



**Namaste**



# **A new child friendly constitution for NEPAL : inputs from MCR Students**

Jean Zermatten

Kathamndu

24.03.2010

# PLAN of the presentation

- A project work done by MCR Students in Switzerland
- Comparative study between national constitutions and children's rights
- Nepal, children's rights, and the Constitutions
- Comparative law
- Some proposals

# NEPAL

## - Ratification status :

**CRC** : R. 26 Jan 1990 ; **EiF** : 14 Sep 1990

• **Réserves, Déclarations** : **NO**

**OPAC** : R. 8 Sep 2000 ; **EiF** : 3 Jan 2007

**OPSC** : R. 8 Sep 2000 : **EiF**: 20 Jan 2006

## - Reporting status :

**CRC** : Initial report 1995 ; second report en 2004 ; next (3th and 4th comb.) report due for 2010....

**OPAC** : initial report due for 2009...

**OPSC** : initial report due for 2008....

# Nepal – Background Information

- November 2006: *Comprehensive Peace Accord*
- 2007: *Interim Constitution: article 22 – child rights*
- 2009: *Expert Submission on Child Rights in the New Constitution for Nepal*
  - Consortium (71 agencies) + National coalition for Children as Zones of Peace + **Children**
  - **comprehensive child right's provisions** in the Constitution
  - **justiciability** children's rights
- March 2010: 1st draft ?
- May 2010: signature of the new Constitution

# Work of the MCR students

- **49 Constitutions:** Africa, Asia & Pacific, CEE/CIS, Western Europe and North America, Latin America & Caribbean
- **Identification** of relevant provisions by themes / Nepal important issues second report to the CRC Committee
- **Comparison:** constitutional provision - CRC provision (wording and spirit)
- **Identification** of the provisions reflecting the CRC
- **Impact:** legislative reforms, policy reforms, jurisprudence
- **Challenges:** language barriers; inaccessibility of documentation

*Literature: P. Alston and J. Tobin's study (2005)*

# Children's Rights in Constitutions ?

- States have adopted **different approaches** to comply with their obligations to implement children's rights in their countries. Some have promulgated new constitutions or amended the existing ones in order to incorporate provisions of the CRC, while others have translated the CRC into domestic law.
- But “no **single approach** can be envisaged as a blueprint best suited to all countries”.

# Interim Constitution

- The current interim constitution of Nepal (2007) includes one specific child rights article (**article 22**, as well as a general clause covering children - s35 (9) concerning the action of the State on behalf of children and other marginalized and minority groups.
- Very **positive** and progressive **development** for the rights of the child in Nepal.
- But art. **36 mitigated the responsibility**

# Art. 22

1. Every child shall have the right to his/her own identity and name.
2. Every child shall have the right to be nurtured, to basic health and to social security.
3. Every child shall have the right to protection against physical, mental or any other forms of exploitation. Any such act of exploitation shall be punishable by law, and the child so treated shall be compensated in a manner as determined by law.
4. Helpless, orphan, mentally retarded, conflict victims, displace, vulnerable and street children shall have the right to special privileges from the State to secure their future.
5. No minor shall be employed in factories, mines or in any other such hazardous work, or shall be used in the army, police or in conflicts.

# Proposal of the Cons + CZOP

The Consortium + CZOP proposed a set of recommendations

- First to delete art 36 interim Cst
- **6 key points**
  1. Fundamental Rights
  2. Responsibilities of the State
  3. The Judiciary
  4. Constitutional Bodies
  5. State Restructuring Committee
  6. General

# Impact

- In January 2010, the Constituent Assembly's Fundamental Rights Committee incorporated most of the Expert Submission recommendations highlighting children's rights into **the draft Concept Note** that will form an important basis for the drafting of the new constitution
- No mention of previous art. 36.
- This is already a very significant achievement of the Consortium and CZOP.

# The Calendar

- Feb 5-March 5: First draft of the new constitution by the CA'CC
- March 6-March 13: CA discussion on the first draft
- March 14-April 4: Public opinion collection
- April 5-13: CA discussion on public opinion
- April 14-20: Constitution bill on public opinion
- April 21-28: CA discussion on the bill
- April 29-May 5: Amendments to the bill
- May 6-May 20: Clause-wise discussion, approval of each article and preamble
- May 22-May 28: Signatures of new constitution by members, seal by Chairman, handover of new constitution to President and promulgation of Nepal's new constitution

# The preliminary draft

**Art. 24** Preliminary draft (unofficial version)

## **Eleven Rights regarding Children**

1. Right to a name, identity, birth registration
2. Right to education, health, alimentation, care, sports and personal development from family and state
3. Right to early childhood care/development
4. Right to be educated in mother tongue
5. Right not to be exploited at work

# The preliminary draft (2)

6. Right not to be forced to marriage, illegal abduction, trafficking and hostage
7. Right not to be recruited and used in army, police, armed conflicts and right not to be mistreated in the media, or by traditional or religious practices, or exploited physically, mentally and sexually
8. Right not to be tortured at home, school and other place
9. Right to a child friendly justice
10. Right to special protection for orphans, disabled, victims of conflicts, displaced and at risk
11. Criminalization of the offences of exploitation and  
Right of the victims : investigation +  
compensation

# Other issues in the draft

- The question of **citizenship**
- art. 3 by descent
- art. 4 by naturalization
- Fundamental Rights
  - dignity** (art. 1) and **torture** (art. 7)
  - prohibition** of the death penalty (art. 2)
- Rights in the justice system : offenders(art. 5) and victims (art. 6)
- Other rights for nepali **citizen** ? freedom of opinion and expression, assembly, equality ?

# Other issues in the draft (2)

- **Non discrimination** (art 9)  
racial : criteria caste, tribe, origin,  
community : eradicate intouchability  
women, disabled people
- Right to **education** (16) : Primary :  
compulsory and free. Secondary?
- Right to **health** (20): free basic health and  
emergency services. Clean water.  
Reproductive health
- Right to **food** (21) + **accommodation**(22)

# Comparative analysis

- Most of the time, constitutional reforms alone cannot achieve the full recognition of children's rights into the domestic legislative order.
- In most of the countries reviewed in the study, these reforms came together with additional legislative measures.
- In fact, a constitutional reform remains a first step requiring further implementation through legislative reforms, in order to adopt new laws or to revise the existing ones to bring them in compliance with the constitutional norms and with the CRC.

# Constitutional recognition of children's rights

- **Options** : two systems : monist and dualist
- Nepal that does not allow for the direct applicability of international treaties, such as the CRC.
- **The adoption of a system of direct applicability** could help Nepal in the drafting process, as it allows to decide - if a selection is required during the process - which rights to really emphasize, by introducing them at the constitutional level.
- But this doesn't close the door to further implementation though direct applicability of the CRC provisions that are recognized as self-executing
- Examples of countries : Albania, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Colombia, Georgia s., France, Nicaragua, Russian Federation, Romania, Rwanda, Switzerland, Togo, Venezuela

# Examples of Comparative Analysis

CRC articles	Countries	Suggestion of the group
<b>Art. 2 non discrimination</b>	Belgium, s11; Brazil, s. 227 (0); Burkina Faso s37 and s23; Canada, s15; Colombia, s13, Ecuador, s11; Fiji, s38 (2) and (6); France, preamble to the Constitution of October 26, 1946; Ghana s28 (1&4); Mexico, s10; Nicaragua, s27; Rwanda, s11 and s46; Serbia, s21; South Africa s9 (3); Switzerland s8; Togo, s.11; Ukraine s52.	Canada s15; Ecuador 11; Mexico s10; Rwanda s11; Switzerland s8; Serbia 21.
<b>Art. 3 (1) Best Interests of the child</b>	Belgium, 22bis; Bolivia, s60; Ecuador, s45; Gambia, s29(1); Venezuela, s75 & 78; Fiji, s27; Sri Lanka, s22; South Africa, s28(2).	Belgium, 22bis; Bolivia s60; Ecuador, s45; South Africa, s28 (2); Sri Lanka, s22 (4); Venezuela s78.
<b>Art. 7 (1) right to a name and nationality</b>	Colombia, s44; Ecuador, s46; Ethiopia, s36 (1b); Fiji, s10 and 11; Gambia, s29 (1); Ghana s6 (2-4); Serbia, s38 and s64; South Africa, s28 (1a); Switzerland s38 and s119; Togo s32; Venezuela, s56.	Colombia 44; Ecuador 46; Ethiopia s36 (1b); Gambia s29 (1); Serbia s38 and s64; South Africa s28 (1a).
<b>Art. 12, 13, and 15 right to participation</b>	Belgium, s22bis; Bolivia s59 (V); Colombia, s45; Ecuador, s46; Serbia, s64; Switzerland, s11 (2) and s41 (g); Venezuela, s79.	Belgium s22bis; Serbia s46 Switzerland s11 and s41.
<b>Art. 19 (2) Appropriate care for neglected children</b>	Nigeria, s17 (3) (f); South Africa, s28 (1) (d); Sri Lanka s22 (1-2);	Sri Lanka s22 (1-2)
<b>Art. 24 adequate health care</b> <b>a) Care of pregnant mother/neonatal cares</b> <b>b) right to adequate health care</b>	a) Brazil, s227 (1.I); Burkina Faso s18; France, preamble to the Constitution of October 29, 1946; Serbia, s63, s66 and s68; Venezuela, s76. b) Brazil, s. 227 (0); Belgium, s23; Bolivia s18 (I-III); Burkina Faso, s18; Colombia, s44; Ecuador, s45; France, preamble to the Constitution of October 29, 1946; India s39; Maldives s23 (c); Rwanda, s41; South Africa, s28 (1)(c); Serbia; 68; Sri Lanka s22 (b); Switzerland, s.41 (b); Togo, s.34.	a) Brazil, s227; Burkina Faso, s 18; France, preamble to the Constitution of 1946; Serbia, s63; Venezuela, s76. Brazil, s227; Colombia, s44; France, preamble to the Constitution of 1946; India, s39; Serbia, s68; South Africa, s28C; Sri Lanka, s22 (2b).
<b>Art. 27 right of every child to a standard of living adequate for her/his development</b>	Brazil, s. 227 (0); Belgium, s23; Bolivia s16 (I-II); Burkina Faso s18; Colombia, s44; Ecuador, s45; France, preamble to the Constitution of October 26, 1946; South Africa, s28 (1)(c); Maldives s23 (a); Sri Lanka s22 (b); Switzerland, s.12;	Brazil, s. 227 (0); Colombia, s44; Ecuador, s45; South Africa, s28 (1)(c); Sri Lanka s22 (b).

# Example : Article 28: Right to education

- A majority of countries has a constitutional provision for the right to education. However, many of the constitutional provisions are ambiguous and do not clearly indicate the nature of the right, who is the right-holder and the responsibility of the government.
- Only Togo and Madagascar refer in their constitutions specifically to the right of the child to education ; all other countries refer to all citizens, all persons or everyone.
- The majority of constitutional provisions provide for primary education to be compulsory and free, however, only a part indicates that this right should be available to all. Several constitutional provisions only provide for primary education to be free but do not mention compulsory.
- Secondary education, only half of the constitutions provide a specific provision (Latin America)

# Some proposals

On the basis of this study and from an international point of view, I will propose

1. To have a **clear definition** of the child ; the questions of the different ages (labour, MACR, marriage, sexual consent...) must be treated in the specific laws
2. To integrate **the 4 general CRC principles** in the Constitution (art. 2, 3 , 6 and 12)  
about participation : to make the distinction between the right to be heard / the participation concept

## Some proposals (2)

3. To ensure that the **basic socio, economic and cultural rights** (food, accommodation, education and health) are mentioned, as well as **protection** against all forms of exploitation are respected
4. To guarantee the access for children to a **Human Rights National Institution** (with separate unit for Children, or to a specific **Child Ombudsperson**)
5. To avoid **statelessness**

# Specifically for Nepal

From the Cobs from the CRC Committee (2005), seems important to deal with

- **Adoption** (domestic and international)
- **Juvenile Justice**
- **Children in armed conflict**
- **Birth registration**

It can be just principles, to be developed in the future Child Act (?)

# Some steps to take (jz)

## Justiciability

- The fact to have rights defined in a constitution does not necessarily mean that the rights under that constitution will be enforceable.
- Even a perfect formulation does not prevent a provision to remain without practical impact for individuals and especially for children, who can face special difficulties when it comes to court's accessibility.
- Moreover, constitutional provisions may be denied direct applicability (see art. 36 Interim Cst)
- Courts may consider that legislations are required to really implement the rights acknowledged by the constitution.

# Some steps to take (2, jz)

## Implementation

- Harmonization in the Constitution between the different articles : example the fundamental rights and the socio-economic and cultural rights
- Harmonization of the different legal texts with the Constitution (Child Act, Civil Code, Criminal Code, Procedural codes...)
- Avoid contradictions
- Facilitate the implementation

# **Good Luck for the New Nepali Constitution**

- And thank you to the  
MCR students
- As well to you for your  
patient attention !

*[www.childsrightrights.org](http://www.childsrightrights.org)*