

# PROMOTION OF CHILD RIGHTS: THE ROLE OF THE JUDICIARY

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## **INTRODUCTION**

I consider it a privilege to be invited to deliver this paper and I thank the organisers of this programme for the honour. This topic is large; it has to deal with child rights in, large subject areas; thus this paper will examine broadly some abuses of child rights in both civil and criminal matters, the U. N. Convention on the Rights of the child, Domestic Legislation of the Rights of the Child. Child Rights principles and the establishment and enforcement of these rights in domestic jurisprudence.

Ghana has expressed commitment to advance the respect, promotion and protection of fundamental rights of the child, such a commitment raises questions about the specific role of the judiciary in the promotion of the child well being; my main objective in this paper is to equip participants with the requisite knowledge and sensitivity to the rights of children, such as to enable Magistrates/Judges to effectively promote the rights of the child.

## **HUMAN RIGHTS**

All human rights international documents re-affirm faith in the dignity and worth of the human person, and declare that the rights set out are applicable to all persons, that every person is entitled to enjoy human rights and fundamental freedoms without distinction of any kind such as social origin, birth and other status.

The rights of the child are fast moving towards the centre stage on International Human Rights Programmes, for a long time, Human Rights were considered as relevant to only the adult world. Some had even expressed the view that advocating rights for children would erode family values and

parental or family responsibilities towards children, but it is now increasingly realized that child rights, far from undermining parental or family responsibilities provide norms for a proper discharge of these responsibilities and ensures State support as well as support from the civil society for the realization of these rights, whether it is in the form of socio-economic support to the family or providing educational structure or setting up appropriate legal framework of labour laws and economic policies or setting up juvenile homes or a juvenile justice system that work towards the realization of these rights.

For this reason there has been the need to make special provision for particularly marginalized groups. Such as children, since their state of dependence on other human beings, adults make them particularly vulnerable to Human Rights abuses.

**i. CONVENTION ON THE RIGHTS OF THE CHILD (CRC)**

The CRC is the main international document that provide for the welfare of children. It provides that “States have a duty to make the provisions of the CRC widely known to both adults and children and to assist parent and others responsible for the child, to implement this right and shall in the case of need provide material assistance and support programmes particularly with regard to nutrition, clothing and housing”. CRC Article 19.

Both parents have common responsibilities for the upbringing and development of the child in the absence or incapacity of parents, the duty of maintenance of the child may be provided by members of the extended family of communities as provided by local custom, legal guardians and other persons legally responsible for the child. CRC Article 5.

Countries including Ghana have expressed commitment through the ratification of the Convention on the Rights of the child, in 2002, the commitment was re-affirmed by Commonwealth Countries in the following terms: -

“We affirm our obligation to take action to promote and protect the Rights of every child, every human being below the age of 18 years including adolescent life are determined to respect the dignity and to ensure the well being of all children. We acknowledged that the Convention on the rights of the child, the most universally embraced human rights treaty in history and its operational protocols contain a comprehensive set of international legal standards for protection and well being of children. We also recognise the importance of other International instruments relevant for children.”

## ii. THE **AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**

The African Charter on the Rights and welfare of the child is the only African Regional treaty, which provides for the legal protection of the survival, development, protection and participation of the African Child. It was adopted in July 1990 and came into force on 29<sup>th</sup> November 1999, after receiving the required 15 ratifications: Ghana has not ratified the treaty to date.

## **GHANAIAN PROVISIONS**

In 1990, Ghana ratified the C.R.C. already in existence were legislation like the Maintenance Decree, the Intestate Succession Law, the Wills Act, the Matrimonial Causes Act, and Institutions such as Ghana National Commission on Children (G.N.C.C.) the Department of Social Welfare (D.S.W) as well as Non-Governmental Organisations (NGO) for the protection of children. Later in 1993, the Commission on Human Rights and Administrative Justice (CJRAJ) was established with the mandate of protecting the rights of all citizens and therefore the rights of children too. The children’s Act was passed in 1998.

## iii. THE **CONSTITUTION (1992) AND CHILD RIGHTS**

Article 28 is the main constitutional provision on the rights of the child. Article 28 reads: -

(i) Parliament shall enact such laws as are necessary to ensure that: -

- (a) Every child has the right to the same measure of special care, assistance and maintenance as it necessary for its development from its natural parents, except where those parents have effectively lities in respect of the child in accordance with law.
- (b) Every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of the parent.
- (c) Parents undertake their natural rights and obligation of care, Maintenance and upbringing of their children in co-operation with Such institutions as Parliament may, by law, prescribe in such manner that in all cases the interest of the children are paramount.
- (d) Children and young person receive special protection against Exposure to physical and moral hazards; and
- (e) The protection and advancement of the family as the unit of society safeguarded in promotion of the interest of children.

(2) Every child has the rights to be protected from engaging in work that constitutes a threat to his health, education or development.

(3) A child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

(4) No child shall be deprived by any other person or medical treatment, education or any other social or economic benefit by reason only of religion or other beliefs.

(5) For the purposes of this “Child” means a person below the age of eighteen years.

## **VIOLATIONS OF CHILD RIGHTS IN GHANA**

In this segment of the paper I shall examine some of the major issues that affects the right of children in Ghana that has perhaps not been given the required attention.

## **ABUSIVE RELIGIOUS AND TRADITIONAL PRACTICES**

### **A. TROKOSI**

The Trokosi system found mainly in the Volta Region involved the giving over into slavery of young female virgins to fetish shrines with the excuse that some gods need to be pacified for offences alleged to have been committed by other members of the girls family. These girls are used by the fetish priest or priestess as unpaid labourers, the girls are forced into sexual union with the priest without the latter assuming the necessary responsibility for the girl or their children born out of such shrines.

### **B. FEMALE GENITAL MUTILATION (FGM)**

This is another practice among certain religious societies. This practice is exactly what it says, it mutilates the female sexual organs. It has been described by the WHO as a serious health risk, under the (Criminal Code Amendment Act 1994)

Act 484 this practice is a second degree felony with a term of imprisonment of at least three years, in spite of this law, the practices goes on baby girls as well as the adult pregnant woman. See Article 39 (2) of the Constitution.

### **C. CHILD MAINTENANCE**

Apart from abusive religious and traditional practices like the trokosi system and female genital mutilations, one of the major problems that many children face in Ghana is the lack of maintenance by their parents, especially fathers, maintenance affect practically every right required for the survival and development of the child, such as the right to life, survival, physical, moral and intellectual development, active participation in society, cultural life and protection from harmful influences.

### **D. CHILD DISCIPLINE**

The issue of punishment has been linked with the discipline in such a manner that it has resulted in the violations of the rights of several children, both at home and in schools. Article 28 (2) of the Convention on the Rights of the Child (CRC)

Provides that:-

“State parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present convention. The children’s Act, Act. 560, 13 (2) provides that “Correction of a child is no justifiable which is unreasonable in kind or in degree according to the age, physical and mental condition of the child, and no correction is justifiable if the child by reason of tender age or otherwise is incapable of understanding the purpose of the correction” There are other provisions in the criminal code (section 41) prohibiting the use of unreasonable force in the correction of the child.

### **E. CHILD LABOUR**

According to a recent ILO Survey, there are about 250 million child workers aged between 5 and 14 in the world. This is without taking into account, children who work within their families, of these, one in five works in hazardous environment and quite a number of these children workers are denied both education and health care.

In Ghana, children suffer a systematic abuse of their rights on account of practices such as bonded labour and trafficking for the purpose of prostitution. The labour Act prohibits the use of Child Labour in hazardous employment, but child labour continues to be used in non-formal industrial sectors, particularly if the industry is small and family based quite a number of children work as labourers on Cocoa Farms, stone quarry and the fishing industry.

### **CHILD TRAFFICKING**

**Internal Trafficking**, this involves children being brought from deprived parts of the country especially the northern part of Ghana to cities or commercial centres such as Accra, Kumasi, Takoradi, Tema, etc. They are engaged in work such as domestic servitude, commercial sex, truck pushers, etc.

Sexual Trafficking – this involves the trafficking of children across borders, Ghanaian children are trafficked to neighbouring countries such as Gabon, Togo, etc.

### **CHILD DOMESTIC SERVITUDE**

These are children who work in other people household doing domestic chores, caring for children and running errands, among other tasks in exchange of remuneration. This practice is prevalent among middle and high income groups.

### **CHILD RIGHTS PRINCIPLES – THE BEST INTERESTS PRINCIPLE**

This is the major principle of child rights, which must guide judicial decision-making. The principle is that, the short term and long term best interest of the child must be a primary consideration in all decisions and actions that may affect present and future children. This principle underlines the entire Convention and the African Charter on the rights and welfare of child. Children are by nature vulnerable and dependant, decisions and actions must be in their best interest, in judicial decision making, this role is entrusted to the Judge/Magistrate or some other judicial decision makers. The courts in the common law jurisdiction have long held that, the welfare of the child must be paramount in determining alternative care and adoption.

In dealing with the Juvenile Justice System, two basic principles have been emphasised:

- i. The best interest of the child
- ii. As far as possible and depending on the age of the child, views of the child be taken into account before the Juvenile Justice System.

Although there may be different social outlooks in different countries, that affect the operations of the juvenile system, the principle that the best interest of the child have to be born in mind, while passing orders, is now almost universally accepted, similarly in many systems. However, depending upon

its age and maturity, the views of the child are taken into account whether the procedure provide for it or not.

Internationally, some diversity prevails in the area of each country's Juvenile System, while many developing countries in the world have a Juvenile System based on the court system, there are other countries whose Juvenile System is handled by law Justices or Social workers or a combinations or both systems, but whatever be the system, if the persons dealing with it are informed about the international norms and principles expected in dealing with such children much can be done to promote the rights of the child.

### **THE RIGHT OF THE CHILD AND DOMESTIC ENFORCEMENT**

There has been diverse response to the application of child rights principles and particularly child rights tenets within various jurisdictions.

### **IN OSEI YAW VRS NSIAH - HIGH COURT (GHANA) 1968**

The Respondent claimed from the appellant arrears of maintenance and an order for future maintenance in respect of three issues of her marriage with the appellant, she alleged that the appellant had failed to look after the children for five years. The appellant who was a farmer contended that apart from the period of time when the action was started, he has been providing clothing and school fees for the children. He however admitted that he had not been giving the children subsistence allowance, the trial judge gave judgement for the respondent and ordered the appellant to pay ø8,000 per month as maintenance for all the three children, the appellant appealed against the judgement of the grounds that: -

1. The entire proceedings before the trial court was a nullity since the matter had not first been referred to the Social Welfare.
2. By virtue of section 6 if Act 257, the appellant should have been examined as to his means before an order for maintenance was made against him. It was held allowing the

appeal that it was clear from section 6 and of the Maintenance of Children Act, 1963 that the making of an application to the Social Welfare Department was condition precedent to the exercise of jurisdiction by the District Court, since there was no evidence that the conditions for bringing the application had been complied with, the whole trial was a nullity.

**IN KELVIN MASCOLLY JACK AND ANOR 11<sup>TH</sup> OCTOBER 1999**

The High Court in St. Vincent and Grenadines held that corporal punishment by a school teacher did not constitute degrading treatment.

IN ITALIAN TAAMALE AND ANOR VRS ATTORNEY GENERAL, 18<sup>TH</sup> SEPTEMBER 1995 The Western Savoan Court of Appeal held that a customary banishment from a village was justifiable in the interest of public order even if it was against the interest of children.

Increasingly however, courts within various jurisdictions are applying the principle of the best interest of the child in other areas as well. In Re (Child) HIV TEST. 3<sup>rd</sup> September 1999 the United Kingdom (U.K.) family Division held that parent's wishes must be overridden if they are against the child's best interest.

**THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE (CHRAJ)**

Children can receive most forms of medical treatment without parental consent. Recent developments, CHRAJ has held that where parents withhold parental consent by reason only of their religious or other beliefs, the medical practitioner should determine what medical procedure would be in the best interest of the child and proceed accordingly.

**CASE NO. CHRAJ/NR/WMD/008/3/97**

The Petitioners, a married couple filed this petition on behalf of a thirteen-year old girl. They sought the Commission's assistance to stop the forced

marriage of the child to an elderly man. The child at the centre of the petition had been married off by her parents at a very early age but had not moved into her matrimonial home because of her rather tender age. She was approximately eight years old when she went to live with the petitioners in Accra as a junior house-help. In 1997, the parents of the girl demanded to take the child back from the petitioners so that, now that she was “old enough”, she could go and live with her husband. She was approximately 13 years at the time. The commission affirmed parental right to custody of their children. However, it explained to the parents the illegality of forced marriages in Ghana. In the special circumstances of this case, the Commission concluded that the child’s right to education was paramount and that the child should be allowed to continue living with the petitioners in order to further her education.

Another decision from Uganda, underlines that it is possible to sideline economic interest to promote child well being. In this case, Mr Mutebi proprietor of a corporation, entered into a contract to supply a second-hand car from Japan to Rev. Father Kwanuka. The Rev. paid the full price of \$6,000. The seller failed to supply. Judgement was entered for \$6,000. The Rev. obtained a warrant of attachment for a residential house. Mrs Mutebi, the wife of the seller appealed and objected to the order, arguing that she and her six children also lived in the house. Justice Arach Amoako took into account the best interest of the children and allowed Mrs Mutebi the application.

The courts in India have also taken the task of realising some of the basic rights of children through court proceedings. In RE: LAXMIKANT (1984) 2 SCC, 244 and (1987) 1 SCC.66. The litigation was brought by a lawyer drawing the attention of the court to malpractices prevailing in the area of sending children abroad for adoption often for monetary consideration. Although there was no legislation to cover this field, the Supreme Court said, to ensure the constitutionally guaranteed rights of the child, it was necessary to lay down guidelines, which would ensure that the only consideration for giving a child in international adoption would be the welfare of the child. Their

guidelines have been accepted. They are now incorporated by all the High Courts as well as the District Court dealing with the adoption of children.

On a complaint from a journalist, the Supreme Court of India dealt with children who were kept in jail instead of remand homes or observation homes and directed District Judges to inspect jails and furnish reports of such children.

**IN PUDR VR. UNION OF INDIA (1983) 1 SCC. 456** the Court held that no child should be employed in hazardous jobs although at that time, the child Labour Act was not on the statute book.

**IN PEOPLES UNION FOR CIVIL LIBERTIES VS. UNION OF INDIA (1988) 8 SCC. 425** Compensation was awarded to bonded child labour; child prostitute and the children of prostitutes were the subject matter of directions in **VISHAL JEET VS. UNION OF INDIA (1990) 3 SCC. 18.**

## **CONCLUSION**

The way society treats its children affects not only its qualities of compassion and protection caring, but also its sense of justice.

The shared aspirations of mankind regarding human rights demands a responsive contribution from judicial decision makers so that there can be maximum contribution to the enjoyment of child rights, to achieve this task, the courts have the onerous duty to apply the **principle of best interests** of the child in determine legal questions that may affect the child, this principle of child rights must become the focus of decision in other areas beyond family law both in private and public spheres.

As members of the Judicial System, all of us are or have been part of the judicial or quasi-judicial system dealing with children, if we can use international treaties to buttress domestic legislations from moulding our orders, we would have fulfilled this important purpose.

Finally, speaking as Judicial Officer, I need to emphasize that the promotion of the rights of the child does not lie in the hands of the Judiciary alone, the Judiciary need to co-operate and collaborate with the State and Governmental Institutions like the GNCC, the Department of Social Welfare, the Ministry of Women and Children Affairs, the Commission on Human Rights and Administrative Justice, etc to ensure the promotion and protection of the fundamental rights of the child.

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