

PROTECTING THE RIGHTS OF THE GIRL-CHILD IN COMMONWEALTH JURISDICTIONS



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Introduction

The United Nations Fourth World Conference on Women stressed in its Beijing Declaration and Platform for Action that the experience of growing up as a girl-child in most world cultures has the effect of perpetuating those forms of inequality and discrimination that women experience in their adult lives. It was resolved therefore, inter alia, that “in addressing issues concerning children and youth, Governments should promote an active and visible policy of mainstreaming a gender perspective into all policies and programmes so that before decisions are taken, an analysis is made of the effects on girls and boys, respectively.”¹ The importance of mainstreaming a gender perspective in policy-making is that it sensitises policy makers to concern the likely effects of what may seem gender-neutral policies and laws on the girl-child. In the case of lawyers and children’s rights advocates, the notion of mainstreaming a gender perspective points to the need to reappraise existing policies and structures (or lack of them) to determine their effectiveness in protecting and advancing the interests of the girl-child.

Our attention is therefore drawn to the fact that the application of gender-neutral human rights norms has different effects on girls. We are reminded that the allocation of community resources, the division of labour in the home, the choice of curriculum at school, and more generally, the education and socialisation of female children, have the effect of undermining the life chances of the girl-child and thus compromising her equality of rights during her childhood and later in life as an adult. Hence, having regard to the fact that these issues are primarily structural, any effort to raise the status of the girl-child must be grounded on a broader strategy in which law is viewed as one element, albeit an important part, of the overall design. Such an approach should aim at

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¹ See Beijing Declaration and Platform for Action, *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995), at 114, para 273 [hereinafter *Beijing Platform for Action*]. Another call to the same effect was made in 1991 when the Executive Board of UNICEF recommended to the United Nations Commission on the Status of Women that the Committee focus on issues concerning girl-children by reference to the human rights standards contained in the Convention on the Elimination of All Forms of Discrimination Against Women (the Women’s Convention) and the Convention on the Rights of the Child (the Children’s Convention). See generally Savitri Goonesekere, *Women’s Rights and Children’s Rights: the United Nations Convention as Compatible and Complementary International Treaties* (Florence, ICDC, 1992) at 37 [hereinafter *Women’s Rights and Children’s Rights*].

creating ideal conditions that assure to the girl-child a smooth transition from childhood to a state of adulthood that is not characterised, nor indeed predetermined, by these structural inequalities.²

This paper considers the extent to which international human rights norms have been applied to protect and advance the rights of the girl-child in Commonwealth jurisdictions. The paper also looks at the extent to which the experience gathered in other jurisdictions of the Commonwealth might be adopted to enhance these efforts. Attention is directed particularly to those human rights norms and standards that have not been given direct effect by local legislation. Although this focus might appear rather narrow, it is certainly the most critical because many states that are parties to international human rights treaties have usually shown little enthusiasm to enact domestic legislation to render these instruments locally applicable.

Localization of international human rights norms

Brian Fitzgerald, in a recent paper concerning “the internationalization of Australian law” has noted that although a few years ago Australian lawyers, “whether they be practitioners, academics or judges”, could have afforded to remain ignorant of the basic tenets of international law, it is now increasingly becoming necessary for everyone to have at least basic knowledge of international law in order to function effectively in what he has described as “the decade of international law.”³ Relying on several decisions of the High Court of Australia, Fitzgerald showed how the High Court has resorted to principles of international human rights law to clarify certain common law principles, for example, the circumstances under which an accused person has a right to free legal representation.⁴ Peter Bayne, another Australian lawyer, also wrote in 1990 about the growing influence of human rights standards in the development of Australian administrative law.⁵

It must be stressed, however, that such developments have not been confined to Australia. Indeed, the Hon Justice Michael Kirby has noted, “... Australian courts are simply following, belatedly, developments which are well-established in courts in England, India, Sri Lanka, Canada, the United States and [more recently, Africa].”⁶ In England and

² See Sue Lees and Jenny Mellor, “Girls’ Rights” in Bob Franklin (ed), *The Rights of Children* (Oxford, Blackwell, 1986) 163 at 165.

³ Brian F Fitzgerald, “International Human Rights and the High Court of Australia” (1994) 1 *James Cook University Law Review* 78 at 79. The Hon Justice Michael Kirby has also noted to the same effect that “judges and lawyers of the future in every land will pay increasing attention to the backdrop of international legal norms, including those dealing with human rights”: M D Kirby, “The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms” (1988) 62 *Australian Law Journal* 514 at 516.

⁴ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292

⁵ Peter Bayne, “Administrative Law, Human Rights and International Humanitarian Law” (1990) 64 *Australian Law Journal* 203.

⁶ Kirby, *supra* note 3, at 516.

Wales, as pointed out by Kirby, "it is now well-established doctrine that, in construing local statutes and in developing the common law, the judge may seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates."⁷ Considering that England and Wales (as part of the United Kingdom) do not have a written constitution, any reference to common law and statutes must be understood as including fundamental rights and freedoms which in other jurisdictions are ordinarily guaranteed in written constitutions.

The Canadian position on this point has been examined by, among others, Maxwell Cohen and Anne Bayefsky, who have argued that, although traditionally Canadian judges have been cautious in drawing from international law to assist in the interpretation of domestic legislation or public policy, the enactment of the Canadian Charter of Rights and Freedoms in 1982 has changed all this. Today, Canadian judges are able to draw more readily on principles of international human rights jurisprudence in order to interpret the Charter and other statutory provisions. This major shift has come about mainly because the Canadian Charter has been linked by its language and concepts to the wider family of international human rights principles and conventions.⁸ Moreover, because Canada has also ratified several international human rights treaties, which have a common value system and comparable standards to those of the Charter of Rights, this has expanded the jurisprudential base from which the courts are now able to draw.

Similar developments are taking place in the superior courts of several Commonwealth African states. For example, the superior courts of Botswana,⁹ Namibia,¹⁰ Nigeria,¹¹ South Africa,¹² Tanzania,¹³ Zambia¹⁴ and Zimbabwe,¹⁵ have all handed down important decisions in

⁷ *Id* at 515. In the case of England, the influence of the European Commission and the European Court of Human Rights are also to be noted. According to Kirby, "the status of that law in England is precisely the same as the status in Australia of the international covenants and treaties which Australia has ratified but not specifically incorporated into municipal law": *id* at 515.

⁸ Maxwell Cohen and Anne F Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265.

⁹ *Attorney General v Unity Dow* (1992) 103 ILR 128, [1992] LRC (Const) 623 (CA of Botswana), affirming [1991] LRC (Const) 574 (HC of Botswana). See also E K Quansah, "Unity Dow v Attorney General of Botswana: One More Relic of a Woman's Servitude removed?" (1992) 4 RADIC 195. In *Unity Dow*, the Court of Appeal of Botswana held that although the African Charter on Human and Peoples' Rights (OAU Doc CAB/LEG/67/3/Rev.5 (1981), reprinted in (1982) 21 ILM 58, adopted on 27 June 1981, entered into force 21 October 1986.) does not "confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land ... we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations:" [1992] LRC (Const) at 656.

¹⁰ *S v D*, 1992 (1) SA 513, [1992] LRC (Crim) 253 (SC of Namibia). See also Pamela-Jane Schwikkard, "Sexual Offences—the Questionable Cautionary Rule" (1993) 110 *South African Law Journal* 46.

¹¹ *Abibatu Folami & Ors v Flora Cole & Ors* (1990) All Nig LR 310.

¹² *Mfjolo v Minister of Education, Bophuthatswana*, 1992 (3) SA 181 (SC of Bophuthatswana).

¹³ *Ephraim v Pastory* (1990) 87 ILR 106, [1990] LRC (Const) 757 (HC of Tanzania).

¹⁴ *Longwe v Intercontinental Hotels* [1993] 4 LRC 221 (HC of Zambia).

¹⁵ *Ncube and Others v State* (1987) 90 ILR 580, 1988 (2) SA 702, [1988] LRC (Const) 442 (SC of Zimbabwe); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, 1995 (2) SA 182, [1994] 1 LRC 343 (SC of Zimbabwe); *Salem v Chief Immigration Officer of Zimbabwe*, [1994] 1 LRC 354 (SC of Zimbabwe).

which they have declared their willingness to draw on international human rights norms to interpret domestic law including national constitutions.¹⁶ Thus, referring to the legal effect under domestic law of Zambia's ratification of various international human rights instruments, Musumali J said in *Longwe v Interncontinental Hotels* that

“...ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by that State to be bound by the provision of such [an instrument]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute.”¹⁷

All the above examples indicate therefore, that the process of localising international human rights norms through the judicial process has been taking place in several jurisdictions of the Commonwealth. It was in view of this global development that in 1988, at the Judicial Colloquium in Bangalore, the participants concluded that, although in the common law system treaties were not directly enforceable in domestic law, there was “a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete.”¹⁸ Whereas such “growing tendency” constitutes a positive development in human rights jurisprudence, the major question is how this developing jurisprudence can be harnessed to improve the legal status of the girl-child in our jurisdictions.

Before considering the above question, it is necessary first to provide a brief overview showing how the human rights of the girl-child are in practice violated. Furthermore, I will show the underlying social and cultural factors that generate and buttress such violations. The notion of “gender-specific violations” is used here to describe this phenomena in order to underline the need to take special measures of protection to the girl-child in our jurisdictions.

¹⁶ This is not to ignore cases of lost opportunities such as the Kenya case of *Virginia Wambui Otieno v Joash Ochieng Ogo and Omolo Siranga*, Nairobi Civil Appeal No 31 of 1987 (CA of Kenya), reprinted in Eugene Cotran, *Casebook on Kenya Customary Law* (Milton Park, Professional Books Limited, 1987) at 331-345, where the Supreme Court of Kenya did not consider the compatibility of Luo customary law with international human rights standards. For a more recent critique of the Kenyan situation, see Mumbi Mathangani, “Women's Rights in Kenya: A Review of Government Policy” (1995) 8 *Harvard Human Rights Journal* 179. See also Marsha A Freeman “Measuring Equality: a Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries” (1989-90) 5 *Berkeley Women's Law Journal* 110 at 121-125.

¹⁷ *Longwe v Intercontinental Hotels* [1993] 4 LRC 221 (HC of Zambia).

¹⁸ *Bangalore Principles* (1988), para 4, reprinted in *Developing Human Rights Jurisprudence: the Domestic Application of International Human Rights Norms* (London, Commonwealth Secretariat, 1988) at ix.

Gender-specific violations of the rights of girl-child

In a study concerned with the role of gender in the definition of human rights violations, Andrew Byrnes argued that “[a] failure to be aware of the relevance of gender can result in a distorted picture of patterns of human rights abuses,” thus leading to an incorrect diagnosis and inevitably to an inappropriate policy intervention.¹⁹ What is needed in women’s rights advocacy, therefore, is to adopt an approach that is both sensitive and open to the possibility that there could be gender-specific violations whose form has been influenced by the fact that the victims are women and not simply because these victims just happened to be women.²⁰ Such an approach suggests that there is a need to analyse certain aspects of gender-specific violations before one can discuss how domestic courts might address them. It is to this discussion that this paper will now turn.

What are gender-specific violations?

It has been noted above that the best way to identify gender-specific violations of human rights is to consider those violations that are influenced by the fact that the victim is of a particular gender. On the other hand, since the concept of gender itself is socially constructed, such gender-specific violations are usually connected with local customs or culture and the prevailing social belief systems of the community.²¹ In this section three aspects of gender-specific violations are analyzed. These are discrimination of the girl-child; control of female sexuality; and sexual abuse and exploitation of the girl-child.

Discrimination against the girl-child

The problem of discrimination has recently been spotlighted again by the United Nations Fourth World Conference on Women which noted that “...in many countries available indicators show that the girl-child is discriminated against from the earliest stages of life through her childhood and into adulthood.”²² The above observation is generally accurate. Thus, referring to the position of the girl-child in India, Mukhopadhyay noted that “the first lesson that a female child is made to

¹⁹ Andrew Byrnes, “Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some Current Issues” (1992) 12 *Australian Yearbook of International Law* 205 at 211.

²⁰ Sarah Y Lai and Regan E Ralph, “Female Sexual Autonomy and Human Rights” (1995) 8 *Harvard Human Rights Journal* 201 at 203.

²¹ According to Coomaraswamy, the United Nations Special Rapporteur on Violence against Women, “certain customary practices and some aspects of tradition are often the cause of violence against women. Besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices which violate a woman’s human rights”. Radhika Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its causes and consequences*, UN Doc E/CN.4/1995/42, at 16, para 67 (1995).

²² *Beijing Platform for Action*, *supra* note 1, at 112, para 259.

learn... is that the differential treatment between her and her brothers is a fact of life.”²³ Some of the evidence concerning discrimination of the girl-child in India is given by Asha Bajpai who has noted that, although amniocentesis is intended to identify genetic diseases or defects in a fetus, “in India, amniocentesis has become synonymous with female foeticide.”²⁴ According to Bajpai, “[t]he data collected from six hospitals in Bombay reveal that out of 8,000 fetuses aborted 7999 were female.”²⁵

Such discriminatory practices are indeed not confined to India. In many cultures, the practice of son-preference is usually a symptom of a deeper form of discrimination that is perpetrated against the girl-child.²⁶ Such discrimination is rooted in patrilineal cultures that depend on sons for the transmission of family property and family name. Lineage continuity and succession on death of the parent are some of the reasons why families greatly desire to have male children. O’Connell noted, “[a] study of 898 villages around the world found that males were usually given priority over females in the family food distribution system.”²⁷

One of the cultural practices that lowers the social status of the girl-child in her family is that since by custom daughters are expected to be married into other families, parents do rely on male children and their offspring for material support, particularly during their old age. There is therefore a great demand for male progeny in these societies. Such demand in turn accounts for the existence of social practices, such as polygyny and ‘widow inheritance’ that are primarily (but not exclusively) designed to maximize the opportunity for men to have sons.²⁸ These cultural beliefs and practices are also responsible for the denial of inheritance rights to women in most societies. And in cultures where on the daughter’s marriage a large dowry is paid by her family, the potential economic burden on her family has a dampening effect on the enthusiasm of families to have female children. As might be expected, in order for such cultures to survive and reproduce themselves, children were socialised from an early age to adapt to their socially-determined

²³ M Mukhopadhyay and Silver Shackles, *Women and Development in India* (Oxford, Oxfam, 1984) at 11-12.

²⁴ Asha Bajpai, “The Girl Child and the Law” in *Report of a Seminar: Rights of the Child*, sponsored by the National Law School of India and UNICEF, 1990, at 118.

²⁵ *Ibid.* In a study of 700 pregnant women in India who received genetic amniocentesis, “only 20 of the 450 women being told they would have a daughter went through the pregnancy; all the 250 male infants predicted, even where a genetic disorder was likely, were carried to full term.” For details, see Helen O’Connell, *Women and the Family* (London, Zed Books, 1994) at 75-76.

²⁶ Such practices include the unequal allocation of family resources between the girl-child and her brothers. This might include more basic things such as preferential allocation of food in home and access to medical treatment. In cases where crucial choices have to be made concerning which child of the family should be sent for further education, a girl child is likely to be considered last.

²⁷ O’Connell, *supra* note 25, at 78.

²⁸ Such practices include adoption of male children (by a son-less family), polygyny and concubinage, especially where the first wife has failed to bear a son. In some African cultures, there are several forms of unions such as the “daughter-in-law marriage” found among certain East African societies whereby a marriage takes place between a notional son in a son-less family, primarily for purposes of giving birth to a son. For more details, see Bart Rwezaura, *Traditional Family Law and Change in Tanzania: a Study of the Kuria Social System* (Baden-Baden, Nomos, 1985) at 143-167.

positions. Whereas boys, for example, are trained to be aggressive and dominant, girls are socialised to be submissive and to accept without question their inferior position in a society as a natural order of things. Within the home, a girl-child will be required to assist her mother in gendered household tasks, while the boys will be free, much like their father, to engage in play or to do their school homework, thus improving on their formal education prospects.²⁹

In a 1991 worldwide study by UNICEF, it was found that over 125 million children between the ages of six and eleven were not enrolled in formal schools. When these figures were analyzed, they revealed that two-thirds of the children who were not enrolled were girls.³⁰ Pamela Reynolds, commenting on the early life experience of Tonga girls of Zimbabwe, has noted that girls work harder than boys partly because women supervise children's labour and are, therefore, able to control girls more firmly; adding that "a woman's duty is to bind her daughter into service in order to secure her future as a farmer and a useful servant in the kinship network."³¹ Unfortunately, women, as trainers of their children, are also perpetrators of practices that are harmful to their own daughters. In the words of O'Connell, "[i]t is a cruel irony that it is the women who teach, practise and uphold the traditional practices surrounding differential feeding and food taboos that are so harmful to their girl children."³² Such a gendered approach to child upbringing continues to create problems in most of our jurisdictions and further affecting the enrolment of girls in schools; their choice of curriculum; and eventually, their career choices.³³

As the Beijing Platform for Action has noted, "the percentage of girls enrolled in secondary schools remains significantly low in many countries. Girls are often not encouraged or given the opportunity to pursue scientific and technical training and education, which limits their... employment opportunities."³⁴ In sum, the gender-bias begins from the cradle and attaches to the woman throughout her whole life.

Control of female sexuality

The social status and place of the girl-child in a particular community is also closely connected with the issue of sexual control. In most parts of Asia and Africa, local cultures consider a woman's natural destiny to be marriage and procreation. Lai and Ralph have indeed argued that "...many societies in all regions of the world continue to accept the

²⁹ This issue has been highlighted in a recent study of the girl-child in Tanzania: see R Mabala and S R Kamazima, *The Girl Child in Tanzania: Today's Girl Tomorrow's Woman: A Research Report* (Dar es Salaam, UNICEF, 1995).

³⁰ See O'Connell, *supra* note 25, at 78.

³¹ Pamela Reynolds, *Dance, Civet Cat: Child Labour in the Zambezi Valley* (London, Zed Books, 1990) at 106.

³² O'Connell, *supra* note 25, at 78.

³³ See Christine K Rwezaura, *A Path Analysis of Factors Affecting Girl's Choices and Careers in Tanzania*, M Ed Thesis, Brandon University, Canada, 1991, Chapter 4.

³⁴ *Beijing Platform for Action*, *supra* note 1, at 113, para 259.

exercise of female sexuality only for the purpose of reproduction and within the context of marriage.”³⁵ Anything that interferes with this important objective tends to be strongly opposed. In many rural communities, even today, young girls are pre-maturely withdrawn from schools to undergo puberty rites and some get married soon after. In certain societies puberty rites include female genital mutilation (FGM) in its various forms and degrees, with the worst form being infibulation.³⁶ Given the fact that FGM is intimately connected with marriage and procreation, much of the efforts that has been made to eliminate it has been largely unsuccessful.

In Kenya, for example, Kabeberi-Macharia found that even though between 1982 and 1984 the President of Kenya had strongly condemned this practice and ordered its abolition, FGM has not shown any signs of decline. Indeed, in some communities where this practice had been previously abandoned as a result of abolition by the British colonial administration, it has now been revived because it is believed that “the previously successful social conditioning [of girls] could work today” as it had done during the pre-colonial period.³⁷ Some of the community leaders interviewed, such as the Kuria people of Tanzania, thought that there was a connection between the growing assertiveness of women and the dilution or abandonment of the ritual of female circumcision (ie, FGM). Perhaps to stem the tide of social disintegration and female assertiveness (which is believed to arise from the current failure to adhere to a correct FGM procedure), the elders have resolved that “women should be circumcised a second time.” However, this threat has been strongly resisted by the women notwithstanding “the awe in which... these guardians of community culture and traditions... are held and the fear of their supernatural powers, women are openly opposing such an idea [of re-circumcision], and it has made no headway at all.”³⁸ It appears, therefore, that FGM has provided a site not only for conflict between generations but also it acts as a focal point for political struggles between the sexes.³⁹

³⁵ Lai and Ralph, *supra* note 20, at 202.

³⁶ According to Kabeberi-Macharia, there are three main types of FGM. “The first is the *sunna* which is often referred to as female circumcision and is likened to male circumcision. This involves the removal of the tip of the clitoris and the prepuce. The second is excision or clitoridectomy which involves the removal of the clitoris and the labia minora. The third which is more severe is infibulation which is excision ‘plus the removal of the labia majora and the sealing of the two sides, through stitching or natural fusion of the scar tissue...[leaving] a very smooth surface, and a small opening to permit urination and the passing of menstrual blood’.” See Janet Kabeberi-Macharia, “Female Genital Mutilation and the Rights of the Girl in Kenya” in the forthcoming *Proceedings for the Workshop on Law, Culture and the Rights of the Child in Eastern and Southern Africa* (July 1996) (manuscript) at 4 [hereinafter *CLESA Proceedings*]. See also *Human Rights: Harmful Traditional Practices Affecting the Health of Women and Children*, Fact Sheet No 23 (New York, United Nations Centre for Human Rights, 1995).

³⁷ See J Kabeberi-Macharia, *Reproducers Reproduced: Socio-Legal Regulation of Sexuality and Fertility Among Adolescent Girls in Kenya*, PhD Thesis, University of Warwick School of Law, Coventry, 1995.

³⁸ Mabala and Kamazima, *supra* note 29, at 56.

³⁹ FGM is probably the best example of a system of sexual control of women. As one Masai elder said, “[i]f a girl is not circumcised, she will not live in a good way with her husband. She will be jumping from one man to another and will finally be divorced.” see Mabala and Kamazima, *id* at 54.

In societies where female virginity at marriage is highly valued or where pre-marital pregnancy is disapproved, parents will endeavour to exercise maximum control over their daughters' movements to ensure that they do not lose their virginity or become pregnant before marriage. The fear that the daughter might lose her virginity invariably leads to early marriages.⁴⁰ It can also create more repression against the girls. In the rural Wuhan province of China, young brides who fail to pass the test of virginity are fined between 200 yuan and 2000 yuan by local authorities and are required to write a self-criticism. As noted by the Director of the Wuhan marriage department, "stiff fines were necessary to stamp out immoral trends that had emerged since China opened up to the outside world."⁴¹

In the Philippines, despite modernisation, community norms provide that a woman has to be chaste, pure, and "untouched" at the time of marriage.⁴² Indeed, Medina noted that "a kiss or an embrace used to be enough reason for the woman's kin to insist on marriage in order to 'save face' and uphold the family honour."⁴³ Yet, as in most world cultures, Filipino males are not equally sexually restrained. According to Medina, "[m]en are allowed greater sexual freedom before marriage; their premarital 'experience' is accepted and even preferred by their wives."⁴⁴

As noted above, the fear that a daughter might lose her virginity prematurely invariably leads to early marriages, sometimes because parents (usually mothers or grandmothers) are eager to release themselves from what seems to be the onerous task of "guarding" or chaperoning their daughters.⁴⁵ For some parents, an early marriage may provide a much needed device for forestalling the emerging assertiveness or "rebellion" of the girl-child and, in some societies, a means to secure the needed bride-wealth for the marriage of an overgrown son of the family. Thus, according to Lai and Ralph, pre-pubescent and adolescent girls among the Hausa of northern Nigeria "are frequently given away by their parents in arranged marriages, despite the girls' express objections or attempts to run away."⁴⁶

⁴⁰ Some parents also consider early marriage as a device for forestalling the emerging assertiveness and rebellion of the girl-child which is assumed to increase with her maturity.

⁴¹ "Non-Virgin Brides Face Hefty Fines", *South China Morning Post*, 11 May 1996, at 7. Lai and Ralph have noted that "[v]irginity exams can be seen as political in the sense that they target women's sexuality and operate as a form of social control reinforcing women's subjugation." Lai and Ralph, *supra* note 20, at 214.

⁴² Belen T G Medina, *The Filipino Family: A Text With Selected Readings* (Diliman, University of the Philippines Press, 1991) at 100.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ For example, it is considered shameful among the Hausa of northern Nigeria for a daughter to start menstruating before marriage, "since she may embarrass her family by becoming pregnant out of wedlock while still residing in her father's home." Lai and Ralph, *supra* note 20, at 220.

⁴⁶ *Id* at 219.

In some jurisdictions, control of female sexuality is either legally enforced by the use of State law⁴⁷ or where State law is neutral, by religious law.⁴⁸ In either case, such female sexual regulation is exerted through administrative control of women in places such as schools and youth centres, by restricting their movement, opening their private mail, subjecting them to a specific dress code and by regular medical examination, so as to ensure that they are not pregnant. Non-compliance with such strictures often leads to various forms of stiff sanctions including suspension or expulsion from school. Many schools and colleges in Africa and Asia have regulations that make pregnancy an automatic ground for expulsion. Such expulsion from school not only punishes the pupil but also contributes to the already high levels of female drop-outs from formal schools. It aggravates the widely recognised low level of trained women in the community. Parents are also negatively affected by such expulsions, given that many of them do sacrifice immensely so that their daughters can obtain good education. For the same reasons, the expulsions have the effect of discouraging other parents from attempting to send their daughters into institutions of higher education.

Sexual abuse and sexual exploitation

Sexual abuse and sexual exploitation of the girl-child are part of the larger question of gender relations and the poor attitude towards women's human rights in certain Commonwealth jurisdictions.⁴⁹ It is best examined within the wider social context of a given community, wherein the role and place of a woman in a society is culturally and socially defined. Therefore, in seeking to understand and to explain why such violations occur, one must not ignore the culture and the norms of a society in which the act is perpetrated.⁵⁰ For example, in cultures where females are considered to be eligible for marriage at the onset of puberty (ie, about the age of 12 or 13), they can be married off to selected husbands in total disregard of their consent, or long term interests such as continuing with further education.

⁴⁷ For example, section 497 of the Penal Code of India provides that "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case the wife shall be punishable as an abettor."

⁴⁸ According to Goonesekere, the idea of a father gifting his daughter to a husband was all pervasive in India and this tradition "was combined with a later development in Hindu law which suggests that she could be given in marriage before puberty. Consequently, Brahmin girls could be married between the ages of eight to ten years." See Savitri Goonesekere, "The Best Interests of the Child: a South Asian Perspective" in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford, Clarendon Press, 1994) 117 at 122 [hereinafter *Best Interests of Child*].

⁴⁹ The term "sexual abuse" which includes rape, is used here to mean unlawful sexual intercourse with a female child (either without her consent, if she has attained the legal capacity to consent, or irrespective of her consent if she lacks such capacity).

⁵⁰ See Eunice Uzodike, "Child Abuse and Neglect in Nigeria-Social-Legal Aspects" (1990) 4 *International Journal of Law and the Family* 83 at 84 and Patti Henderson, "Silence, Sex and Authority: the Contradictions of Young Girls' Sexuality in New Crossroads, Cape Town" (1994) 6(2) *Vena Journal, the Girl Child* 33.

The performance of tasks such as domestic work (which is defined as a woman's job), or running errands for adults can expose the girl-child to sexual abuse and exploitation. Research conducted in some Tanzanian schools has uncovered cases of sexual abuse and harassment of female pupils by their male teachers. When girls attending grade 6 and 7 at one local primary school were interviewed about sexual harassment, 75% of them said that some teachers attempted to seduce female pupils. Indeed, "several girls interviewed gave the names of the teachers and, although interviewed individually, they gave the same names."⁵¹ It appears that an opportunity for such abuse occurs when female pupils are instructed to draw water for their male teachers or to perform other domestic chores for them, such as preparing meals. On the other hand, girls who perform domestic chores in non-school contexts are equally vulnerable to sexual abuse. Alice Armstrong found in her research in Zimbabwe that 7 out of 36 case studies (ie, 19%) concerned girls "who were raped while carrying out a chore for a parent, a neighbour or an acquaintance."⁵²

Enforced prostitution and trafficking in young women and girls continues to be a problem particularly in Asia and Africa.⁵³ As Goonesekere noted, "[r]esearch has revealed the extent of the abuse of girls in child marriage. Its connection with child trafficking is apparent from the fact that girls are taken across national borders for prostitution or marriage."⁵⁴ In 1993, the International Women's Rights Action Watch (IWRAP) noted that Japanese companies "employ travel agencies to organise sex tours, typically in Thailand or the Philippines, as rewards for good business performance."⁵⁵ And within Japan itself, it was noted that "[t]rafficking in women and sexual enslavement or enforced prostitution within Japan also show little sign of abating."⁵⁶

⁵¹ For details, see Mabala and Kamazima, *supra* note 30, at 43.

⁵² These victims included Fatima (a 12-year old girl) who was raped by a neighbour when she went to his house to pick up some cash in order to buy paraffin for him. Also, a 5-year old girl was raped by a neighbour when she was sent there by her mother to collect a debt. See A Armstrong, "Custom, Culture, and the Sexual Abuse of Girls in Zimbabwe", in *CLESA Proceedings*, *supra* note 36, (manuscript) at 17-18.

⁵³ In its recent report, the International Labour Organisation (ILO) has strongly condemned the continued practice of child slavery in parts of South Asia and Africa, noting that children in these regions are "typically sold into bondage by their parents to pay off debts." ILO, *Child Labour: Targeting the Intolerable*, a report for the 86th Session International Labour Conference, 1996 (Geneva, ILO, 1996). See also Asia Watch Committee (US), *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, Asia Watch and Women's Rights Project* (New York, Human Rights Watch, 1993). This report is based on accounts by women victims and exposes practices such as the use of debt bondage to force women to remain in the sex industry with the complicity of local officials.

⁵⁴ Goonesekere, *supra* note 48, at 131. In the above-mentioned report by ILO, it is reported that there has been a marked increase in the number of child prostitutes worldwide. The increase is linked to the belief that child prostitutes are thought less likely to be infected with the AIDS virus: See Douglas Roberts, VOA Correspondent Report, Geneva, 10 June, 1996.

⁵⁵ According to IWRAP, "[m]any of the women, who are usually Thai or Filipina, are recruited with the promise of jobs as factory workers, hostesses, waitresses or domestic workers. Upon arrival in Japan their passports are taken, they are driven to night clubs and confined. They are often beaten if they do not agree to have sex with the customers to work off the debts they owe for their passage. In October 1993 Japanese Kyodo News Service reported that immigration officials had to rescue ten Thai women from a snack bar. The rescue came after the women wrote a letter to the Thai Prime Minister appealing for help." See Sharon Ladin, *1994 IWRAP to CEDAW Country Reports on... Japan*, (Minneapolis, University of Minnesota, 1993) at 41.

⁵⁶ *Ibid.*

It might be imagined that the outbreak of AIDS worldwide would be counteracted by radical changes in social attitudes and sexual habits. Yet, in many places, this has not yet happened. Considering the lack of accurate information on various aspects of the disease; the low level community awareness regarding how AIDS is transmitted; the existence of traditional pressure on women to marry and bear many children; the well-known unwillingness of men to use protective condoms; and the unequal gender relations that undermine the woman's right to say no to unprotected sex; all these factors provide ideal conditions for the transmission of the deadly disease.⁵⁷ A study supporting the above observation was made at a local hospital in Tanzania, where it was revealed that a big age difference existed between males and females who had recently tested HIV-positive. Within the age group of 13 to 18 years, there were 32 girls and only one boy, whereas within the age group of 13 to 25 years, there were 203 females and only 84 males.⁵⁸

In summary, when considering the strategies for raising the status of the girl-child, we have to remember that these gender-specific violations are in many ways a reflection of the local cultures and religious systems in which they occur. Nevertheless, as mentioned above, these cultures have been deeply invaded and transformed by the market and other external influences such as state regulation.⁵⁹ In looking at how judges have ruled on issues of children's rights, it is useful to bear in mind the fact that we are dealing here with structural violations of rights and not merely isolated incidents of abuse. This suggests that since law alone cannot change these deeply rooted social practices overnight, we have to try to locate the law into a wider socio-economic matrix and to ask ourselves the ways in which court decisions can be used as a springboard for social action.

Domestic protection of children's rights: a new role for the courts?

Within the context of municipal or domestic law, it is possible to secure the protection of the girl-child's rights by relying on either one or both of the following approaches. The first approach is to invoke the fundamental rights and freedoms contained in most national

⁵⁷ For an insightful study on how the process of transmission and control of AIDS is affected by differential power relations between men and women in Uganda. See Christine Obbo, "Gender, Age and Class: Discourses on HIV Transmission and Control in Uganda" in Han ten Brummelhuis and Gilbert Herdt (eds), *Culture and Sexual Risk* (Australia, Gordon and Breach, 1995) at 79.

⁵⁸ See Mabala and Kamazima, *supra* note 29, at 63. These findings are consistent with the finding in Uganda. Obbo noted that "there are three times as many girls as boys, in the age group 15-25, who are infected with HIV:" Obbo, *supra* note 57, at 83. Such findings suggest that it is girls who are being infected by older men, not women.

⁵⁹ As Angeles-Bautista found, "there are no easy answers or explanations for sexual exploitation and abuse, especially child prostitution, as was the case with families in Pagsanjan, Laguna (in the early 80s) who objected to the interference of NGOs who exposed the paedophiles or the cases of parents who were pimps for their own daughters." See Feny de los Angeles-Bautista, "The Filipina Girl: from Vulnerability to Resilience and Power", *Vena Journal, the Girl Child* 16 at 21.

constitutions.⁶⁰ The second is to utilise the principle of the best interests of the child contained in most domestic legal systems. Although in most Commonwealth jurisdictions litigants have not frequently invoked constitutional provisions to protect children's rights, this position is now slowly changing. The use of the best interests principle has traditionally been linked and limited to family disputes and often within the context of family law, this practice is also changing to the better. Today, in a number of Commonwealth jurisdictions, the best interests principle has seemingly crossed the realm of domestic law to become a general principle of international human rights law. This development has opened up new possibilities for the advancement and protection of children's rights.

In the following sections, this paper considers the ways in which these two approaches have been used or may be applied to protect the girl-child in Commonwealth jurisdictions. I conclude this section by examining the extent to which the experience of the Indian Supreme Court could be adopted to overcome current problems, including the lack of access by most victims to the legal system.

Constitutional protection

Professor Goonesekere has suggested that in seeking to raise the status of children in our individual countries "...national constitutions represent a powerful value framework that should be used to link with international standards on child rights that have been accepted by all countries through ratification of the [United Nations Convention on the Rights of the Child]."⁶¹ A comparable suggestion has been made by the Chief Justice of Tanzania, the Hon Francis Nyalali, who has advised that although Tanzania has not yet enacted a law to localise the Children's Convention, which it has nonetheless ratified, this is not a serious setback because "the Bill of Rights embodied under the Constitution covers all those areas of the Convention which concern Human Rights in general" and courts can draw on them to ensure that children's rights are fully protected.⁶² What has come to be known as public interest or social action litigation in the Supreme Court of India has greatly relied upon constitutional provisions to protect individual or group rights. It can be argued, therefore, that the constitutional framework offers a viable option for the enforcement of children's rights. This is more so in those jurisdictions of the Commonwealth where courts have power to overrule ordinary legislation when this is proved to conflict with the national Constitution.

⁶⁰ See, eg, Freeman, *supra* note 16.

⁶¹ Savitri Goonesekere, *supra* note 48, at 145. The Convention on the Rights of the Child (the Children's Convention), GA Res 44/25, UN Doc A/44/49 at 166 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

⁶² Hon Francis Nyalali, "Perception of Children's Rights", *The Lawyer (Tanzania)*, April-August, 1994, 5 at 7.

A recent decision of the Botswana Court of Appeal shows how constitutional safeguards can be activated to redress human rights violations. In 1995, the Botswana Court of Appeal held that a local college regulation which provided that, on becoming pregnant, a female student was required to withdraw from studies for one year, was discriminatory and therefore, unconstitutional.⁶³ The Court of Appeal found that one year of suspension from studies was too long, compared to the three months maternity leave currently enjoyed by civil service employees. The court also found that the regulation did not apply to married women students at the college, who were normally treated as a special case whenever they became pregnant. Furthermore, the regulation provided that a student who became pregnant for the second time would be required to withdraw permanently from studies. Contrary to the claim by the college administration that the rule was intended for the benefit of the female students and, therefore was not discriminatory, the court held that the real object underlying the rule was to penalise unmarried female students.⁶⁴

The practice of expelling female students summarily from schools and from other training institutions on account of their pregnancy is common in many Commonwealth jurisdictions.⁶⁵ The decision of the Court of Appeal of Botswana can be used by concerned groups and social reformers to challenge not only future expulsions of pregnant girls from educational institutions, but also other violations aimed at regulating and controlling female sexuality. These include the violation of girls' privacy, such as opening their private mail; interfering with their right to physical security by subjecting them to body searches; or to compulsory and regular medical inspection.⁶⁶ The Botswana decision may also be invoked to require college and school administrations to provide alternative facilities to pregnant students, so that they can continue with their education without being compelled either to undergo illegal abortions or to abandon their role as mothers.⁶⁷

Other related policy interventions may be considered in the light of this decision. For example, it may be necessary to introduce a programme of family life education in schools as a preventive measure against

⁶³ *Student Representative Council of Molepole College of Education v Attorney General of Botswana*, Civ App No 13 of 1994, noted by E K Quansah, [1995] 39(1) *Journal of African Law* 97.

⁶⁴ More telling was the fact that no similar sanction applied to male students who "could be responsible for any number of pregnancies in the College during [their] course and suffer no such liability." See Quansah, *id* at 99.

⁶⁵ For the case of Tanzania, see Zubeida Tumbo-Masabo and Rita Liljestrom (eds), *Chelewa, Chelewa: the Dilemma of Teenage Girls* (Uppsala, Scandinavian Institute of African Studies, 1994).

⁶⁶ In a recent study of the girl-child in Tanzania, it was found that the practice of expelling girls who became pregnant was rampant: see generally *ibid*.

⁶⁷ It is important to note that in the *Molepole College* case, *supra* note 63, one of the College regulations stated that "[a] student whose pregnancy ceases while enrolled at the College shall not be allowed to attend studies at the College or stay in a hostel unless she has been certified as medically fit by a licensed medical practitioner." Such a rule was presumably aimed at penalising students who might terminate their pregnancy illegally.

accidental pregnancy and exposure to HIV infection. Notwithstanding the possible resistance of parents and guardians, provision of contraceptives and other forms of protective measures, including life skills education for girls, may be introduced. These and other strategies can be institutionalized in all public and private schools and colleges, in order to assist female pupils to manage their lives and reproductive capacities better.⁶⁸ This would enable them to benefit from the education and training facilities that are financed with public money to which the girl-child, as any eligible citizen, is equally entitled.⁶⁹ Such measures are also mandated by article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention),⁷⁰ which enjoins States Parties to take "all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education...".

Similar developments have also been taking place in other jurisdictions. For example, in 1990, the High Court of Tanzania, relying on the Constitution, the Universal Declaration of Human Rights (the Universal Declaration),⁷¹ the Women's Convention, and other major international and regional human rights instruments to which Tanzania is a party, held that the customary law providing that women could only inherit clan land for use during their life time without an equal right to sell as male heirs were entitled, was discriminatory and therefore contrary to the Tanzanian Bill of Rights.⁷² This decision is quite remarkable for a number of reasons. First, the fact that the term "sex" or "gender" is not specifically mentioned in the relevant provisions of the Tanzania Constitution did not deter the court from deciding that the Bill of Rights did prohibit discrimination against women. The reasons the judge gave to support his ruling included that the socialist government of Tanzania had emphatically rejected gender discrimination; that the Universal Declaration had been incorporated into the Tanzania Constitution by virtue of art 9(1)(f) of the Constitution;⁷³ and finally, that Tanzania had

⁶⁸ Such a step has to anticipate some resistance from traditionalists and religious leaders, some of whom take the view that sex education has the effect of promoting pre-marital sex among girls, adultery among married women and more generally, the corruption of public morals.

⁶⁹ Article 28 of the Children's Convention provides that "State Parties recognise the right of the child to education, and with a view to achieving this rights progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all...".

⁷⁰ 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

⁷¹ GA Res 217 A(III), adopted on 10 December 1948.

⁷² *Ephraim v Pastory* (1990) 87 ILR 106 at 106-107, [1990] LRC (Const) 757 at 757-758.

⁷³ Article 9(1) states

"The aim of this Constitution is to enable the Union Republic to develop as a nation of equal and independent people, who enjoy freedom, justice, brotherhood, and peace by following the policies of socialism and self-reliance, which require the implementation of the philosophy of socialism by taking into account the existing conditions in Tanzania.

Therefore, the Authority of the State and all its instruments must direct all their activities and policies towards the task of ensuring:

...
 (f) that human dignity is preserved and maintained in accordance with the International Declaration on Human Rights."

ratified most of the major international and regional instruments prohibiting gender discrimination. In conclusion, Mwalusanya J noted that the principles contained in these human rights instruments constitute “a standard below which any civilized nation will be ashamed to fall.”⁷⁴

In 1992, the Court of Appeal of Botswana read the word “sex” into the relevant discriminatory provisions of the Botswana Constitution on the ground that the legislative intent behind the relevant section was not to exclude the word “sex” as a ground against which discriminatory law are not to be made.⁷⁵ Following this interpretation, the same conclusion was arrived at in *Molepole College*.⁷⁶ Besides the use of constitutional provisions, the principle of best interests of the child, particularly having regard to its expanding scope, offers an alternative as well as a complementary procedure for the protection of the girl-child. It is to the best interest principle therefore that this discussion will now turn.

The best interests approach to protection

Family lawyers and others practising in that branch of private law are familiar with the principle of the best interests or welfare of the child, along with its varying levels of emphasis. The best interests principle was introduced in most Commonwealth jurisdictions as part of the received English common law. In some jurisdictions, the application of this principle was at first confined to the general law applied to issues such as guardianship, custody, adoption and wardship. In more recent years, however, the best interests principle has been extended by courts, and in some cases by the legislature, to cover disputes involving customary and religious laws.⁷⁷ This development has come largely due to the growing concern throughout the world, for the security and welfare of the child.

From the beginning of the colonial era, there has been a certain convergence between the received English common law and the indigenous systems of law in both Asia and Africa. Both systems have traditionally placed strong emphasis on patriarchal notions of parental power.⁷⁸ Such shared ideals of patriarchy are usually expressed in a variety of rules, principles and procedures. For example, although the indigenous laws of Sri Lanka reflect child-centred concerns, they are also dominated by “ideas of parental power and family authority which tend to deny the identity of the child.”⁷⁹ In the case of Islamic legal systems,

⁷⁴ (1990) 87 ILR at 110, [1990] LRC (Const) at 763b.

⁷⁵ *Unity Dow v Attorney General of Botswana*, (1992) 103 ILR 128 at 141-144 and 150, [1992] LRC (Const) 623 at 636-639 and 645.

⁷⁶ *Molepole College*, *supra* note 63.

⁷⁷ See Bart Rwezaura, “Tanzania: Building a New Family Law Out of a Plural Legal System” (1994-95) 33 *University of Louisville Journal of Family Law* 523 at 535 and Welshman Ncube, *The Convention on the Rights of the Child and Child Laws in Zimbabwe*, a study commissioned by and written for Redd Barna-Zimbabwe (1994) at 10-19.

⁷⁸ Goonesekere has noted that the “[e]arly English common law recognised the superior parental right of a man in a family unit created within marriage, and was more concerned with safeguarding his paternal rights than the interests of children.” Goonesekere, *supra* note 48, at 119.

⁷⁹ *Id* at 122.

Goonesekere notes that "the concept of parental power was just as strong...[and this] enabled adult interests to prevail over the health and developmental needs of children."⁸⁰ Therefore, until early this century when courts began to question the notion of absolute parental power, the best interests principle was in many parts of the Commonwealth dominated by paternalistic notions that were opposed to viewing the child as an autonomous being with independent or personal rights.

This situation is now changing in many parts of the world. In England, for example, after a series of judicial opinions, many of which sought to interpret and apply the best interests principle, parental power has considerably been weakened. Hence, in what is clearly a major landmark case along this winding road, the House of Lords held in *Gillick*⁸¹ that "parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."⁸² Based on an earlier decision in *Hewer v Bryant*,⁸³ the House of Lords noted that parental right to custody of a minor was "a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is."⁸⁴ Judicial opinion and statutory law in Australia, Canada and New Zealand have largely tended to reflect these developments.⁸⁵

In the 1980s, the nature as well as the scope of the best interests principle has significantly altered. It seems to have evolved as a legal concept from the realm of private law into a principle of international human rights law. According to Professor Alston, the evolution begun by the insertion of the best interests principle into international human rights instruments accepted as binding by many states. For example, in 1959 the best interests principle was first included in the Declaration of the Rights of the Child⁸⁶ and has subsequently been inserted in the 1979 Women's Convention, in articles 5(b) and 16(1)(d).⁸⁷ A similar reference is found in the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally.⁸⁸ At the regional level, we have the African Charter on the Rights and Welfare

⁸⁰ *Id* at 120.

⁸¹ *Gillick v West Norfolk and Wisbech Area Health Authority*, [1986] AC 112.

⁸² [1986] AC at 184B. Professor Freeman has also noted that English courts began to make regular reference to the importance of children's rights from the 1970s. See Michael Freeman, "The Convention: An English Perspective" in Michael Freeman (ed), *Children's Rights: A Comparative Perspective* (Brookfield, Dartmouth, 1996) 93.

⁸³ *Hewer v Bryant* [1970] 1 QB 357.

⁸⁴ [1970] 1 QB at 369.

⁸⁵ See, eg, *Re Jane* (1988) 85 ALR 409, (1989) FLC ¶92-007. In England, the *Gillick* decision was followed within three years by the enactment in 1989 of the Children Act (6 *Halsbury's Statutes* (4th edn) (1992 reissue) 400). The Act came with a long list of guidelines to which English courts are expected to have regard in deciding issues affecting children within the context of family proceedings.

⁸⁶ GA Res 1386, UN Doc A/4354 (1959).

⁸⁷ Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in *Best Interests of Child*, *supra* note 48, 1 at 3.

⁸⁸ GA Res 41/185 (1986).

of the Child,⁸⁹ article 4 of which makes reference to this principle.⁹⁰ Besides these instruments, the preamble to the 1980 Convention on Civil Aspects of International Child Abduction⁹¹ makes reference to the fact that “[t]he interests of children are of paramount importance in matters relating to their custody.”⁹²

Even in cases where no direct reference to the best interests principle is made, as in the case of the International Covenant on Civil and Political Rights,⁹³ the Human Rights Committee has referred in two of its *General Comments* to “the paramount interest of the children” in cases involving the dissolution of marriage.⁹⁴ Based on the above analysis, Professor Alston concluded that by 1989, when the principle of best interests was included in the Children’s Convention, it had already been widely accepted by the international community as a principle of international law.⁹⁵

Article 3(1) of the Children’s Convention states:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The significance of this article is: first, it underlines the international status of the best interests principle; second, it introduces a principle whose scope is broader than [those] traditionally applied in the domestic law of most states. Thus, as Alston noted, “the principle applies not only in the context of legal and administrative proceedings, or in other narrowly defined contexts, but ‘in relation to *all* actions concerning children’.”⁹⁶ Although the standard of best interests required by article 3 of the Children’s Convention is lower than that contained in most domestic statutes, it has the merit of extending to a much wider area of actions affecting the child.⁹⁷ The principle has now been extended to all

⁸⁹ OAU Doc CAB/LEG/24.9/49 (1990), adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, July 1990, not yet in force.

⁹⁰ Article 4 is on the best interests of the child. It states that

“1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”

⁹¹ 1343 UNTS 89, concluded at Hague on 25 October 1980, reprinted in (1980) 19 ILM 1501.

⁹² Preamble, paragraph 2.

⁹³ 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

⁹⁴ They are *General comment 17* (35) (1989), para 6, UN Doc A/44/40 (1989), Annex VI, reprinted in HRI/GEN/1/Rev.2, at 23; and *General comment 19* (39) (1990), para 6, UN Doc A/45/40 (1990), Annex VI, reprinted in HRI/GEN/1/Rev.2, at 28.

⁹⁵ Alston, *supra* note 87, at 4.

⁹⁶ *Ibid.*

⁹⁷ Freeman, *supra* note 82, at 94.

actions undertaken not only by courts of law, but by virtually all public and private institutions. Even though it remains to be seen what "actions concerning children" will be encapsulated in the best interests principle, there are encouraging signs that judges are willing to give the phrase a broad and generous interpretation, so as to catch most actions affecting children.⁹⁸

A good example of how the principle has been applied is found in *Minister for Immigration and Ethnic Affairs v Teoh*⁹⁹ where the High Court of Australia held that although the Children's Convention had not yet been incorporated into Australian municipal law, its ratification by Australia "was an adequate foundation for a legitimate expectation, in the absence of statutory or executive indications to the contrary, that administrative decision-makers... would act in conformity with the Convention and treat the best interests of the child as a primary consideration."¹⁰⁰ In *Teoh*, an application for resident status by a non-citizen father of four minor children was rejected by the Australian immigration authorities before first considering the effect of its decision on the applicant's children. The decision was challenged by the applicant on the ground that the immigration authorities had failed to take into account the principle of the best interests of the child as stipulated in the Children's Convention. Evidence was given to the effect that the Review Panel and the Minister's delegate had treated the requirement that the applicant be of good character as the primary consideration when dealing with his application. Moreover, there was no indication that best interests of the children had been treated as a primary consideration. As the court put it, "it followed that there had been want of procedural fairness in the making of the decision to refuse resident status to the respondent."¹⁰¹

The effect of this decision is that the best interests principle contained in article 3 of the Children's Convention has now been raised into a relevant factor that every decision-maker has to consider before making a decision affecting a child, otherwise a review court would be entitled to set aside such a decision. On the other hand, if it is accepted that this requirement is not limited to administrators but extends (as per article 3) to "courts of law", this clearly enlarges the scope of best interests standard beyond the traditional area of child custody and guardianship. All this tends to suggest that the best interests principle has become the standard against which most decisions affecting children are to be measured. Such decisions are not limited to those made by public bodies and officials such as courts of law, educational institutions and administrative bodies, they

⁹⁸ See *Benjamin Daguio*, Immigration Review Tribunal No 5590 Adelaide, IRT Ref No V94/00143; referring to *Minister for Immigration v Teoh*.

⁹⁹ (1995) 128 ALR 353.

¹⁰⁰ *Id* at 354 (line 15).

¹⁰¹ *Ibid* (line 35).

also include those decisions made by private institutions and local communities, including family heads and parents.¹⁰²

By expanding the scope of its application, the best interests principle can now be invoked, for example, to require all decision-makers to show sensitivity to the best interests of the child including the girl-child. Where a child is capable of forming his or her views, article 12 of the Children's Convention requires that the views of the child be freely expressed and due weight be given to them before a decision affecting that child is taken.¹⁰³ While we must not overlook the known difficulty of defining, interpreting and applying the best interests concept even in a domestic law context, these difficulties are not insurmountable and at any rate, the trouble that will be taken in giving life to such a concept is well worth the while. The same can be said in relation to the difficulties that may be encountered in the interpretation of phrases such as "actions concerning children" (as stated in article 3(1)) and "matters affecting the child" (as stated in article 12(1)).

In summary, it can be argued that, if it is sensitively interpreted and applied, the best interests of the child principle can indeed be the very mechanism for achieving the goal of 'mainstreaming' a gender perspective into all national policies and programmes which are likely to impact on the girl-child. The principle can also complement the constitutional mechanism (examined above) and both would be used in appropriate circumstances (either together or separately) to advance the rights of the child.¹⁰⁴

Public interest litigation: a practical means for accessing the law

Before concluding this paper, it must be noted that although national constitutions and the best interests principle have a great deal of potential for raising the status of the child in our jurisdictions, this potential is yet to be realised. Two important problems must be stressed here. The first is the general lack of awareness concerning the concept of children's

¹⁰² For a recent evaluation of how the provisions of article 12 of the Children's Convention are applied in Tanzania and in Zambia, see Bart Rwezaura, "The Duty to Hear the Child Before Making a Decision: a View from Tanzania" in *CLESA Proceedings*, *supra* note 36, and Chuma Himonga, "The Child's Right to Participate in Decision- Making in Families and Family Tribunals in Zambia", in *id.*

¹⁰³ Article 12 states:

"1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

¹⁰⁴ It is possible that courts may differ in their interpretation of words such as "all actions concerning children". Some judges might be unwilling to accept that certain "actions" taken by administrators "concern children", while others may take a more liberal view of this article. It may depend on how their local circumstances and their understanding of the issues are. However, as Mason CJ and Deane J have advised, article 3 of the Children's Convention must be given a broad reading and application, ie, "one which gives to the word 'concerning' a wide-ranging application [that] is more likely to achieve the objects of the Convention": *Minister of Immigration v Teoh* (1995) 128 ALR at 363 (line 30).

rights, not only within various communities, but also among public officials such as lawyers and judges.¹⁰⁵ The second problem, which is connected with the first, is that the legal mechanism for the protection of children's rights cannot be easily accessed by the victims. It seems necessary, therefore, to consider, even if tentatively, alternative means by which the legal system can be mobilised to protect the economically disadvantaged and the politically marginalised members of the community, including the girl-child. It will be argued in this section that public interest litigation offers a practical option and is the most suitable, given the social and economic circumstances of Asia and Africa.

In this connection, the practice of the Supreme Court of India in public interest litigation under the Constitution requires our careful consideration. In exercising its constitutional powers, the Supreme Court has insisted, for example, that public officials must not only act in accordance with the specific statutory requirements, but also act in a manner consistent with the requirements of the Constitution, the Directives of State Policy, local statutes relating to children and the international treaties ratified by India.¹⁰⁶ The Supreme Court has also liberalised court procedures in order to permit concerned citizens to petition against perceived violations of fundamental rights of children, among other groups. Such petitions need not be technical documents. An ordinary letter has been held to be acceptable as a petition. Where necessary, the Supreme Court has appointed its own fact-finding commission of inquiry to investigate alleged violations and has generally maintained a monitoring role after its ruling has been handed down. In one case, the Supreme Court applied article 39(f) of the Indian Constitution¹⁰⁷ to require state governments to bring into force a long neglected statute that was beneficial to children.¹⁰⁸

In order to improve particular social services offered to children, the Supreme Court of India has held that where legislation provides for the establishment of a juvenile court, or any public facility for children, it would be contrary to the spirit of that statute to appoint a person who had no special training in handling children's needs.¹⁰⁹ In this particular instance, the court ordered the State of Maharashtra to improve the living

¹⁰⁵ See for example, Bart Rwezaura, "The Legal and Cultural Context of Children's Rights in Hong Kong" (1994) 24 *Hong Kong Law Journal* 276.

¹⁰⁶ *Sheela Barse v Secretary, Children Aid Society* 1987 AIR SC 656 at 660, para 12.

¹⁰⁷ Article 39 of the Constitution provides that:

"the State shall, in particular, direct its policy towards securing:

...

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

¹⁰⁸ *Sheela Barse v Union of India* 1986 AIR SC 1773 at 1776. See also Goonesekere, *Women's Rights and Children's Rights*, *supra* note 1, at 30.

¹⁰⁹ In *Sheela Barse v Union of India*, the Court ordered that the child welfare officer and other officers in charge of children should be properly trained and further ordered that the Juvenile Court had to be staffed by a Judicial Officer with special training who was sensitive to the needs of children.

conditions of children in its remand homes, to ensure that their detention was not unduly prolonged, and while they were in these homes, to provide them with appropriate education and to prepare them to be good citizens.

These instances are just one aspect of the Supreme Court's crusade for children's rights. As noted by Goonesekere, "there are many cases...in which the Supreme Court of India has mandated State action to realize constitutionally guaranteed rights [for children]".¹¹⁰ Professor Peiris has noted that the Supreme Court of India has in a number of times shown that it is willing to immerse itself in administrative detail in order to ensure that adequate facilities are available to disadvantaged groups, such as mental patients or, as in one instance, the inmates of a protective home for girls run by the government of Uttar Pradesh whose services were found to be very inadequate.¹¹¹

Many observers believe that India's public interest litigation has achieved an identity of its own in the jurisprudence of the subcontinent.¹¹² This new jurisprudence provides a meaningful escape from the procedural strictures of the common law, particularly regarding the principle of *locus standi*. It also liberates the law, as it were, from the monopolistic service of the rich by making it accessible to the underprivileged social classes or politically marginalised groups. It is not surprising, therefore, that this spark has generated new fires in other jurisdictions in the region. In his inaugural address to the judges and lawyers of the South Asian Association for Regional Co-operation, the Chief Justice of Pakistan fully endorsed the need for the court to stick out for the weak and disadvantaged members of the community, adding that "the scope of social action litigation must be expanded in South Asia to realise fundamental rights, and provide access to justice for the people."¹¹³

The Indian experience has shown that in many cases there is no need to pass new legislation in order to improve the conditions of children or to protect their rights. The laws are often already there in the books. However, due to bureaucratic inaction, ignorance or lack of sensitivity to children's rights, and a shortage or lack of advocates to campaign for change, these laws remain largely dormant. And where these laws are applied, their fullest potential is never realised. Nevertheless, this problem is not peculiar to India. As the Chief Justice of Tanzania notes, although the Tanzanian version of the Children and Young Persons Ordinance¹¹⁴ establishes a juvenile court and a special procedure for trying suspected young offenders, that Ordinance does not extend to the

¹¹⁰ Goonesekere, *supra* note 48, at 142. For a more detailed evaluation of this approach, see G L Pereis, "Public Interest Litigation in the Indian Sub-Continent: Current Dimensions" (1991) 40 ICLQ 66.

¹¹¹ See Peiris, *supra* note 110, at 76. The case referred to is *Upendra Baxi v State of Uttar Pradesh* [1986] 4 SCC 106.

¹¹² Peiris, *supra* note 110, at 66.

¹¹³ Cited in Goonesekere, *supra* note 48, at 143.

¹¹⁴ Children and Young Persons Ordinance (Cap 13).

lowest courts where the majority of such cases are heard.¹¹⁵ Under section 42 of the same Ordinance, the Chief Justice could issue direction to make the Ordinance applicable in these courts, but “[n]o such direction has been made since the Ordinance was enacted in the colonial days.”¹¹⁶

Why then, one might ask, has this important Tanzania statute been ignored? The answer is that even in the District Court where the Ordinance is applicable, it is in practice never applied. Most District Court Magistrates who try cases involving juveniles are either unaware of this law or are “too busy” to apply it. Chief Justice Nyalali believes that the main problem is the “pervasive ignorance [on the part of] both the public and relevant officials, including judges, magistrates and lawyers regarding [children’s] rights.”¹¹⁷ It appears that the major problem here is not really the lack of appropriate enactments to safeguard the interests of children, rather, it is the lack of efficient utilisation of existing legislation. On the other hand, the failure to utilise the law adequately also suggests the need to have a specialist body whose major task is to promote and protect the rights of children nationally. A body such as the Commissioner for Children’s Rights can act as a child’s advocate in the broader sense by promoting, *inter alia*, community education and awareness regarding the rights of children. Perhaps the Commissioner, working with interested non-governmental organisations, can also initiate social action litigation on behalf of children and even supervise the implementation of court’s decisions. Such a body would arguably perform, more efficiently, some of the administrative duties that the Indian Supreme Court has been performing, and so perhaps, act as a bridge between the law and its enforcement.

In summary, although we cannot count on law alone to change society, the law can and should play the role of a leader and an educator by showing people the way forward. In that sense, if the law is carefully studied, dynamically interpreted and imaginatively applied, it can provide a basis for social action and a political platform for change.

Conclusion

This paper began by stressing the importance of looking at the violation of the rights of the girl-child as a structural issue embedded in the social and cultural systems of our societies. Because of the entrenchment of the conditions which give rise to these violations, the role of law in righting these wrongs must be seen not in isolation, but as part of wider effort for change and social justice. The law, if viewed in this way, can provide

¹¹⁵ The Ordinance is not applicable in the High Court and Court of the Resident Magistrate.

¹¹⁶ Nyalali, *supra* note 62, at 8.

¹¹⁷ *Ibid.*

leadership and can become a legitimate platform for social action. The experience of the Supreme Court of India has shown that, with a well-informed and committed judiciary, much can be done to protect the weaker members of our communities. Moreover, given that for various reasons, our communities are not able to mobilise the legal system to protect their individual rights, the establishment of an independent body at state level seems the best way forward. Such a body will be best suited to deploy more effectively the emerging jurisprudence of public interest litigation and also to undertake an advocacy role aimed at creating greater rights awareness in the community. Such a body will have the power, and hopefully, the means to insist that the rights of the girl-child must be respected. It is also under these circumstances that the emerging judicial approach of drawing principles, values and standards from international human rights treaties to interpret domestic law, should be fully supported and encouraged as the best way forward in the continuing search for agreed universal standards to protect the interests of the girl-child in our various jurisdictions.