishment in the school environment, the Education Act (2004) continues to allow the practice.

In Zimbabwe, the minimum age of criminal responsibility is 7 years. Those children between the ages of 7-14 benefit from a special treatment with a focus on rehabilitation while those above 14 do not necessarily benefit from such treatment.<sup>15</sup> The two Acts that are directly relevant for juvenile justice are the Children's Act (Chapter 33) and the Criminal Procedure and Evidence Act (Chapter 57). The juvenile courts and the magistrate's courts are two important institutions in dealing with juvenile justice.

Children benefit from the Criminal Procedure and Evidence Act which establishes the victim friendly Court system. The Act also provides that a child shall be brought to court as soon as is reasonably possible. In the absence of free legal services to those juveniles whose parents or guardians lack the means to engage the services of a lawyer, it is even more important to use imprisonment as a measure of last resort. Some efforts, at the programme level, are being undertaken to administer child justice in a child friendly manner. For instance, in 2009, efforts were made to remove juvenile offenders from the formal criminal justice system through a pre-trial diversion programme.

<sup>12</sup> Article 15.

<sup>13</sup> Article 241 of the Act.

<sup>14</sup> Criminal Procedure and Evidence Act: Art 353, corporal punishment of male juveniles.

<sup>15</sup> Criminal Law, Codification and Reform Act [Chapter 9:23] Act 23/2004, Art 6, children under the age of 7 years are not criminally liable.

## 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

### 1. Ratification of Child Related Instruments

Treaty	Date of Ratification (or signature if not ratified)
The African Charter on the Rights and Welfare of the Child (ACRWC), 1990	Ratification, 19/01/1995
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	Ratification, 15/04/2008
Convention on the Rights of the Child (CRC), 1989	Ratification, 11/09/1990
Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000	-
Optional Protocol on the Sale of Children, Child Prostitution & Child Pornography (OPCS), 2000	Accession, 14/02/2012
Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011	-
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Ratification, 01/02/2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006	Ratification, 29/09/2008
ILO Convention 138 on Minimum Age of Employment, 1973	Ratification, 06/06/2000
ILO Convention 169 on Indigenous and Tribal Peoples, 1989	-
ILO Convention 182 on Worst forms of Child Labour, 1999	Ratification, 11/12/2000
Hague Convention on International Child Abduction, 1980	Accession, 04/04/1995
Hague Convention on Inter country Adoption, 1993	-
Hague Convention on Parental Responsibility and Protection of Children, 1996	-
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	Initial Report	Second	Third
ACERWC	-	-	-
UN Committee	29 Nov 2001	-	-

3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Zimbabwe

UN Committee on the Rights of the Child (shadow reports on the CRC,OPSC,OPAC)		African Committee of Experts on the Rights and Welfare of the Child
Organization	Date	None
Children In Need Network (CHIN)	January 2003	

4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and UN Committee on the Rights of the Child

ACERWC		UN Committee
Name	Term of service	-
Justice Alfas M. Chitakunye	July 2010 – July 2015	

## Useful links to background documents used

1. ACPF (2012), Child Law Resources, Volume 2 : Reporting Status of African States, available at [www.africanchildinfo.net/clar/vol2](http://www.africanchildinfo.net/clar/vol2)
2. ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>
3. ACPF (2011), In the Best Interests of the Child: Harmonising Laws on Children in West and Central Africa available at <http://www.africanchildinfo.net>
4. Website of the African Committee of Experts on the Rights and Welfare of the Child, African Union, <http://www.africa-union.org/child/home.htm>
5. Website on the African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/>
6. Website of the UN Office of the High Commissioner for Human Rights (Treaty Bodies) <http://tb.ohchr.org/default.aspx>
7. Website of the UNHCR, <http://www.unhcr.org/refworld/country>
8. The US Department of State: Human Rights Reports, <http://www.state.gov/j/drl/rls/hrrpt/>



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