

## Children's Rights – Moving Forward

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### Overcoming Cynicism and Children's Rights

25 years ago, it was not clear that there was going to be a Convention. Those of us who were drafting the Convention were criticised for including children's civil and political rights in the same treaty with economic, social and cultural rights. We were told that this was not how international law worked. For the same reason we were castigated for extending the Convention to violations in both war and peace. Then once it became clear that the Convention was to be adopted by the United Nations we were told, very few countries would ratify it.

I think it is important to stress the extent and depth of the criticism at the time because there are now a number of major child right initiatives which are facing the same type of scepticism. The first is the campaign to incorporate the UN Convention into British law and the second is the creation of a right of petition for children so that children who fail to receive a satisfactory domestic remedy would be able to petition the UN Committee on the Rights of the Child.

So as important as it is for us to continually point out failings and lacunae in British legislation and policy it is equally important for us to point to successes. I think all of us who work long and hard in children's rights could do better in two key areas. One is celebrating our successes and the other is the potential of the courts to strategically help combat child poverty here in the United Kingdom.<sup>1</sup>

There is an understandable tension about publicising the achievements of the Convention and of children's rights. Because, we feel it risks distracting energy away from other important areas where so much remains to be done. However, when we look back over the past twenty years, there have been many successes. Twenty years ago children's rights was radical, a slogan in search of a definition. Now we have children's rights at the heart of government policy with the creation of children's ministers from Bangladesh to

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<sup>1</sup> For a fuller analysis of the potential of law to combat child poverty see **Van Bueren**, *The Separation of Powers and the International Legal Status of the Best Interests of the Child in Assisting Domestic Courts to Protect Children's Economic and Social Rights* in Collins, Grondin et al eds, *Rights of the Child Proceedings of the International Conference*, Wilson and Lafleur, Montreal. ISBN 978-2-89127-831-7, 2008, pp 237 – 273

the United Kingdom; children sitting in a range of parliaments and local authorities from France to Mozambique to India; children consulted over legislation and amending the constitution in countries ranging from Brazil to South Africa; children's rights commissions and commissioners in many countries – and the children's but not child rights commissioners in the United Kingdom. In addition the international and diplomatic agenda are no longer closed to issues such as child sexual exploitation and children in armed conflict. The spirit of the Convention and its philosophy has even extended beyond the states parties, with the United States Supreme Court in Roper prohibiting the execution of all those who have committed crimes below the age of 18.

We are good at highlighting our successes in funding applications and for targeted audiences but we need to do the same in relation to all citizens so that children's rights can become popular in Britain rather than being greeted with scepticism and in some cases with fear. However, we are also nervous about publicising our successes, because we are worried about being accused of wearing rose tinted glasses. Yet drawing attention to our successes does not mean being blind to problems. . Compared to 1990, 10,000 fewer children under the age of 5 are dying every day. This is significant progress which ought to be more widely publicised, but in publicising it, it does not mean that we are blind to the 8.8 million children, who die each year before their fifth birthday.

Publicising successes should be part of an all round child rights strategy, because it is empowering. It energises those who work in the field which enables more work to be done and by showing that progress is possible, more resources and more support is made available. I hope that we will take this 20th anniversary as an opportunity to celebrate and to publicise what has been achieved, as well as highlighting what needs to be done.

In the United Kingdom publicising the successes of children's rights is particularly important because, if we are arguing for the incorporation of the Convention into British law or for our Government to support a right to petition under the Convention, then we have to show what it has achieved both here and abroad.

I have been privileged to spend 5 years of this century working in South Africa, where there is much more optimism from children and adults who have so much less. And I think this is one of the lessons that we in the North can learn from the South. The other is that it is possible to think of the courts and legislation in very different ways when dealing with child poverty. We have begun to think differently about the potential of the courts with the Child Poverty Bill, in which almost unnoticed is the possibility of judicial review, if a government minister fails to set or meet a child poverty target and possibly even if the setting of the target is too late or too little.

Child poverty is still seen in this country as predominately a political, economic and social issue rather than a challenge for the courts. It is ironic that an economic right, the right of the unborn to inherit property, is

recognised and well protected under British law. Yet, the economic and social rights of children, whilst alive, are rarely as well protected. Even though it is clear that Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights, UNESCO and most of Latin America and parts of Africa and Asia are beginning to see it very differently.

One of the reasons, not the only reason, we need to incorporate the Convention into British law and to allow children the right to petition the UN Committee on the Rights of the Child, is because it will allow children to have both British courts and an international tribunal consider their socio-economic rights – their right to the highest attainable standard of health, their entitlement to social security and to a quality education. We have to accept that this is ambitious but it is an appropriate ambition. Because it is clear that something else is needed. Whilst the United Kingdom has experienced economic growth, children have not only failed to share proportionately in the benefits of such growth, but have fallen behind in the very period when the Convention on the Rights of the Child came into effect. We need to enquire the reason for the Convention succeeding in raising the equality of children's civil rights, but failing with children's economic and social rights.

Many lawyers and judges have been wary of tackling resource issues for fear of impinging upon the separation of powers and provoking critical constitutional reaction from government. Hence child social justice continues to be a matter of discretionary political welfare rather than protected legal entitlement.

Currently with the Government failing to meet its child poverty targets, with social mobility being frozen and with the possibility of economic cuts injuring the most vulnerable British children there is no international body to which British children can appeal. The European Convention on Human Rights was never intended to be a holistic children's rights treaty and although children have won important cases at Strasbourg, they have generally been in the civil and political rights field and not in relation to the allocation of resources.<sup>2</sup>

Although it is possible to argue both under the European Convention and under the Human Rights Act, that the extent of a child's socio-economic deprivation is so extreme that it amounts to degrading treatment, what does it say about our society that the courts are only prepared to step in, once poverty is so extreme that it becomes degrading?

Nor has the European Court of Human Rights or British courts under the Human Rights Act displayed a great desire to develop the prohibition of discrimination on the grounds of 'social origin', 'property, birth or other status' enshrined in article 14, to include children living in poverty.

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<sup>2</sup> Although there have been cases concerning positive obligations with resource expenditure, see further Van Bueren, *Child Rights in Europe*, Council of Europe, Strasbourg, 2009. Also available on google books.

The United Kingdom is not party to the Council of Europe's revised European Social Charter, the sister treaty to the European Convention on Human Rights. The European Social Charter allows collective complaints on behalf of children. This has proven helpful to poorer children living in wealthier democracies. France, for example, has had to amend its policies improving autistic children's access to education, and Portugal has had to amend its policies on the exploitation of child labour.

A petitioning mechanism for children would greatly benefit British children. For children living in poverty in the United Kingdom, it would mean that children would be able to petition the UN Committee on the Rights of the Child on violations of their socio-economic rights. It would also prove that socio-economic rights are capable of being adjudicated as cases would refer to the growing range of case-law around the world, where children have been able to successfully challenge violations to their socio-economic rights. The government has already committed to introducing legal targets for combating child poverty under the Child Poverty Bill so such a procedure would complement government policy.

### **A Complaints Procedure for the Convention on the Rights of the Child**

I first raised the need for the Convention to allow children access to a direct international remedy over 20 years ago, when we were drafting the Convention and it was rejected both by countries and by the majority of non-governmental organisations, with the exception of Amnesty International and the International Commission of Jurists. It was opposed because it was argued that such a procedure would inject contention into a treaty which had been negotiated by consensus and it could possibly harm development work in developing states. However, the tide is changing and a number of countries as well as a new and welcome global non governmental campaign are calling for a Third Protocol to the Convention on the Rights of the Child to create a complaints mechanism which would allow children, after they have exhausted all effective domestic remedies, to bring their complaints to the UN Committee on the Rights of the Child.

Apart from giving children living in poverty a chance of a remedy, a Third Protocol, that is an additional treaty to the existing Convention and two Protocols, would also create a complaints mechanism for children, who live in parts of the world where such mechanisms do not exist, not even for violations of children's civil and political rights. Asia, where the majority of children live, has no regional human rights machinery to which either children or adults can petition. If a government has not fulfilled its legal duty towards children under the Convention, children do not have any legal recourse. This is why Asian governments such as Korea and the Philippines are supporting a complaints mechanism.

The only region of the world to have a general treaty on children's rights is Africa. Under the African Charter on the Rights and Welfare of the Child, children living in Africa can petition the African Committee on the Rights and Welfare of the Child for a wide range of civil, political, economic, social and

cultural rights. To allow children in only one continent to have this right appears arbitrary, unrelated to any inherent aspect of childhood, and breaches the principle of equality.

The advantage of having complaints heard by the Committee on the Rights of the Child is that complaints would be judged by those with a direct experience of children's rights. A successful complaint against one state would not only benefit children living in that state, but would set the standard, which other states would have to meet, to avoid litigation brought against them. In this way, the complaints procedure would serve both as a deterrent and as a catalyst for other states to take positive measures to implement the Convention fully.

Other Protocols to treaties which establish complaints mechanisms, provide UN Committees with flexible investigation powers<sup>3</sup> - this would mean the UN Committee on the Rights of the Child would be able to conduct on-site investigations, if a massacre of children has been alleged and could help prevent further killings. A complaints procedure would also provide an opportunity for the Committee to provide fuller and better reasoned opinions and therefore to gain more respect amongst states. There have been cases, for example concerning the physical punishment of children in the United Kingdom, where the European Court of Human Rights found the United Kingdom not to be in violation and the Committee on the Rights of the Child found the United Kingdom to be in breach over essentially the same provisions in international human rights law. It is difficult to persuade a state to adopt a more progressive approach, when it has two conflicting opinions from different international bodies – one of which, the recommendation from the UN Committee on the Rights of the Child, provided very little reasoning. Hence a communications procedure under the Convention would reinforce domestic procedures by setting a model for child-sensitive procedures, and as the decisions would be more similar to case-law it would provide reasoned and more practical guidance for implementation at the national level.

Importantly, and in contrast to some court procedures, a complaints procedure would not be traumatic for children, because children would not have to appear in person and be subject to cross-examinations. Under a complaints mechanism, if a government were to be found in violation of the Convention on the Rights of the Child, it would mean that either legislation or government policies would be amended and/or monetary compensation awarded. Similar to the European Court of Human Rights, if a child lost a complaint she would not have to pay the government's costs.

The length of any international proceedings is obviously a concern, however, treaties which create complaints mechanisms incorporate the power of the Committee to impose binding interim measures. This is particularly important with socio-economic rights, so that children do not continue to face hardship

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<sup>3</sup> See art 45 African Charter on the Rights and Welfare of the Child

whilst a complaint is being decided. The Indian Supreme Court, in a case concerning the right to food, *PUCL v the Union of India*, in which it was argued *inter alia*, that the right to food was a corollary of the right to life, used interim measures very effectively to direct the state government to provide in every state school a prepared mid-day meal with minimum calorie and protein content within a three month time frame. This sought to ensure that children did not continue to suffer whilst their case was being heard. *PUCL v the Union of India* demonstrates the massive positive impact such jurisprudence can have on improving the daily lives of the most vulnerable of children. Hence by supporting a complaints mechanism the United Kingdom will ensure that remedies for violations of children's rights are provided as speedily as possible. The chair of the All Party Parliamentary Children's Committee has written to ministers asking the United Kingdom to support a third Optional Protocol creating a right of petition for children, but so far as I am aware, no reply has been received.

### **Incorporating the Convention into British Law**

There is of course another way in which children's rights in the United Kingdom can be better protected, and that is by incorporating the Convention on the Rights of the Child into domestic legislation. This would allow children to initiate a legal action in the United Kingdom on the basis that one or more of their Convention's rights had been violated, in a similar way to the Human Rights Act.

Although there have been significant legal reforms since the United Kingdom became party to the Convention, they have only been on a sector by sector basis, which focuses only on the specific area under review. Sectoral review does not develop principled uniform interpretations across a range of actions. Sectoral reform has also meant that certain children's rights have been neglected, such as the child's right to privacy and the right to freedom of movement and association, both of which have seen huge inroads in the name of child safety and public order.

The United Kingdom has already incorporated children's rights treaties into domestic law, including the Hague Convention on the Civil Aspects of Child Abduction. British courts already take account of the Convention on the Rights of the Child when interpreting children's rights, but in an *ad hoc* way, without a principled framework and without having the opportunity to build up a body of reasoned jurisprudence on the Convention.

The Convention on the Rights of the Child requires Governments to "undertake all appropriate legislative, administrative and other measures"<sup>4</sup> to implement it. Developing this the Parliamentary Joint Committee on Human Rights has recommended incorporation of 'at least some' of the Convention into domestic law, as well as recognising the need to strengthen children's rights protection.

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<sup>4</sup> Article 4, UN Convention on the Rights of the Child

Indeed, the government in its March 2009 Green Paper on a possible future Bill of Rights recognises the Convention as a 'crucial instrument' to achieve change for children and explicitly acknowledges the need to foster greater respect for children. Incorporation of the Convention would be a natural progression in the development of our domestic law.

Incorporation would also meet with the guidance issued by the Committee on the Rights of the Child. The UN Committee on the Rights of Child twice recommended in 2002 and 2008 that the UK should incorporate the Convention into domestic law in order to improve its implementation. Public opinion supporting incorporation may not be as far behind as many believe. An opinion poll carried out for the Northern Ireland Human Rights Commission found overwhelming support for 'special rights for children' in their emerging Bill of Rights.

Those who argue against incorporation argue that the Convention is expressed in aspirational and broad language, too broad to be incorporated into English law. This I think is an easy objection to dispense with because the same argument was made from the 1960s for decades in relation to the incorporation of the European Convention. British judges are now accustomed to interpreting such broad rights. And judges from countries such as Belgium and the Netherlands and Chile and Senegal, where the Convention on the Rights of the Child takes priority over national law, are able to interpret the Convention on the Rights of the Child. What one has to enquire is different about the British judiciary?

The other main argument is that the Convention also protects a wide range of socio-economic rights from guaranteeing children access to adequate housing to an entitlement to an adequate standard of living and that these rights will give too much power to judges to allocate resources. This same argument was raised before the Constitutional Court of South Africa in the Treatment Action Campaign case, a case concerning free access for mothers and babies to life-saving HIV medication. In a unanimous opinion, the South African Constitutional Court said that, although the South African Constitution protects economic and social rights, the Constitution contemplates a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Although the judicial process may have budgetary implications, judgements are not in themselves, directed at rearranging budgets. Indeed as the Supreme Court of Canada has observed in *Schachter* 'Any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money.'<sup>5</sup>

Another argument made by those who do not wish to see the Convention form part of British law, is that it is not for judges to concern themselves with resources – that is the proper function of the cabinet and parliament, and for

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<sup>5</sup> *Schachter v Canada* 1992 2 Supreme Court Reports 679 at 709.

judges to concern themselves with socio-economic rights would be a breach of the separation of powers. However, as the South African Constitutional Court also said,

‘ it cannot be said that by including socio-economic rights ..., a task is conferred upon the courts so different from that ordinarily conferred upon them by bills of rights, that it results in a breach of separation of powers.’

In other words once the Convention on the Rights of the Child were a part of British law, the courts would only be interpreting the statute and not taking new powers upon themselves.

## **Conclusion**

One of the impacts of the Convention on the Rights of the Child has been on the rapid development of comparative child rights jurisprudence. Comparative child rights jurisprudence represents the human face of globalisation. It opens legal cultures up to different ways of remedying problems, which had previously been regarded as intractable by the courts. In the past, children’s rights case law has been drawn, in the main, from North American and European sources. Now in our globalised world, in this era of what Slaughter describes as transjudicialism - the increasing contact through real and cyberspace between judges<sup>6</sup> and lawyers, there is no excuse for merely looking northwards – the south, particularly in the alleviation of child poverty litigation has much to offer when we consider the incorporation of the Convention.

If I may make a non-commercial commercial, I hope that some of you will have the opportunity to speak to my fellow members of Rights of the Child UK (ROCK), which is a UK-wide coalition working towards incorporation of the Convention and perhaps you would like to join. Briefings have been prepared for all the main political party conferences. And we are working with Baroness Walmsley, who plans to introduce a Private Members Bill on or around 20 November, the Convention’s 20<sup>th</sup> anniversary.

One of the ways in which we managed to achieve such widespread ratification of the Convention on the Rights of the Child was that as a non governmental coalition generously funded by UNICEF, we managed to go round the sceptics and raise such grass root support never seen before by governments in relation to the ratification of a treaty.

The entire momentum for international children’s rights, historically has never been government – it has always been individuals and civil society. The originator of international children’s rights was a British woman, Eglantyne Jebb, who founded Save the Children and who drafted the worlds first global rights instrument, the Declaration of the Rights of the Child adopted by the

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<sup>6</sup> Slaughter, A Typology of Transjudicial Communication 29 University of Richmond Law Review 1994, 99

League of Nations in 1924. We in the United Kingdom should celebrate and build upon this heritage.

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