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Children and Justice: Integrating International Standard into the National Context

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THERE WAS a time when anything that concerned law and the legal system was the exclusive preserve of lawyers. The experience that many of our countries have had with the administration of justice has created a very real awareness of the need for a partnership with all groups in society if law is to be used as an effective strategy in realising fairness and equity. The United Nations Convention on the Rights of the Child (CRC), the most recent major human rights instrument, is based on a commitment to a solidarity effort on behalf of the children of the world.

The CRC, as compared to any other human rights instruments, has been ratified and accepted as a binding multilateral treaty by the largest number of countries in the shortest period of time. Countries that have yet to ratify the international covenants which are part of the international bill of rights, have ratified the CRC. This indicated a core reality. In a world full of conflict and violent confrontation, we have found a single issue that can evoke a positive sense of agreement. If we widen this small window of reconciliation, and realise even a few of the core values of humanism that the CRC articulates we may well succeed in having an impact on the quality of life of all people.

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The record of many countries in implementing international standards has not been one to be proud of. State parties ratify conventions and yet decades later continue to recognise laws, policies and practices at national levels which infringe those standards. Most international instruments refer to "the people" on whose behalf these instruments have been ratified. Yet it is only recently that the people are becoming aware that international law has been transformed. and that it is no longer exclusively a matter for diplomatic relations between states, but rather a set of norms that can be used to promote accountability in government within the state and at the national level. The European Convention of Human Rights has adopted a radical procedure in this regard and even gives individuals a right of relief and redress for infringement of the standards of the Convention by their governments.

There are those who will argue that a rights strategy and realising justice through the use of law, are superfluous or irrelevant, particularly in developing countries which suffer problems of poverty, social divisiveness and economic limitations. Yet the history of the past and the realities of today must surely convince us that the state has to be a presence in governance. It cannot "wither away" if we are to prevent anarchy. It is therefore vital to recognise the reality, and develop structures and institutions that will

humanise the interaction between the state and the people. Laws and a legal system, fashioned according to norms of justice and international human right standards which reflect the anguish and inspiration of human experience in struggling with authoritarianism are important for all peoples and their governments. They represent a universal and common heritage for ensuring that state power does not emerge as authoritarianism, but is exercised in a democratic environment.

The CRC is based on a strategy of rights and the implementation and enforcement of those rights. It envisages an important role for the legal system in realising those rights. International agencies such as UNICEF which are committed to the interests of children have a critical role in helping to interpret those rights and refining them within the context of international human rights law standards. It is the responsibility of both the state and the people to ensure that these rights will not remain aspirations or concepts of international law that we have no hope or expectation of realising. We cannot afford to create an impression of international consensus, a common vision and a value system, where there is no real commitment to move our societies towards fulfilling their promises to children.

Accepting treaty commitments under international law often becomes only a gesture, because most of our countries do not recognise that international law and domestic law are one system. According to this dualist approach, international law can be enforced domestically, only if treaty standards are incorporated into the national legal system. National courts therefore perceive treaty standards as having moral rather that legal authority. This is why it becomes vital to ensure that the standards set by the CRC are incorporated into the national legal systems.

In setting about the task of incorporation, we must stand committed to certain basic values that are enshrined in the CRC. The CRC, like certain other human rights treaties, recognises the concept of cultural pluralism and diversity. Nevertheless, articles 2 and 3 of the CRC which can be described as the "non- discrimination" and "best interests of the child" clauses require that state parties commit themselves to realising the same framework of core rights for all children. Article 2 in particular clarifies that a child's right of survival and development, protection from exploitation and aggression, and the right to participate in matters that concern the child, consistent with evolving maturity, must be realised for all children within ratifying countries. Factors such as the child's or the parent's or guardian's birth, economic class, disability, ethnicity, religion or gender, cannot be a justification for denying these rights or diluting them.

The commonality of the core standards set by the CRC in articles 24, 26, 27 and 28 must stimulate uniformly applicable policies on education, health and a safe environment. We can no longer justify different standards in the treatment of children on the basis of a different vision of the nutrition, health, safe environment or education needs of "our children" and "others' children." It is difficult if not impossible to adopt a culturally relativistic approach which would argue that the state had no right to intervene, or impose common standards. The articles in the CRC on compulsory education and attaining the highest standards of health mandate policy intervention by the state, to prevent or undermine social practices that would be an obstacle to the realisation of those standards for all children.

To emphasize, the convention does not prioritise one set of rights but treats them all as non-divisible and inter-dependent. It is not possible to realise the child's right to survival without projecting towards and committing efforts to realise the rights of development,

protection from exploitation and participation. This inevitably means that law making becomes not merely a task for the legislator and the law reformer. Laws have to be put in place with a holistic perception of their linkages, and a commitment of the resources necessary for implementation. It is not therefore possible to prohibit child marriage or child labour by setting minimum ages by law, without legislative and administrative decisions that provide for compulsory education, facilities for registration of marriage, and the general implementation of relevant socio-economic policies. Resource allocation for education, immunisation, nutrition and sanitation, and legislative and regulatory mechanisms to ensure the proper delivery of these services becomes as much a part of law reform as legislating on minimum age for marriage, employment, and juvenile justice. These social and economic policies can no longer be considered issues of political choice outside the realm of law and enforceable rights.

Is this an impractical agenda or framework of international standards for implementation at the national level? In order to answer this question we must recognise the social costs of our past experience in law-making without providing adequate socio-economic support or making enforcement a reality. Many developing countries in Asia and Africa face problems of infant mortality, child marriage, maternal mortality, and the phenomena of child widows, child trafficking even across national borders for prostitution, and child labour. We are used to consider these children as high risk, exceptional categories who need protection by law as children are placed in difficult social and economic circumstances. Yet the reality is that these children are a product of our countries' inability to realise their rights and the right of their families to national resources.

When families are given minimal allowances to care for children, when maternity leave is grudgingly granted or perceived as a "benefit" to the working mother, we are perpetuating the perspective of alleviating poverty and destitution, and a welfare payments and benefits ideology. Many of our countries have vagrancy laws that perceive poverty as a fault. Juvenile justice laws which deal with neglected street children speak of the need to rehabilitate them, and impose sanctions on parents for their poverty and neglect. Because we do not provide adequate resources for education or registration of marriage, we are reluctant to impose sanctions on parents and the family for infringement of laws on child marriage and child labour. We recognise the validity of child marriage even as we set a standard of minimum age of marriage by law. In a vicious cycle the inadequacy of the facilities is used as a justification for not imposing sanctions for violations. In the process we do not begin to touch the fringes of the problem of gender discrimination and denial of children's access, girls in particular, to minimum standards of health and education. We cannot ameliorate adult female illiteracy or the health of the working mother. Maternity leave laws make it more difficult for a woman to compete with men for employment. Law making is perceived as ambivalent, and fails to have an impact on these problems.

The CRC focuses on our past failures in recognising that we should shift from the "poor law" and "welfare benefits" approach that has fertilised the jurisprudence of our countries for many centuries. Access to basic education, health care and a safe environment become the socio-economic rights of all children and their families who become entitled to resource allocation for these purposes. State parties are required to "take measures" to diminish infant and child mortality, combat malnutrition, ensure pre-and post-natal care for mothers as a social responsibility, and make atleast primary education compulsory. It is only if these policies can be put in place, that it will be possible to realise

the protection and participation rights of children. A reduction of the level of gender-based and other types of violence in our societies against children cannot be expected unless the prohibitive sanctions are combined with socio-economic policies that encourage responsible parenting and life chances for all children.

The concept of people's and children's core right to basic services in the area of health, education and environment is not as radical for national legal systems as it seems. Indigenous norms and even laws often recognised the concept of "community rights" in land. Even the legal systems derived from Roman law accepted that "the people" had certain rights in public rivers and the sea shore. We already have on the statute books of countries, compulsory education laws, or laws on immunisation, sanitation, community health and maternity leave that are often not monitored or enforced.

Countries with written constitutions also have powerful machanisms for using their chapters on fundamental rights to promote social action in areas such as health and education. Many of these constitutions adopt the typical standpoint in the traditional human rights discourse and treat civil and political rights as enforceable rights and social and economic interventions as unenforceable guidelines to state policy. However the Indian Supreme Court with its extensive power of judicial review has developed the concept of using rights' litigation to link the directive principles to justifiable fundamental rights. Social action litigation has expanded the scope of Constitutional redress for violation of child rights in areas such as child labour, adoption, children in prison, prostitution and trafficking. The right to life has been recently interpreted as broader than a negative duty of the state to refrain from infringement of personal liberty. It has been interpreted as a positive duty to provide the basic conditions for survival. These initiatives reflect the same perspective, that core needs in the area of health, education and the environment are part of the basic justiciable fundamental rights that accompany citizenship. Citizenship laws themselves which discriminate on the basis of gender have been challenged in the courts of Pakistan and Bangladesh.

The new Constitutional Bill proposed for the Republic of South Africa is unique in the area of constitution making for its integration of international law standards on children's rights, and for recognising socio-economic needs as justiciable rights. Children share with adults a fundamental right to basic education and a safe environment. This Constitution is also unique in making the link between child labour and education, following ILO standards and the standards of the CRC. Unlike many other constitutions, the South Africa Constitution defines the right to protection from hazardous labour as a right to be protected from labour that is prejudicial to health and education.

The CRC therefore provides an incentive to the people, legislators, courts and lawyers to expand the scope of fundamental rights by constitutional amendments and/or interpretations of the law that link national constitutional standards to obligations of their states under international law. If an ethos is created in which there is widespread awareness of the CRC, courts and lawyers can be motivated to interpret constitutional and legal standards so as to incorporate the concept of child rights into dispute settlement.

In countries that face problems of divisiveness it is important to remember that common legal values have already been forged by certain processes. Many countries continue to recognise the "choice concept" which permits persons to be governed by state law instead of personal laws based on ethnicity or religion. Certain laws and policies apply to all citizens, irrespective of choice. The courts in most countries have

used the concept of the "child's best interests" in guardianship litigation to forge uniform standards that undermine gender discrimination, discrimination against non-marital children and the separateness of personal law that can have a negative impact on children. Constitutional standards already recognise equality before the law and even provide for affirmative state action on behalf of women and children so as to achieve substantive rather than formal equality. Gender discrimination and discrimination against non-marital children is a remarkable feature of the jurisprudence of many countries. With constitutional clauses on equality and non-discrimination, the standards of the CRC can be used to lobby for those areas that have been ignored in law reforms, since they strengthen and relate to the constitutional standards of domestic legal systems.

Where judicial discretion is exercised, and understanding of the framework of rights can stimulate dynamic interpretation of law that will give the child access to justice through the court system, and influence other methods of dispute settlement. The absence of a child-centred focus in legal proceedings is largely due to the tendency to treat the child as a miniature adult who is before the courts of law. A child-centred approach stimulated by the standards of the CRC can help to create spaces for providing the child access to justice even within the constraints of existing laws.

It may be argued that this kind of judicial activism is inconsistent with the traditional role of the judiciary as an agency concerned with interpreting rather than making law. Yet the judiciary has expanded and expounded the content of major areas of law precisely because the arrival at a decision in legal proceedings involves policy choices. Today, written constitutions are the basic law of the land, and courts must interpret these constitutions so as to realise fundamental rights. It is hardly possible to argue that they cannot interpret the constitution to promote the realisation of rights.

The obligation of states to publicise the CRC and the regular country report, as well as the concept of national and international cooperation in realising child rights prevents arguments of state sovereignty being used to restrict the monitoring of state performance. Nationally and internationally the CRC envisages a partnership between many actors and encourages dialogue and cooperation. Just as it requires and assumes a joint parental and family responsibility, it assumes a shared state and family responsibility for realising the rights of children. This concept of a shared commitment makes law making and law enforcement something more than the exclusive preserve of lawyers, judges and law enforcement agencies or their critics. There is indeed no place for professional exclusiveness in formulating strategies to realise these rights.

As we see the massive violations of rights in many of our countries it is easy to lose faith in a strategy of rights and their advancement through legal processes. Yet a rights' strategy has been usually forged through the experience of human anguish in containing the abuse of power. Rather than allow social and economic injustice to continue and spawn the terror of violence and disillusionment that has an impact on all our lives, civil society and governments can work together to promote state, community and family accountability, in the use of power and authority. If we can ensure accountability and humanism in the process of governance on an agenda of child rights on the basis of the value system of this new and important human rights' convention, we will have found a path to improving our past record on rights and moving from rhetoric to action. We can then truly say to children, "You are indeed the wonder tree plant, grown of ruins."

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