

CHRONICLE CHRONIQUE CRÓNICA

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CRC and the third optional protocol

As I write this editorial, news has come through that Costa Rica has become the tenth country to ratify the third optional protocol to the Convention on the Rights of the Child (OP3 CRC)¹. This means that in three months time, OP3 CRC comes into operation in those countries.

Jean Zermatten*, the immediate past Chairman of the CRC Committee has written a brief history of the route to OP3 CRC and an overview of its provisions which allow children a direct means of bringing complaints about violations of their rights to the CRC Committee.

Valerie Yates, Director of the Child Rights International Network (CRIN) relates the struggle that Non-Governmental Organisations had in trying and not succeeding in getting group actions included in the provisions but also tells us of her hopes for the success of the new optional protocol.

Benôit Van Keirsbilck*, Director of *Defence for the Child International* in Belgium, has kindly agreed to publication of a talk he gave to encourage the ratification by countries of OP3. It is a useful *aide memoire* to the provisions of the new optional protocol.

Our immediate past Chairman, **Justice Renate Winter***, sits, as you know, on the Committee of the CRC. Renate is well aware of the demanding practical issues involved in implementing OP3 and her article sheds light on those issues. **Abdullah Khoso** of Pakistan enlarges on those issues from his point of view as a Child Rights Co-ordinator working in Pakistan for *Save the Children*.

The African Charter on the Rights and Welfare of the Child (1990; operational in 1999) set out to be complementary to the CRC but it went further and incorporated a communications procedure. **Professor Julia Sloth-Nielsen*** sits on the Committee that receives and adjudicates cases. She tells us about the functioning of the Committee, describes two of its cases and explores the differences between the CRC with its three optional protocols and the African Charter.

I should also like to draw your attention to the very informative OP3 article written by **Professor Charlotte Phillips*** and published in last January's Chronicle.

Children and the courts

As we know, representation of children in legal matters is a sensitive and difficult area. I am pleased to be able to publish an article by **Professor Amaury Terwangne**, an advocate at the Brussels Bar, who is very well placed to enlighten us on the various roles a lawyer plays when representing a child. OP3 will add another role!

The article by retired **Judge Leonard Edwards*** beautifully sets out the late twentieth century path away from treating children as children. The maxim *adult time for adult crime* has been much used and acted on. It is therefore important to note that the United States Supreme Court has started a movement back towards the original juvenile court concept and there is hope that the rehabilitative ideal may be restored by state legislatures.

The Cree and Inuit First Nations of Quebec number some 28,000 people, of whom 40-50% are under the age of eighteen years. **Judge Daniel Bédard***, writes most interestingly of sitting on cases in the James Bay and Inuit Territories where judges may take judicial notice of systemic and historical parameters and *must* consider cultural heritage within an approach linked to restorative justice.

South Pacific

Two conferences held in the South Pacific in 2013 are of particular interest.

The first was the Australasian Youth Justice Conference: *Changing Trajectories of Offending and Reoffending* held in Canberra Australia in May at which **Judge Andrew Becroft***, Principal Youth Court Judge of New Zealand, presented his work *"From Little Things, Big Things Grow", Emerging Youth Justice Themes in the South Pacific*²

From that work I publish the chapter on the overlap between the youth and family courts where I know, from my own experience, that the same children are likely to be the subjects of proceedings in both courts albeit usually, but not always, at different times in their lives.

¹ The countries that have ratified are: Albania, Bolivia, Gabon, Germany, Montenegro, Portugal, Spain, Thailand, Slovakia and Costa Rica.

By December 2013 forty five other States had signed OP3 CRC . indicating their intention to ratify.

² The full work is available in English from the Editor.

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The second conference was the Annual Meeting of the **South Pacific Council of Youth and Children's Courts (SPCYCC)*** which was held in New Zealand in September.

Emily Bruce was, at that time legal, counsel to Judge Becroft*. Emily has kindly reported on the meeting which continued the theme of the Canberra conference and examined lessons from Youth Justice Systems in the South Pacific and refers to the Pacific Judicial Development Programme.

The SPCYCC meeting also considered a very useful tool to assess the nature and qualities of a youth justice system. I reproduce it here along with a ten point plan for a fair and efficient youth justice system drawn up by **Prison Reform International** and the **International Juvenile Justice Panel** of which we are a member. The two guides go well together.

Surrogacy is an ever increasing possibility for childless couples and one of which **Anil Malhotra***, a barrister in India, has much knowledge. So much so that he has written a book about it and contributed an illuminating article about surrogacy in his country.

The Chronicle

This edition of the Chronicle is my fifteenth. I should like to thank the Editorial Board, Judge Ginette Durand-Brault and all contributors for their unfailing support.

During my time as Editor-in-Chief I have received many complimentary comments about the Chronicle which I believe is a well-respected journal.

I also believe that it is time for me to hand over editorial responsibility to someone new. So I should like to hear from any of our members who may be interested in taking the Chronicle forward in the next mandate.

The Editorship is a challenging but rewarding role bringing worldwide engagement with those who share our Association's principles.

May I wish all our members a happy, healthy and prosperous 2014 when I look forward to meeting you.

Avril Calder

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A message from the President and Secretary General

Members will be aware that we have had to postpone the 2014 World Congress that was due to be held in Foz de Iguaçu at the end of March. The Brazilian and Argentinian Associations have worked extremely hard to plan the Congress. Sadly the difficult financial climate now prevailing in parts of the world have made it impossible to hold IAYFJM's Congress in South America.

The Local Organising Committee and the Executive are very sorry for the disappointment and inconvenience the postponement may cause for members.

The Executive are currently considering options for staging the World Congress and the General Assembly and will communicate with the Council and members as soon as we can.

The Rights of the Child— a new optional protocol for the UN Convention

Jean Zermatten



Improving respect for children's rights

The December 2011 session of the UN General Assembly adopted a third optional protocol to the UN Convention on the Rights of the Child (CRC) intended to meet legitimate demands from children, their representatives, NGOs and the whole of the international community that children should be afforded a means of bringing up violations of their rights at an international level. Formally, this is the **Optional Protocol to the Convention on the Rights of the Child establishing a communications procedure**¹, known as OP3. The text is the direct result of an unanimous decision by the UN Council on Human Rights supported by 59 member states² requesting the UN General Assembly to augment the power of the Committee on the Rights of the Child so that it can hear and investigate complaints either from individual children or from member states about violation of children's rights and gather evidence in cases of systematic abuses. So the way is now open for the 196 UN member states to sign and ratify this new international instrument. At the time of writing, 36 member states have signed the protocol, but only six have ratified it. Ten ratifications are needed for it to come into force and it is hoped that the ten necessary ratifications will be achieved in 2013.

Steps on the way

In order to monitor children's rights, the CRC created a Committee with powers set out in articles 43.45 whose main task is to consider periodic reports from member states. From the beginning, NGOs outlined and argued for a communications procedure, but the idea was not looked upon favourably by member states.

This means that the Committee on the Rights of the Child (the Committee) currently has no power to receive communications from either individuals or states. Nor can it undertake investigations. This puts the Committee in a unique position, because all the other organizations under the Convention have such powers.

It is worth noting that, apart from the CRC Committee, all the other eight bodies under the Convention have (or will have once the corresponding arrangements have come into effect) the power to consider communications from individual people.

Several important events have occurred since 1989 to raise awareness of children's rights and give substance to them. A communications procedure was proposed at the tenth anniversary of the CRC, but at that time the Committee was not completely convinced that it was needed and no proposal was developed. Discussion started up again in 2006, led by a group of NGOs specializing in children's rights, and the campaign for a third protocol was launched and gathered momentum. An important milestone was the day in May 2008 that the Committee devoted to consideration of the issues. The main concern was to be sure that an arrangement of this kind would be suitable for children and could be made to work. Following these discussions, the Committee unanimously decided to support the setting up of a communications procedure. In January 2009 Slovenia organized the first informal consultation under the umbrella of the Human Rights Council (HRC) and subsequently took on leadership of the group of states in favour of the idea.

At the January 2009 session, HRC members agreed to set up a working group to look into the issue and on 17 June agreed a resolution (A/HRC/11/L.3) setting up an ad hoc working group to consider the development of an optional protocol to the Convention. The working group held its first meeting from 14. 18 December and considered four specific topics:

- justification for developing the protocol and the timetable;
- what arrangements currently existed at a national and international level and how accessible and effective they were for children;
- rights that are specific to children; and
- implications of the protocol for the CRC.

A group of NGOs, several experts, and members of the Committee took part and put forward their views on this range of issues.

¹ Adopted on 19 November 2011 by the 89th plenary session of the UN General Assembly, reference A/RES/66/138

² Resolution A/HRC/17/36

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In March 2010 the HRC agreed a new resolution (A/HRC/RES/13/3), extending and amending the working group's terms of reference so that it could work up the protocol in detail with the production of the text being entrusted to the Chairman of the working group, Mr Drahoslav Stefanek. The working group held its second series of meetings to discuss the text from 6. 10 December 2010. In January 2011, following this first round of negotiation, Mr Stephanek circulated a version which he had revised in the light of the views of the experts and member states. The working group met for the last time from 10. 16 February to consider the details of the revised proposals. After some intense and difficult negotiations the text that emerged was agreed by the working group, although with considerable reluctance on the part of NGOs, some experts and two members of the Committee who had been accorded observer status and were not allowed to take part in the negotiations. The final compromise was reached only at the last minute by means of a package put forward by Mr Stephanek, accepted as it stood without opposition. The working group's report and proposals were not sent forward until April 2011 and were not discussed by the Council until its June session, being adopted on 17 June 2011.

This was the text that was put to the General Assembly in December 2011 and is now the third optional protocol.

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The main impact of the protocol will undoubtedly lie in the opportunity it affords for direct communication or complaints to be brought before the Committee. A complaint can be made by or in the name of an individual or group of individuals alleging a violation of the rights set out in the CRC or in the two optional protocols attached to it (art 5.1). There was lengthy discussion about the representation of children and this was finally covered in art. 3 on general arrangements. The outcome was that the Committee has the power to hear and consider individual statements relating to the three main instruments (CRC and its first and second optional protocols) with no opt-out for member states.

There was a great deal of negotiation over the admissibility criteria for the complaints. The NGOs and the experts argued that it was important for the criteria to be flexible so that the procedures would indeed be accessible to children and those in a position to speak for them. In its final form, art 7 lists the various criteria, basing its structure and content on similar procedures currently in existence.

To be admissible, a complaint must meet the following conditions :

- it must not be anonymous (condition a.);
- it must be in writing (condition b.);
- it must not be an abuse of rights (condition c.) or ill-founded (condition f.);
- it must not be made in parallel with or be a repetition of another complaint (condition d.);
- it must not be retro-active (condition g.);
- all domestic avenues must have been exhausted (condition e.).

Although the NGOs and experts insisted throughout the negotiations that the process must be child sensitive, this concept was left out of the final version, reducing the role of children in the process to the filing of their individual complaints. Finally, condition h. adds a time constraint. To be admissible, the complaint must be received within a year of the exhaustion of all domestic remedies.

A second important aspect is the system of inquiries that the Committee will be able to undertake once it has been reliably informed of grave or systematic violations of the CRC or the two optional protocols. Arts 13 and 14 cover the setting up of the inquiries and the procedures to be followed. By and large, these correspond to the procedures established for the other bodies that have this power under the treaty.

Once it has received credible reports, the Committee can designate some of its members to undertake an inquiry, possibly involving a visit to the country (paras 1 and 2). The inquiry is to be undertaken in confidence and with the cooperation of the country concerned (para 3). While the NGOs and the experts looked on the system of inquiries as a useful adjunct to the individual communications, many member states expressed reservations throughout the drafting and tried to reduce the impact of the proposal as far as they could by emphasising the optional nature of the procedure and offering an opt-out clause to states unwilling to accept it. This weakens the system of inquiries.

A third aspect is in art 12 which provides the option of a traditional system of communication between states. Member states have to make a declaration that they recognise the competence of the Committee to hear a complaint from another state. Para 2 establishes reciprocity and, under para 3, the Committee must reach a negotiated settlement. However, this is rather theoretical as up to the present, there have been no inter-state communications under any of the international treaties that provide for them. There has therefore been little discussion of this aspect.

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In addition, the protocol incorporates the main principles of the CRC (child's interests are paramount, the right to be heard), the concept of 'child-friendly' procedures, the possibility of protective measures, the protection of and confidentiality of victims. Rules of procedure are to be decided by the Committee.

A few disappointments

The debates did not agree to admit collective complaints. This would have broached new ground for UN treaty bodies. Nor is it possible to renounce the making of reservations, as the optional protocol to Committee on the Elimination of Discrimination against Women (CEDAW) allows. The need to find consensus put an end to such hopes.

Rules of procedure and representation

In February 2013 the Committee agreed rules of procedure for hearing children's individual complaints in a document called, *Internal rules under the optional protocol for children's rights setting up a procedure for communication*.

Note that, in line with regulations adopted by other treaty bodies, these rules start with a chapter headed, *General rules governing the operation of the Committee*, which covers:

- the paramount importance of the interests of the child(ren), taking account of both the rights of the child(ren) and their views, according those views the weight appropriate to the age and maturity of those concerned;
- the principle of timeliness- communications must be dealt with promptly with no unnecessary delay;
- the principle of confidentiality- no individual's or group's identity is to be revealed in public without the express consent of those concerned;
- protection- every attempt must be made to ensure that no-one within the Committee's jurisdiction is subjected to an abuse of their human rights or to maltreatment or intimidation as a result of their communicating or cooperating with the Committee.

This opening chapter is important because it makes clear what applies to children from the moment that they become part of any process under a treaty body.

Next one might have expected a section devoted to how a child or their representatives can appear before the Committee. Article 1.2 gives a rather vague indication: *The Committee will take every step necessary to ensure that child(ren) are not subject to inappropriate pressure or persuasion by those acting on their behalf.*

In fact there is no detailed guidance on this except on the submission of a complaint. Summarising articles 12 and 13 of the rules, it emerges:

- that a child (or a group of children not acting collectively) can submit a complaint even if their country's law does not give them legal standing;
- that the issue of discernment is a key in deciding whether or not the child should be represented;
- that third parties can file a complaint on behalf of children, with or without their agreement;
- that the Committee will hear these complaints, including those from third parties and that it must investigate:
 - whether pressure or manipulation has been applied;
 - whether the representative is acting in the best interests of the child and not in the interests of others;
 - whether third parties filing on behalf of children are acting in the children's best interests; and
 - irrespective of who has filed the complaint, whether it is indeed in the best interests of the child. .

Expected outcome

This new power complements the monitoring through country reports that has been practised by the Committee up to now, because individual complaints can fulfil three important functions:

- consideration of individual violations should put a stop to those particular abuses and/or lead to compensation for the victims;
- consideration of a particular complaint will not only benefit the victim of that abuse, but may lead to changes in the law and practices within states; and
- an individual complaint may perhaps reveal serious or systematic breaches of the law within a given state.

Finally, we should not overlook the fact that the need to exhaust all domestic remedies may prompt a state to set up an internal system to avoid a direct approach being made under the protocol. Perhaps Switzerland will consider establishing a system of complaint at national level as we would wish and as the Committee explicitly recommended in 2002? We shall see.

Jean Zermatten*

8 September 2013

http://www.humanrights.ch/home/fr/Instruments/ONU-Traites/Nouveau/idcatart_10105-content.html

Making CRC OP3 work—a view from the Childs Rights International Network (CRIN) Veronica Yates



Introduction

Almost three years have passed since the final negotiations meeting approved a communications procedure for the UN Convention on the Rights of the Child (CRC), and I am still struggling to be optimistic about it.

Having taken part in the whole process of lobbying for the treaty through to the drafting process, I want to reflect on some of the hurdles we had to overcome and some of the battles we lost in our efforts to get this new mechanism. The reason I want to do this is that the relative weakness of the communications procedure is indicative of the low status of children's rights globally.

Beyond the good news of the adoption of the treaty and its imminent entry into force¹, let's not forget that children had to wait almost 25 years to get this mechanism. No other so-called 'distinct group' of people had to wait this long. This was and remains a serious matter of discrimination against children.

Until December 2011, the Children's convention was the only treaty with a mandatory reporting procedure that did not have such a communications procedure. The OP to the International Covenant on Economic, Social and Cultural Rights (adopted in 2008 and entered into force in May 2013) was one of the few treaties that had a long negotiation process.

Other treaties were either drafted with a complaints mechanism as part of the main text (Torture, Racial Discrimination, Migrant Workers, Enforced Disappearances)², or drafted an OP establishing the procedure at the same time as the main treaty.

Of course, it was a major achievement when it was adopted and it was certainly a very positive example of collective campaigning by NGOs. And of course we need to ensure it is widely ratified and eventually used strategically to advance the protection of children's rights and increase their access to justice.

But I think we should also reflect on why the mechanism is weak. Why do I want to dwell on the past? Because it might help us find solutions to overcome the low status of children's rights globally, consider all available options, and perhaps change the way we, as advocates and campaigners work, by considering new strategies and tactics.

The weakest link

This new procedure was drafted over a period of a few years with a number of five-day long meetings, the final of which was in February 2011. Negotiations with States had given cause for optimism until the last few days. Over the previous three years of meetings, we as NGOs, had not been met with too much opposition. We knew negotiations would be tricky on some issues, including on the collective communications, and we knew concessions would have to be made, but the conclusion of the final meeting turned into a somewhat dramatic event (for a UN meeting in Geneva)³.

It was only during the last three days of negotiations that States suddenly started voicing serious concerns about the draft text... yet they had been quiet until then. Rumours were spilling out of the drafting corridors that a few Western States had scared others into opposing the treaty, so as to avoid taking the blame; or, in line with the low status of children's rights, States had simply not paid attention until they realised an actual treaty was about to be adopted.

In an effort to conclude the meeting with some sort of agreement, the Chairperson of the Working Group entrusted with developing the treaty, proposed a take-it-or-leave-it package that would, in effect, turn the treaty into a menu for States to pick and choose which provisions they agreed with⁴.

A few more hours of unofficial behind-the-scenes meetings followed, and the proposed package was more or less agreed, leaving children with a weak complaints mechanism - probably the weakest of all, as Yanghee Lee, the then Chair of the UN Committee on the Rights of the Child, said: "I am afraid we have confirmed that children

1 When this article was written in November 2013, there were nine ratifications and a number of unconfirmed reports of others happening soon.

2 See the website of the High Commissioner for Human Rights for details of existing complaints procedures: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>

3 Read CRIN's coverage of the negotiations here: http://www.crin.org/law/CRC_complaints/

4 See: <http://crin.org/resources/infodetail.asp?id=24154>

are indeed mini humans with mini rights, and the current draft fits this idea of children.¹⁵ She further said she wanted to apologise to all children for what she viewed as a missed opportunity, "I am deeply sorry to every child that we have not succeeded in recognising them as rights holders."¹⁶

All is not lost

The outcome? The provision allowing for *collective communications* had been deleted entirely. States could enter reservations when ratifying the procedure, States could opt out of the *inquiry procedure* and would need to opt in to the *inter-state communications*. The one good thing that was left was that States would not be allowed to opt out of the other two Optional Protocols (OPs) on the involvement of children in armed conflict and on sale of children, child prostitution and child pornography, meaning **if a State is a party to one or both of the other two OPs**, a complaint can be filed alleging a violation under these treaties.

For a complaint to be admissible, it must be based on violations that have occurred since the State ratified. There are *Interim Measures* which means that if a complaint has been received, the Committee may make an urgent request that the State takes certain measures (for instance, if the alleged victim may suffer irreparable damage while a complaint is considered).

A State could make a complaint against another State if it feels that the State has not fulfilled its obligations under the CRC or its two OPs (but both States must be parties to the third OP). But, this is an opt in.

There is an *Inquiry Procedure* for grave or systematic violations. If such information is submitted to the Committee, it can, for instance, nominate a few members to conduct an inquiry, which could include a visit to the country. A State that is subject to an inquiry must respond within six months. After this there is a follow up procedure. But, States can opt out of this procedure as well.⁷

Collective communications, looking elsewhere

The biggest disappointment for us was the complete deletion of the collective complaints procedure. The proposal for such a procedure that had been included in an earlier draft of the OP, and supported by the Committee on the Rights of the Child and a number of States⁸, would have

allowed the Committee to consider complaints alleging violations of the Convention without the identification of specific child victims or groups of victims. All that would be required is evidence of the law and/or policy which is causing violations. Because of the particular situation of children, their dependence on adults, their vulnerability, age (babies or very young children), their inability to access mechanisms to seek redress themselves in many cases, this would have been especially useful.

Perhaps it was a long shot as none of the communications procedures under the other UN treaties allow this, and few domestic legal systems do. But it is technically possible to file a complaint without the identification of an individual victim both under the Inter-State Communications on the grounds that a State is not fulfilling its obligations under the treaty; and under the Inquiry Procedure of several treaties, if a Committee receives reliable information indicating 'grave or systematic violations'.⁹

Collective complaints—other international bodies

So perhaps we should consider looking elsewhere and evaluating all our options. There are other international bodies that do consider collective complaints, including the African Committee of Experts on the Rights and Welfare of the Child (see article by Julia Sloth-Nielsen page 20--Ed).

There is a **collective complaints** procedure under the **European Social Charter** which was adopted in 1995 as an optional protocol and came into force in 1998. This complaint procedure has been successfully used to challenge violations of children's rights in cases related to child labour, special education, discrimination and the legality of corporal punishment in a number of European States.¹⁰

To date, 15 Member States (out of 47) have accepted the collective complaints procedure, and there have been a total of 103 complaints, including seven recent complaints against governments for failing to explicitly prohibit corporal punishment (Belgium, Czech Republic, Cyprus, France, Ireland, Italy and Slovenia).

ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure+, 1 September 2010, A/HRC/WG.7/2/2. See:

http://www.crin.org/docs/ChairDraft_OEWG.doc.

9 Newell, Peter. "Collective communications . an essential element in the new Optional Protocol for the Convention on the Rights of the Child+; contribution to the first session of the Open-ended Working Group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child . September 2010. See:

www.crin.org/docs/Collective_Communications_EN.doc

10 Council of Europe website: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

5 of Europe Ms. Lee quoted the famous words of Maud de Boer Buquicchio, Deputy Secretary General for the Council

6 Read full details here: <http://crin.org/resources/infodetail.asp?id=24181>

7 For further details, visit the website of the UN Committee on the Rights of the Child <http://www2.ohchr.org/english/bodies/crc/>

8 Human Rights Council, "Proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-

There is also a complaint procedure under the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Individuals, groups of individuals and NGOs can submit an individual complaint to the Committee on Conventions and Recommendations of UNESCO if they are direct victims or if they have a sufficient connection to claimed violations in relation to the rights falling under UNESCO's competence in relation to the Universal Declaration of Human Rights, including the right to education (Article 26), right to participate in cultural life and to share scientific advancement (Article 27), right to information, including freedom of opinion and expression (Article 19), freedom of thought, conscience and religion (Article 18), right to freedom of association (Article 20). The protected persons are teachers, students, researchers, artists, writers and journalists. The procedure is confidential from the beginning to the end.¹¹ As of 2011, UNESCO had examined a total of 566 communications, 360 of which had been settled.¹²

The constitution of the International Labour Organisation (ILO) provides for a Complaint Procedure in relation to the protection of rights under a number of the ILO Conventions, including Convention No. 138 on the minimum age for admission to employment, and No. 182 on the worst forms of child labour. A complaint has to be made against a Member State that is a party to the relevant Convention and can be filed by another Member State having also ratified the same convention, a delegate of the ILO Conference (each Member State has two delegates: one representing workers, one representing employers), or the ILO Governing Body. It cannot be filed by an individual as such, but an NGO could, for instance work with a delegate who might be a union leader.¹³

Give the OP CRC a chance

Let's come back to the new OP CRC. Even though we were and remain disappointed, as international NGOs and advocates, we must ensure the new OP to the CRC is ratified by as many States as possible. And in our ratification campaigns, we must try to convince our governments not to opt out of any provisions, opt

in where required, and not enter reservations. We then need to identify which cases would be better dealt with by the UN Committee on the Rights of the Child, rather than by any other existing procedures.

Once it has entered into force, together with national organisations, we need to start looking for child victims; and identify what persistent violations can be challenged under the OP. I want to focus on those last two points: Finding child victims who are able and willing to be the applicants for the purposes of litigation, and finding organisations or lawyers who can take the case, both of which could be challenging.

There was a recent example in the United Kingdom (UK), with revelations about the use of forms of restraint involving deliberate infliction of pain in youth custody. These . which amount to inhuman or degrading treatment . had affected more than a thousand young people over a decade, yet not a single one came forward during that time to take legal action or seek compensation.

The difficulty in getting claimants to come forward is a challenge for a number of reasons, and they may vary from country to country. What is common across the globe is that children often do not know that their rights have been violated. And when they do, they rarely have access to any sort of remedy, nor to legal advice, probably even less so to legal representation. In most countries, children can be held criminally responsible - but they cannot hire a lawyer without an adult's involvement!

But it is probably not just because they are children. It is likely that many complaints or class-action suits brought on behalf of adults were also at the initiative of well organised NGOs or advocates and lawyers who went out to find the victims - and we, as children's rights advocates, need to do the same.

In looking across regions, it is clear that there are many persisting, serious violations of children's human rights (economic and social, as well as civil and political). In some countries, new forms of violations are occurring. And in most countries, these have been highlighted or denounced by various international human rights bodies.

In more than 20 years since the CRC was adopted, we have submitted hundreds of alternative reports to the Committee to examine, which it did, yet governments are not responding (or not quickly enough) to conventional forms of advocacy or to repeated identical recommendations from the Committee on the Rights of the Child. Why is that?

11 See:

http://www.claiminghumanrights.org/unesco_procedure.html

12 Visit the website of UNESCO for details of complaints: http://portal.unesco.org/en/ev.php-URL_ID=15243&URL_DO=DO_TOPIC&URL_SECTION=201.html

13 Visit the ILO website for more information: <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang-en/index.htm>, list of complaints to date:

http://www.ilo.org/dyn/normlex/en/fp=1000:50011:3961898354:680607:::P50011_DISPLAY_BY:1

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One reason may be that there has been little use of legal action or regional and international human rights mechanisms to try to force greater respect for children's rights from governments. This highlights the need to resort to stronger methods and to ensure that the CRC is used as the legal instrument that it is. And of course the new OP should contribute to this.

The need for legal advocacy

While legal advocacy is not a new or revolutionary idea, it is evident that it needs to expand to involve more people and organisations - not only lawyers specialising in children's rights, but all those who work with and for children as well as children themselves.

At CRIN, we have been debating how we can contribute to these efforts. We already document violations worldwide, we provide detailed information and advice on using human rights mechanisms, including the communication procedures; we have a regular strategic litigation e-newsletter and are collecting and disseminating key judgements from all regions which have quoted and applied the CRC. But the challenge we are aiming to overcome is identifying how we can best support national NGOs in pursuing legal advocacy.

A few years ago, we began developing a wiki¹⁴ of children's rights which aims to bring together all the recommendations, observations or case law issued by every human rights body - regional and international - in order to identify persistent violations in every country, with the ultimate goal of matching these with avenues for redress. Now that we have completed this exercise for almost 150 countries, we are evaluating our next challenges.

In order to identify the best avenues for redress, we must also collect information and case studies on what forms of advocacy have been tried and failed to achieve necessary reforms; how violations of children's rights can be challenged through domestic law, what relevant constitutional provisions can be used, and what is the real status of the CRC and other international instruments in every country.

Legal status of children's rights

Answering those questions is a pre-requisite to any attempt at using an international complaints system, including the complaint procedure to the CRC. This brings us to the second part of a major piece of research we are doing with pro bono support from the law firm White and Case who are

preparing reports detailing what the legal status of children's rights is in almost every country. This includes - but is not limited to - looking at whether the CRC has been incorporated into national law, how children are treated in legal proceedings, do they have access to legal aid, can they seek legal representation independently from adults, are there available complaints mechanisms, including collective complaints, and what are the practical considerations involved in legally challenging violations.¹⁵

With this information we intend to show the ways that national legal systems can be used to challenge violations of children's rights, a pre-requisite to using any regional or international human rights complaints procedure.

However, establishing how these violations have been - or can be - challenged is only the beginning of the process. The research will not be useful unless we identify national partners who can use it. This has been a challenge so far as few children's rights organisations have the capacity to take on such work, in many cases, they are not allowed to undertake any form of advocacy, or if they do, they might not have legal expertise within their organisations and the more mainstream human rights organisations do not tend to work on children's rights. This is why we are increasingly partnering with legal professionals, legal clinics and Ombudspersons with the mandate to receive individual and collective complaints on behalf of children.

In conclusion

We still have a long way to go before children are recognised as rights holders, whether at home, in schools, or in the courtroom and it is unlikely that the OP CRC will change that in the immediate future. However, what it probably will do is contribute to the development of more legal advocacy nationally, which will lead to new partnerships with legal professionals. This in itself may lead to more funding for children's rights organisations interested in legal advocacy, which will ultimately contribute to challenging the low status of children and their rights in our societies and in the human rights world.

Veronica Yates, Director of the Child Rights International Network - CRIN

¹⁴ A **wiki** is a web application which allows people to add, modify, or delete content. For the Children's Rights Wiki, the idea is that CRIN compiles the research from UN and regional Human Rights sources and collaborators can contribute to the sections on how to challenge the identified violations. See here: http://wiki.crin.org/mediawiki/index.php?title=Questions_and_Answers

¹⁵ More information as well as examples of country reports is available on our website at: <http://www.crin.org/law/legalstatusofthechild/>

Ratify OP3 CRC

Benoît Van Keirsbilck

slide 1



Ratify OP3 CRC

INTERNATIONAL COALITION FOR THE OPCR
ON A COMMUNICATIONS PROCEDURE

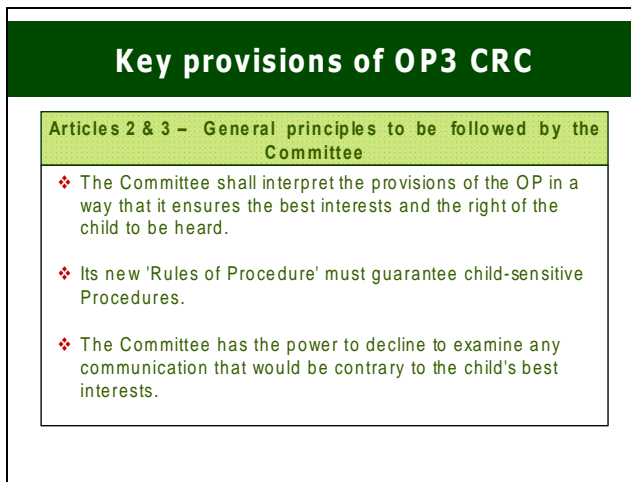
Information OP3 CRC

2nd of July, 2013

Benoît Van Keirsbilck
Defence for Children International - Belgium
Centre interdisciplinaire des droits de l'enfant
Thanks to the support of the International Coalition for the OPCR



slide 4



Key provisions of OP3 CRC

Articles 2 & 3 – General principles to be followed by the Committee

- ❖ The Committee shall interpret the provisions of the OP in a way that it ensures the best interests and the right of the child to be heard.
- ❖ Its new 'Rules of Procedure' must guarantee child-sensitive Procedures.
- ❖ The Committee has the power to decline to examine any communication that would be contrary to the child's best interests.

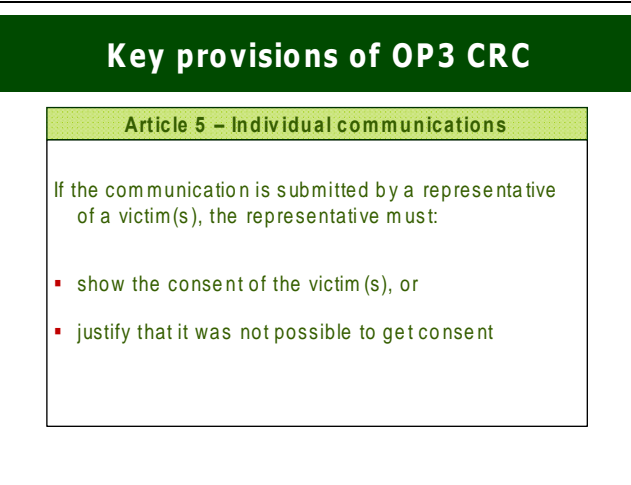
slide 2



What is a communication procedure?

- ❖ The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) is **an international human rights treaty** that allows children, groups of children or their representatives, who claim that their rights have been violated by their State **to bring a communication, or complaint**, before the UN Committee on the Rights of the Child.
- ❖ It's a **quasi-judicial** mechanism

slide 5



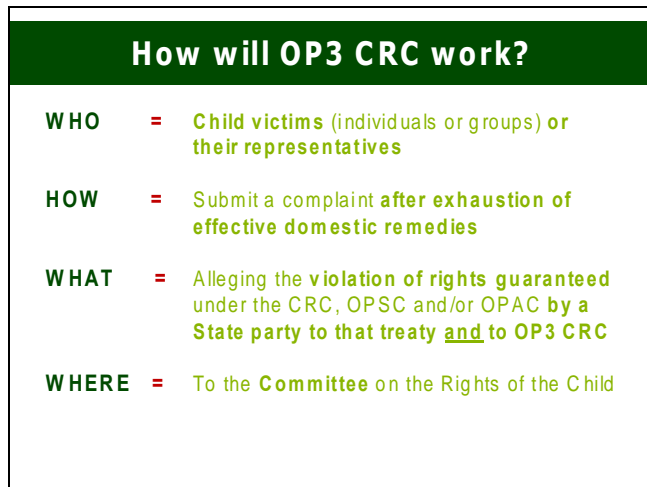
Key provisions of OP3 CRC

Article 5 – Individual communications

If the communication is submitted by a representative of a victim(s), the representative must:

- show the consent of the victim(s), or
- justify that it was not possible to get consent

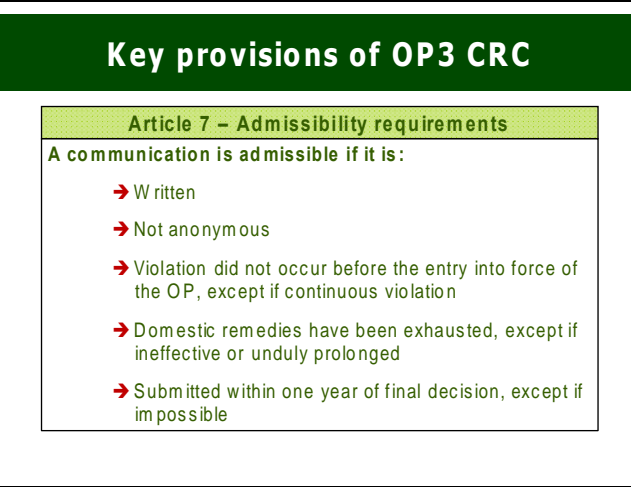
slide 3



How will OP3 CRC work?

WHO	=	Child victims (individuals or groups) or their representatives
HOW	=	Submit a complaint after exhaustion of effective domestic remedies
WHAT	=	Alleging the violation of rights guaranteed under the CRC, OPSC and/or OPAC by a State party to that treaty and to OP3 CRC
WHERE	=	To the Committee on the Rights of the Child

slide 6



Key provisions of OP3 CRC

Article 7 – Admissibility requirements

A communication is admissible if it is:

- ➔ Written
- ➔ Not anonymous
- ➔ Violation did not occur before the entry into force of the OP, except if continuous violation
- ➔ Domestic remedies have been exhausted, except if ineffective or unduly prolonged
- ➔ Submitted within one year of final decision, except if impossible

slide 7

Key provisions of OP3 CRC

Article 13 – Inquiry procedure for grave or systematic violations

- ❖ Additional, optional mechanism (opt-out)
- ❖ Open to any actor (not only to victims)
- ❖ Reliable information indicating grave or systematic violations
- ❖ No need to exhaust domestic remedies
- ❖ Confidential but information is transmitted to the State concerned
- ❖ Possibility of country visit, with the consent of the State

slide 10

Why a state should ratify OP3?

It shows the real commitment
of the State **to take children's
rights seriously**

slide 8

Where are we now?

28 February 2012: the Protocol was open to signature and ratification by UN Member States

As of 7 June 2013, 36 States signed the Protocol and 6 States (Thailand, Gabon, **Germany**, Bolivia, Albania and Spain) **ratified it.**

OP3 CRC needs to be ratified by ten countries to enter into force, and it will only enter into force in the States that have ratified it.

slide 11

Why a state should ratify OP3?

- ❖ All state (but three) have ratify the CRC (so, are committed to **respect, protect and fulfill** all children's right)
- ❖ Ratifying OP3 is **in line** with this commitment
- ❖ It **strengthen** the monitoring mechanism (which should be the aim of the State)
- ❖ The OP3 **doesn't create new rights**, it just guarantees a better implementation of the existing ones
- ❖ The CRC is the **only UN Treaty without** such a mechanism
- ❖ It's complicate to ask other States to ratify if Europe doesn't

slide 9

Why is OP3 CRC important?

- ❖ It **strengthen** the monitoring mechanism of the CRC (only UN treaty without such a mechanism)
- ❖ It gives more **power** to the Committee and a bigger capacity to ensure the monitoring of the CRC
- ❖ It allows the Committee to develop **international jurisprudence** and provide authoritative **interpretation** of the CRC provisions and states obligations

slide 12

Is it complicate to ratify?

- ❖ It **doesn't need a lengthy and thorough analysis** : it is similar to all other communications procedure
- ❖ It doesn't create as such **new obligations** to the State party
- ❖ Since the State has ratified the CRC (and other UN treaties and probably other communications mechanisms), it's the logical consequence of it

slide 13

Aim of OP3?

- ❖ The aim of the OP3 **is NOT to bring as many cases as possible** to the Committee!
- ❖ It is to **complete** the monitoring mechanism of the CRC at international level (and within the country - encourage States to look, evaluate, improve, equip, make accessible their national mechanism)
- ❖ It is also to look for a **friendly settlement** of a case

slide 16

Are there risks?

- ❖ It is unlikely the Committee shall be **overwhelmed** with complaints
- ❖ The mechanism will be left on the sidelines if it does not **receive the means to operate** (financial and human resources)
- ❖ In such a case, children will be **disillusioned** if they find that the promises are not kept
- ❖ The **length** of the procedure
- ❖ The **ineffectiveness** of the procedure if States don't implement the decision of the Committee

But the biggest "risk" is to improve the respect of children's rights

slide 14

Consequences of the ratification?

- ❖ Each State should **analyse, assess and strengthen** the mechanisms at NATIONAL level to give NATIONAL remedies to children's rights violations
- ❖ They should assess the **legal status** of a child towards the justice system
- ❖ They should ensure that children (all children under their jurisdiction) receive **information** about these mechanisms and the OP3
- ❖ They should include the OP3 into the **training** of all professionals working with children

slide 17

Views of a field worker?

- ❖ Ratification has an important **symbolic significance**
- ❖ Ratification reaffirms States **commitment** towards children's rights
- ❖ Civil society will have an **important role to play** in informing children and supporting in their complaints

slide 15

Consequences (II)?

- ❖ Each State should put in place mechanisms **to support children exercising their right to complain** (at national and international level)
- ❖ Guarantee a free, easy and child friendly **access to legal aid** for children exercising their right to complain
- ❖ States should also support the UN to ensure its capacity to comply with this new mission (in particular the Secretariat of the Committee and the **Complaint Procedure Unit of the UN**)

slide 18

Final thoughts ?

- ❖ One will have to make choices between all international mechanisms when it comes to help a child to complain at international level :
 - ECHR (individual complaints under the European Convention on Human Rights)
 - European Court of Justice
 - European Committee of Social Rights (ECSR) for collective complaints
 - Other Treaty bodies (Civil rights, Non discrimination, etc.)
 - CAT, CPT, etc.
 - Working group on arbitrary detention

Benoît van Keirsbilck*, Director, Defence for the Child International, Belgium

Impact of the OP3 on the work of the CRC Committee

Justice Renate Winter



Ratification

Finally, we are there, or almost! Just one more ratification (ten are necessary) by a Member State and Optional Protocol number 3 to the Convention on the Rights of the Child will enter into force after three months.

Preparation for implementation:

- the Rules of Procedure are written and endorsed,
- the Petitions Unit of the United Nations Office of the High Commissioner of Human Rights has been functioning for a long time and is ready for OP3 (is it really? taking into account the scarce staffing of the office!) and
- the members of the Committee of the Rights of the Child are elected professionals, familiar with the above mentioned Rules of Procedure.

So far, so good. At least in theory. The practice, as always, might show a different picture.

Practical considerations

Let's see, dear Reader, how the three different mechanisms, that is the individual complaints, the inquiries and the inter-state communications, function and if it is really possible for them to do so. And let's take into consideration as a basic condition that OP3 is designed first of all to make it possible for children to seek redress for breaches of their rights by a State Party.

For this purpose, let's imagine the following situation:

A 12 year old boy from a member State to the CRC lives in a so called orphanage put there by his widowed mother. His right to have visits by members of his family has been violated, because the director of the institution didn't at all like the behaviour of the boy and, in retaliation, forbade such visits for one year. Furthermore, in order to effectively supervise the boy, all his letters to his

mother were opened, censored and often not sent. Thus his right to privacy has been violated too.

What can the boy do?

Almost certainly, the boy will not do anything, because he, like most children worldwide, doesn't even know that he has rights and that these rights can be violated.

As a consequence, you will agree, dear Reader, that, before the OP3 can become effective, the children of our planet have to be informed about their rights and the possibilities to ask for their implementation.

Let's imagine that the boy knows about his rights. Will he consider complaining? Most probably, once again, he will not. He knows by experience that complaining means extra punishment, and a severe punishment too.

As a consequence, you certainly will agree, dear Reader, that for the children of our planet who wish to complain about a violation of their rights, a protection mechanism that cannot, or at least not easily, be circumvented, has to be set up, before the OP3 will become effective.

Let's again imagine, for the purpose of our consideration, that the Member state in question has set up a mechanism to protect children who want to complain. The boy now wants to send a so called communication letter, as he would call it, to the Committee. The letter can be sent only if all the legal proceedings of the Member State in question have been exhausted. (There is of course as well a procedure for emergency cases where this requirement is not prescribed, but the right to privacy and the right to have visits of the family is maybe not a real emergency matter.)

You will again agree, dear Reader, that it is really cumbersome for the boy, if not impossible, to get a final verdict in his case, not knowing a lot about legal proceedings and not having legal assistance of a knowledgeable person, even if the Member State in question has set up a free legal aid system (which not many Member States have introduced in their legal systems for child victims anyway). Thus you will certainly agree that free access to legal aid has to be set up for the children of our planet, before the OP3 will become effective.

State mechanisms exhausted

Let's imagine that the boy got a final verdict in his case during the time he lived in the institution, which by itself is not at all assured, given the usual length of a full legal procedure and that he now wants to write the letter to the Committee.

He has to write the letter in a language of the UN, in English, French, Spanish, Russian, Chinese or Arabic. Unfortunately none of these languages is his mothertongue (as is the case for many children worldwide) and unfortunately his school didn't provide enough knowledge for writing a complaint letter in any language.

Of course there is always a possibility for a child not to write a letter but to send a drawing, a cartoon, a video, a CD, a DVD, but none of these possibilities are available for the great majority of all children worldwide, save the first one, the drawing. But, once again, you will agree, dear Reader that not every child is gifted enough to draw a picture about the violation of his/her rights, especially if pencils and paper and envelopes and stamps are not available to that child.

Availability of assistance

Of course, dear Reader, you will argue that a child, while addressing the CRC, will have the assistance of an NGO, a lawyer, his/her parents or caregivers and that therefore pencils, paper etc will certainly be available as well as some kind of assistance in formulating a letter along with an interpreter, not to speak about help with the typed forms for complaints available on internet.

Unfortunately this is exactly what most of all children whose rights are violated don't have: an informed adult, interested in assisting them and certainly in most of the cases no access to the internet to get information themselves. And didn't we say that first of all the OP3 is established to secure the access to the CRC for redress for children especially? Do you agree, dear Reader, that unconditional assistance of an adult has to be granted for all children of our globe, before OP3 will become effective?

A letter is sent....to Geneva

Let's imagine that our boy had such assistance and could finally write his complaint letter and send it to the CRC. Who is going to get it? Who is doing what with it? According to the complaint mechanisms of all treaty bodies, (and the CRC is no exception) the Petitions Unit of the United Nations Office of the High Commissioner of Human Rights in Geneva will get it.

There are not many people working in that Unit, as the UN has to save costs and they have to deal with all complaints of all treaty bodies, as mentioned above.

So, let's hope that there are not too many children complaining at one time and that there are not too many letters coming from other entities, as otherwise the Unit will be overloaded. The Unit will have a first look at the complaint to see if all conditions mentioned in the Rules of Procedure are fulfilled, otherwise it will not accept the letter. Thus, let's hope that our boy and his assistants have known about all the conditions and have fulfilled them. Certainly not an easy task for a child, you agree, dear Reader?

After the complaint is accepted....

Once a communication reaches the Committee for consideration and the Unit at first sight doesn't find any flaws, the Optional Protocol and Rules of Procedure together determine whether and how it will be admitted and examined. This of course takes time, because, when the Committee accepts the complaint, it has to get in touch with the government of the Member State in question and ask for a response.

To answer, the government will have up to 6 months to make its response and if the answer is not satisfying enough, the committee has the right to ask questions anew.

When all the necessary documents are before the Committee (and that can take quite a lot of time) considerations can start.

The CRC Committee

You will agree, dear Reader, won't you, that one has to know who will be the person or the persons of the Committee mandated to review a case. There must be a mechanism set up to find out who decides (the president of the Committee, a subcommittee?) about who has to do the review (one member of the Committee?, a group of members? what if a mandated member falls ill etc), and how is communication with the Unit to be established (what will be the necessary time, the maximum time? who has to get the answer to the parties involved? who has to monitor if the State party applies the recommendation(s) given?) All that has to be established clearly and unequivocally even before our boy will be contacted. Let's hope that the boy gets his assistance before he leaves the institution as an adult, don't you agree, dear Reader?

Getting the complaints procedure going

It doesn't seem easy to get the planned access for complaints to the Committee for children going, does it, dear Reader? Especially not for children who are really in need of assistance, because the Member State is not willing or ready to act and might try everything in its power to prevent a complaint reaching the Committee, to prolong the procedure and evade its responsibility, because there is nobody who cares for the child, or maybe because there are too many children living a life of abuse, pain and neglect in the member State suspected of widespread violations of children's rights.

The complaints procedure in this regard is already clear and rather typical for a treaty body;

- Members of the Committee have to be elected to deal with complaints;
- reports by the members are written (in what time?) and sent to the State;
- the answer from the State government (6 months) is awaited

INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

- discussion of the issues with the government (hopefully willing to cooperate) follows and
- finally the Committee monitors the implementation of its recommendations (if possible, as usually there is no travel money for members of the Committee; otherwise monitoring will be during the usual five yearly reporting process for a country, if the problem is still acute).

Let's just hope, dear Reader, that the whole process will go smoothly and be timely, as widespread abuses of children do need a swift reaction!

Interstate communication

Finally, the Committee can act in cases of interstate communication, when one Member State accuses another Member State of child rights violations. How often will that happen in the best interest of children, do you think, dear Reader? And how often will it be another political tool in a battle between governments of States which are not happy with one another?

Taking all the difficulties into consideration that affect the practical implementation of the OP3, the near future doesn't seem too brilliant for its impact. Maybe in the not so near future, its jurisprudence can and will make a change.

There will be communications which will show real problems that have to be solved because states are not willing to do it. There will be issues brought up by NGOs in the name of children, by groups of children which might need a decision providing directives for the future development of child's rights, given just like judgements in international Courts to assist Member States to get their strategies in order.

This way, the OP3 will most certainly have an important impact in our globalized world for the children of our planet, you agree this time again, dear Reader?

Justice Renate Winter*

Member of the CRC

What if Pakistan ratifies OP3 to the UNCRC**Abdullah Khoso**

In 2012, civil society organizations (CSOs) urged the government of Pakistan to sign and ratify the third Optional Protocol (OP3) on a Communications Procedure to the United Nations Convention on the Rights of the Child.¹ The Child Rights Movement (CRM) - a coalition of more than one hundred organizations working to promote and protect child rights in Pakistan - stated that OP3 allows individual children, groups or their representatives to complain to the Committee against the State, but the government has not signed and ratified it. During the Universal Periodic Review (UPR) of Pakistan in October 2012, Slovakia also urged Pakistan to ratify OP3.² However, Slovakia too has not signed and ratified OP3.

Children's Complaints Office (CCO)

One of the reported reasons for not signing and ratifying OP3 is that Pakistan already has a Children Complaint Office (CCO)³ which implies that Pakistan has strong, independent and effective complaint mechanisms and that the situation in Pakistan is good.

The office of the CC comes under the Federal Ombudsman and is thus under the law⁴ and has a mandate to provide a mechanism for receiving and resolving:

- complaints from children and
- complaints about mal-administration by the federal agencies (run by the Federal Government), but
- **not** where there has been mal-administration by provincial agencies (run by Provincial Governments).

Unfortunately, the CCO, now the Commissioner for Children (CC)⁵, has jurisdictional limitations.

A United Nations agency supports Children's Complaints Offices at provincial Ombudsmen's offices but they have no legal standing.

Civil society organisations (CSOs) are seriously concerned that the office of the CC is not able to play an effective role⁶ and its scope and procedures are complicated and, perhaps, not child friendly⁷.

Provincial Ombudsmen

The Sindh, Khyber Pakhtunkhwa and Punjab provinces have introduced provincial Ombudsman laws and set up provincial Ombudsmen's offices. These Provincial Ombudsmen offices have a mandate to provide protection to women, children and others. These offices will not act automatically but wait for a formal complaint to be lodged by aggrieved children.

In addition, these offices will not entertain cases which are pending in the courts and courts in Pakistan hardly ever conclude trials in a timely manner - cases may take years to conclude.⁸

There are a number of such cases involving juveniles pending in both the Supreme Court of Pakistan and in the Juvenile Justice System, which is governed by the Juvenile Justice System Ordinance (JJSO) 2000. This Ordinance was struck down on December 6, 2004, by the High Court of Lahore which named it unreasonable,

¹ Pakistan UPR Stakeholder Report: April 2012 The Universal Periodic Review (UPR) Pakistan : The State of Children's Rights in Pakistan by the Child Rights Movement (CRM) Pakistan

² Pakistan's UPR Outcome document by the Office of the High Commissioner of Human Rights: Recommendation number: 122:10

³ Society for the Protection of the Rights of the Child (SPARC) (2013), The State of Pakistan's Children 2012; Islamabad; page 10

⁴ The Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983

⁵ Head of the Children Complaint Office has been appointed as the Commissioner for Children

⁶ Express Tribune (2013), Child Laws in Pakistan at <http://tribune.com.pk/story/487484/child-laws-in-pakistan/>

⁷ Mahmood, A (2011), Child Rights (Chapter) in the State of Pakistan's Children 2010; Society for the Protection of the Rights of the Child (SPARC), Islamabad.

⁸ The Committee on the Rights of the Child under Article 7(e) OP3 may consider entertaining complaint if the state or its departments have unreasonably prolonged the trial or unlikely to bring effective relief to the child or child rights situation;

unconstitutional and impractical⁹, “because it contained such downright absurdities as to create havoc in the country’s criminal justice system”¹⁰.

The judgement said the JJSO is “inconsistent with and violative of Articles 4, 9 and 25 of the Constitution besides being replete with incompatibilities with other laws”.

It also declared that the ~~so~~ “so-called ‘rights’ of children” are not laid down in the Constitution of Pakistan and

any “special provisions” giving “additional advantages” to women and children

“cannot be allowed to have the effect of denying others their own rights under the said or other provisions of the Constitution”¹¹

In 2005, the Federal Government and Non Governmental Organisations took the matter to the Supreme Court which restored the JJSO until it (the Supreme Court) has had time to decide on it. The outcome is that when a case involving the JJSO reaches the Supreme Court it stays there awaiting that Court’s decision on the constitutionality of the JJSO. There is no indication that the Supreme Court will come to a decision soon. The possibility of a case going to the Supreme Court causes a very long delay before a case is heard and finalized at the trial court (the lower district court) except in matters pertaining to bail.

Exhausting all avenues for justice within a country.

Three case histories demonstrating prejudicial delay

1. Since 2010, in Machh jail of Pakistan, 4 juveniles¹² have been living in solitary confinement awaiting their appeal cases to be heard in the High Court of Balochistan. All of them were given death sentences in murder cases.¹³
2. In 2009, a 15 year old girl (A) was continuously raped by her paternal uncle for several years in Karachi. She was about to

commit suicide when her aunt saved her and took her to the nearby Mahmoodabad police station, where they described the rape story to male police officials. The police arrested the culprit but released him on the same day without any further investigation. After this deep disappointment, her aunt took her to the Women Police Station Shahr-e-Faisal, Karachi, where the First Information Report was lodged on 24th June 2009- [First Information Report No 13/09 under Section 376 of the Pakistan Penal Code]. The Women Police sent her for a medical examination, seven days after the last incident. The medical report proved that she was non-virgo but it did not prove that the accused person was responsible for it. There was no proof to show she had been raped. As a result, the culprit was released within a year. The child’s mother shared [with the author, when he was working with SPARC in its Karachi office in 2009] that they were extremely poor; they could not afford legal fees of lawyers and transport fares. They could not face people and questions in the Court. They did not dare to go for the next option of the High Court, which they considered only humiliation for them.

3. In May 2005, the District & Sessions Judge Ghokti (in Sindh province of Pakistan) pronounced the death sentence for Ateeq Ahmed for committing murder in February 1999. He was arrested on the day of the murder. The District Court ignored Ateeq’s plea of juvenility and did not refer Ateeq to a medical board for age determination (age ossification). In April 2006 on Ateeq’s appeal, the High Court of Sindh bench at Sukkar referred the matter to a medical board, which revealed that Ateeq was aged only 12 or 13 at the time of the offence.¹⁴ In February 2012, however, Ateeq’s appeal was turned down by the High Court Sindh bench at Sukkar where the court did not give consideration to the age given in the medical certificate. Within 90 days, Ateeq filed a Jail Petition (appeal)¹⁵ in the Supreme Court of Pakistan. In August 2013, Ateeq’s appeal was accepted in the Supreme Court and he has been given a date for the hearing of case. Ateeq is still in the Central Prison Sukkar-I.

If the Supreme Court considers Ateeq a juvenile based on the medical certificate, then his death sentence will be converted into life imprisonment¹⁶, which he has already

⁹ Amnesty International at <http://www.amnesty.org/es/library/asset/ASA33/026/2005/es/4/82b9c27-d4a6-11dd-8a23-d58a49c0d652/asa330262005en.html>

¹⁰ Asian Human Rights Commission (2005), Pakistan: Lahore High Court Strikes Down Juvenile Law [News] at <http://acr.hrschool.org/mainfile.php/0214/418/>

¹¹ Amnesty International at <http://www.amnesty.org/es/library/asset/ASA33/026/2005/es/4/82b9c27-d4a6-11dd-8a23-d58a49c0d652/asa330262005en.html>

¹² Sarfaraz Shah was 16 and Bhai Khan, Naseerullah and Zahor Ahmed were 17 years old at the time of commission of the offences. Sources: CRIN at http://www.crin.org/docs/pakistan_final1.doc SPARC’s annual report on the State of Pakistan’s Children 2010 and 2011 [Chapter Administration of Juvenile Justice].

¹³ Khoso, N.A. (2012): Justice for Juvenile Offenders, in Dawn Newspaper at <http://beta.dawn.com/news/688906/justice-for-juvenile-offenders>

¹⁴ Child Rights International Network (2011); PAKISTAN: Inhuman sentencing in practice at <http://www.crin.org/resources/infodetail.asp?ID=24902>

¹⁵ JP 31/2012

¹⁶ Because under Section 12 of the JJSO death sentence cannot be awarded to children under 18 years

completed¹⁷, and he would be released. If the Supreme Court does not change the death sentence, then he could again appeal for review of the petition by the Supreme Court; if the review petition does not bring anything for Ateeq, then he could finally appeal to the President of Pakistan¹⁸ who can convert his death sentence into life imprisonment. But in order to reach this final option involving the President, Ateeq has to wait perhaps several more years. Ateeq's father shared on the telephone with me that he had spent too much money on Ateeq's case but all was useless. He cannot afford heavy fees of the Supreme Court lawyers but have been managing by borrowing from relatives, he said.

Ateeq's case is not only the case in Pakistan where are numbers of children who have been unable to exhaust all options for redress. Perhaps in this scenario it would not be easy for children to seek help from the Committee on the Rights of the Child. Perhaps more rigorous steps for the implementation of child rights within strong judicial and quasi-judicial systems are needed.

Understanding the system

A dark aspect to this complaint system¹⁹ in Pakistan is that people and children do not know if there are avenues for redress or complaint; even if they know about those venues, time and financial resources are needed to pursue their cases. But the more serious issue is that people have little or no trust in the institutions which are responsible for providing justice to children; this includes the police, lower judiciary, lawyers, prosecution departments and Commissions. There are serious elements of corruption and nepotism at all levels that discourage children and their families from going for the next option for remedy in Pakistan.

Non-Governmental Organisations

In addition to the courts, CCOs and the CC, there are national and provincial human and child rights/protection institutions²⁰ but none of these are powerful, strong and effective to address individual as well as collective complaints of children who are victims of abuse, exploitation and violence.

Ratification of OP3 by Pakistan

Given the nature of child rights violations, which include rapes, murders, extra-judicial killings, enforced disappearance, trying children under Anti-Terrorism Laws and so on, it is not likely that Pakistan will ratify the OP3 in the near future.

Even if Pakistan ratifies the OP3, in the short term, it does not seem possible that children can lodge complaints with the Committee in light of its criterion Article 7 (e) that all available domestic remedies must have been exhausted²¹. If children lodge complaints with the Committee, they might well face complications and may jeopardize their safety and protection. It may also be possible that state institutions may influence witnesses and evidences.

In the long run, OP3's existence will bring a meaningful change in children's lives in Pakistan, whether Pakistan ratifies it or not. It is hoped that the very existence of OP3 may pressurize Pakistan to establish its own effective redress mechanisms to address children's complaints and make information about the mechanisms more widely known and available to children and their families.

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¹⁷ Ateeq has been in prison 14 years

¹⁸ Under Article 45 of the Constitution of Pakistan, the president has the power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

¹⁹ Available at different levels, forums and institutions

²⁰ For instance the KP Child Protection Welfare Commission, the National Commission for Human Rights, the Sindh Child Protection Authority

²¹ All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

Litigating children's rights at the continental level— the experience of the African Committee of Experts on the Rights and Welfare of the Child¹

Professor Julia
Sloth-Nielsen



This article commences by providing an overview of the work of the African Committee of Experts on the Rights and Welfare of the Child (hereafter African Committee), the body established under the African Charter on the Rights and Welfare of the Child (1990) to monitor its implementation. Thereafter, the communications procedure under the African Children's Charter is explained with reference to the Charter itself as well as to the rules of procedure developed by the African Committee in 2006. The discussion in the next section turns to the finding of the Committee in the first communication in which a finding was made, namely the so-called Nubian Children case.² A concluding section highlights challenges and raises some procedural issues. Practice which can be used to inform children's rights litigation at the international level once the 3rd Optional Protocol to the Convention on the Rights of the Child (hereafter CRC) enters into force is also mentioned.

1. Overview of the work of the African Committee

The African Children's Charter was developed in response to a continental view that African concerns had not been sufficiently assimilated during the drafting process of the CRC, in which only four African countries had been represented.³ It was intended to be complementary to the CRC; although many provisions are replicated in similar,

or slightly similar terms, provision is also made for heightened protection on issues such as harmful social and cultural practices, child marriage, child soldiers and children who are imprisoned with their mothers, amongst others.⁴ The Charter (comprising 31 substantive articles as seen against the 40 substantive articles of the CRC) uniquely provides for the responsibilities (or duties) of the child, commensurate with his or her evolving maturity. Although formulated and adopted in 1990, the Charter entered into force only in 1999 after receiving the requisite number of ratifications.⁵ To date, 47 states parties have ratified the Charter, and the African Committee is presently communicating directly with the African governments who still remain to ratify in the expectation that universal continental ratification is possible within the foreseeable future.

The 11 member Committee of Experts are elected by the Assembly of Heads of State of the African Union (previously the Organisation of African Unity).⁶ The first Committee of Experts took office in 2002. The Committee ordinarily meets twice annually for a week: compare to the CRC Committee which meets thrice annually for three week sessions. The first part of the millennium was spent drafting the Committee's (various) rules of procedure, and at least until 2006, it could truly be alleged that the Committee had not achieved much in the way of substantive work: state party reporting has been slow, and, despite the Charter requirement that initial reports be submitted within two years of ratification,⁷ the first state party reports were received for consideration only in 2007. To date approximately 17 state party reports have been reviewed. Recent indications are that more than six reports will require consideration in 2014, leading to concerns about the Committee's capacity to do this effectively in the (mere) two weeks allotted for ordinary sessions per annum.⁸

⁴ G Bekker & The African Committee on the Rights and Welfare of the Child in M. Ssenyonjo (2012) (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* 249-263 (Brill publishers, The Netherlands).

⁵ 15 ratifications were required for entry into force.

⁶ Chapter 2 of the Charter, set out in articles 32-37, describes the organisation and mandate of the Committee of Experts.

⁷ Article 43(1); periodic reports are required thereafter every 3 years.

⁸ The Committee resorts under the Department of Social Affairs of the AU and does not (yet) have an autonomous location which would enable it to function independently of the AU (eg in respect of translation, venues, and assistance of other stakeholders). Since the AU calendar is very crowded, it has been difficult to motivate for additional meeting times.

¹ This article draws substantially on a chapter prepared for T. Liefwaard and J. Doek *Litigating Children's Rights* (forthcoming, 2014)

² This article uses the terms 'decision' and the 'finding' of the Committee interchangeably.

³ Only Algeria, Morocco, Senegal and Egypt had participated in the drafting process of the CRC: see D Chirwa, (2002) The merits and demerits of the African Charter on the Rights and Welfare of the Child 10(2) *International Journal of Children's Rights* 157.

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The mandate of the Committee of Experts is set out in Chapter 3 of the Charter, in articles 42- 45, and is at first blush obviously far more extensive than that of the CRC Committee. Article 42 (headed *Mandated*) refers to the function of collecting and documenting information, commissioning interdisciplinary assessments of situations on African problems in the fields of the rights and welfare of the child, organising meetings, encouraging national and local institutions concerned with children's rights, and giving its views and making recommendations to governments. It is further mandated in this article to formulate and lay down principles and rules aimed at protecting children's rights, and to co-operate with other African, international and regional institutions and organisation concerned with the rights of the child, as well as monitoring the implementation of the Charter and interpreting its provisions.

Article 43 governs the reporting procedure, which has already been mentioned. Article 45 covers investigations that the Committee may undertake, on any matter falling within the ambit of the present Charter as well as the mandate to request information relevant to the implementation of the Charter from State parties to the Charter. It is article 44 which deals with Communications, which forms the subject of the next section.

2. The procedural architecture

Article 44 concerning the Charter's communications procedure is brief, comprising only two sections:

1. The Committee may receive a communication from any person, group or nongovernmental organisation recognised by the African Union, by a member state, or the United Nations relating to any matter covered by this Charter.

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

From this, the procedural workings of a communication are not apparent. Such matters as the level of substantiation required to underpin a communication, whether the victim or the person or group whose rights have allegedly been violated must know about or consent to the communication being brought, whether domestic remedies must first be exhausted, and how communications brought to the Committee relate to possibilities for parallel processes to be underway elsewhere in the African human rights system are not spelt out.

Hence when the first communication under the Charter was received by the Committee (in 2006), it was first necessary for the Committee to develop *Guidelines for the Receipt of Communications*⁹

⁹ The Guidelines were adopted at the 8th Ordinary meeting of the African Committee of Experts on November/December

The Guidelines provide admissibility criteria in three domains: with reference to the author; the form of the communication; and the content.

The author requirements clarify that communications may be presented by individuals, including the victimized child and/or his parents or legal representatives, witnesses, a group of individuals or non-governmental organizations recognized by the African Union, by a Member State or by any other institution of the United Nations system. The author of the communication shall specify either to have been a victim of violations of the rights spelt out in the Charter, or to act on behalf of a victim or of other eligible parties. However, a communication may be presented on behalf of a victim without his/her agreement on condition that the author is able to prove that his/her action is taken in the best interest of the child. The victimized child who is able to express his/her opinions shall be informed of the communications presented on his/her behalf.¹⁰ Bekker¹¹ comments that this is a broad *locus standi* provision.

As regards the form of the communication, no communication shall be considered by the Committee if it is anonymous; if it is not written; and if it concerns a State non-signatory to the Charter.¹²

Concerning the content, the following is required:

- The communication must be compatible with the provisions of the Constitutive Act of the African Union or with the African Charter on the Rights and Welfare of the Child;
- The communication must not be exclusively based on information circulated by the media;
- The same issue must not have been considered according to another investigation, procedure or international regulation;¹³
- The author must show that he or she has exhausted all the available appeal channels at the national level or explain that the author not satisfied with the solution provided at the national level;

2006. See BD Mezmur (2007) *Still an infant or a toddler? The work of the African Committee of Experts and its work on the 8th ordinary session* (2007) 7:1 *African Human Rights Law Journal* 276-270.

¹⁰ Chapter 2 article 1.1-1.3 of the Guidelines (which can be accessed at www.acerw.org).

¹¹ Bekker (note 4 above).

¹² Chapter 2 II 1 of the Guidelines. There is an unusual savings clause that a Communication may be received in respect of a non- state signatory if this is in the best interests of the child; however, with near universal ratification of the Charter, it is only a remote possibility that this may arise.

¹³ This renders it more or less impossible that the same matter could be brought to the African Committee and the CRC Committee, and conflicting responses emerging.

- The communication must be presented within a reasonable period after appeal channels at the national level have been exhausted; and
- The wording of the communication shall not be offensive.¹⁴

The communication will generally be considered by a working group of two or three committee members, who will consider the admissibility of the communication, advise the outcome of this decision to the author, and to the state party concerned, and who may request any further or additional information. The Committee's working group may request the presence of the author or authors, and the state parties concerned, to provide further clarifications, and may conduct ~~on~~ the spot investigations.¹⁵ The Committee's actual deliberations on a communication are held in closed session. Only general matters of a procedural nature pertaining to article 44 may be held in open session, a practice which gives practical effect to the principle of respect for state signatories.

Chapter 3, Article 3.1 and 3.2 of the Guidelines provide that the Committee should take measures to ensure the effective and meaningful participation of the child or children concerned by the consideration of the validity of the communications and its author, and that when the child is capable of expressing his opinions, he should be heard by a Committee member. To date, practical effect has not yet been given to this injunction, as only one communication has (at the time of writing) been fully finalised.

3 The 'Nubian Children Case'

This complaint was brought by the Institute for Human Rights and Democracy in Africa (based in The Gambia) and the Open Society Justice Initiative. The communication was based on an alleged denial of Kenyan nationality to persons of Nubian descent born in Kenya,¹⁶ a violation of articles 3 (non-discrimination) and 6 (right to name and nationality) of the Charter; it was also averred that there had been consequential violations of the socio-economic rights to education and health care under articles 11 and 14 of the Charter. At the 15th ordinary session of the Committee, the communication was deemed to be admissible. Evidence has been submitted that the matter had served before a High Court in Kenya for some seven years, with judgment not having been given. It was concluded, therefore, that local remedies were de facto exhausted since they were not effective or efficient. The argument was put forward that the delay in adjudication of the case in the national courts rendered the local remedy ineffective.

In March 2011, a finding was made against the Government of Kenya, *in absentia*. The Government had been advised through the appropriate official channels of the Committee's intention to consider the merits of the communication; but Government did not take the opportunity to present any argument or submit opposing papers.¹⁷ The African Committee reasoned that children's best interests demanded that it consider the Communication on its merits, and that it could not be in children's best interests to be left in legal limbo for a protracted time. As a result, the Committee heard oral argument by the complainants, and scrutinized the validity, legality, and relevance of argument through a series of questions.¹⁸ A large volume of substantiating documentation, including statements from affected descendants, formed part of the communication.

¹⁴ Chapter 2 III 1(a) . (f). These criteria are drawn from prior jurisprudence of the African Commission on Human and People's Rights, which commenced receiving communications in the early 1990s.

¹⁵ See Guidelines Chapter 2 V 4, which uses this terminology.

¹⁶ Originally the Nubians had served in the British armed forces and they stayed behind after independence in 1960. However, they were not granted land and since descent is linked to ancestral land tenure, they were excluded from the civil registration system. This background is set out in the finding on the communication *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v The Government of Kenya* Decision: No 002/Com/002/2009, available at www.acerwc.org/wp-content/uploads/2011/09/002-09-IHRDA-OSJI-Nubian-children-v-Kenya-Eng.pdf (accessed 10 June 2013). See E Durojaye and E Foley (2012) *Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication* *African Human Rights Law Journal* 564-578.

¹⁷ See paras 9, 10 and 11 of the communication. The finding indicates that a Note Verbale was sent in June 2010 and again in February 2011.

¹⁸ Para 12 of the communication.

Kenya was found to be in violation of children's rights to non-discrimination, to nationality and to protection against statelessness. The Committee regarded the overall thrust of the violation as centrally linked to protection against statelessness, which is accorded substantial discussion in the body of the decision: the implications of the multi-generational impact of the denial of right of nationality are manifest and of far wider effect than may at first blush appear in the case. Systemic under-development of an entire community has been alleged to be the result.¹⁹

Consequential violations of their socio-economic rights to health and education, as alleged, were also confirmed, and characteristic of the decision is the indivisibility of rights as a core theme, as rights generally regarded as civil and political rights spill over into those traditionally regarded as being socio-economic rights. Furthermore, the Committee draws on the unique provisions of article 31 of the Charter (the duties of the child) and links this to the denial of nationality to the children born of Nubian descent, noting that because they have been born in Kenya, they are subject to the requirement of their serving their national community by placing their physical and intellectual abilities at the service of the nation, as well as preserving and strengthening social and national solidarity and the independence and integrity of the country. It was not suggested that the fulfilment of these duties is contingent upon their status as nationals and their identity as children of Kenya, but it was argued that the fulfilment of article 31 responsibilities highlights the reciprocal nature of rights and responsibilities, which reciprocity is not fulfilled when article 6 rights are not respected by the State concerned.

In the judgment, the Committee does refer to the CRC²⁰ and the concluding observations that that Committee issued in response to the Kenya Country Report in 2007, but it is noticeable that the jurisprudence of the African Commission on Human and Peoples Rights was given a more prominent place.

It has been suggested that the Nubian children case represents a promising start to litigation for children's rights at the continental level.²¹

4 Ugandan case

The finding of a violation in a second case, against the government of Uganda (for the use of children in the war against the Lords Resistance army in the period 2002-2005) was accepted at the 22nd ordinary meeting of the African Committee in the first half of 2013, following a site visit (mission) by members of the Committee to the affected territory to interview people at grassroots level. The Committee's decision was

communicated to the Government of Uganda at the AU Heads of State meeting in mid 2013. However, a reasoned decision setting out the bases for the relevant findings has not yet been published or shared with the Government concerned. Therefore it cannot be stated definitively what the consequences of the Ugandan decision will be, or what contribution to child rights jurisprudence could be made as a result of this communication.

Conclusions

First, it is apparent that since 2002 when the first Committee took office, only one decision has been conclusively dealt with. This is indicative of slow progress. Admittedly, Guidelines had to be developed, there were issues with translation of the first communication into the official languages of the Committee and government and complainants had to be afforded an opportunity to defend their positions at one of the two annual committee meetings. Also, national processes have first to be exhausted, where applicable. It is suggested that the CRC Committee cannot, in all likelihood, expect a flood of cases from the inception of the coming into operation of the Optional Protocol.

Second, it has become evident that treaty bodies are not courts of law, and that they lack the forensic tools of adjudication of courts of law (evidence, cross examination, the ability to call witnesses and so forth). Hence, when two contradictory versions surface, the treaty body is not in a position to challenge one or the other version simply through dialogue with states parties. Hence the need to travel to Northern Uganda on a fact finding mission, which was rather uncharted territory.

Third, there is a need for awareness of the communications procedure under the Charter to be raised. The submission of only three communications (a third one is sub judice) in the 14 years that the Charter has been in force is worryingly low. If, as is widely thought, the communications procedure provides the vehicle for the detailed consideration of substantive violations of rights in concrete situations, then the nettle must be grasped and efforts directed towards more regular utilisation of this channel.

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¹⁹ Para 68.

²⁰ Articles 6, 7 and 24 of the CRC are referred to.

²¹ See J Sloth-Nielsen in Liefwaard and Doek, Note 1 above.

The role of the advocate in children's cases—myth and reality

Professor Amaury de Terwangne



Introduction

The question of the role of the advocate in children's cases has once again become the subject of lively discussion. Depending on the circumstances, an advocate may be:

- *the representative of the young person's interests*, a role which takes priority over all the others and which must guide adults ;
- *the confidant of the child's states of mind*
- *the arch-defender* of the weakest of human beings if in danger, or of the most dangerous if s/he has committed serious crimes ;
- *the omniscient guardian* responsible for acting on the child's behalf without taking too much notice of what he says ;
- *his legal advisor*, the defender of the rights to which he is entitled ;
- *the voice of the child* able by means of his training and intellect to grasp precisely what the child means and to communicate it exactly ;
- and, all too often, *a mere machine*, serving as a rubber stamp giving validity to the formulaic rhetoric of the rights of the child. In this role, whenever he feels tempted to, he will be asked not to interfere in the choices made by the other participants.

So the concept of the child advocate's role takes on many shapes in the public mind.

When in 2001 the Belgian Parliament wanted to legislate on the scope of the child advocate's responsibilities, the debates in the Senate's justice committee clearly demonstrated a confusion¹. In the preparatory material accompanying the draft text, the ideal profile of the child advocate of the future was set out in an extremely positive, but highly unrealistic, way. The child advocate should have a sympathetic approach derived from training in psychology and sociology. As a family mediator he would intervene constructively between parents in a crisis. According to the parliamentarians, he should have a calming effect during the process. He should rapidly be able to gain the confidence of young people and become their acknowledged confidant. Finally, the advocate should be the young person's spokesperson, but should slip into the guardianship role whenever the situation demands.

From another perspective, the attacks of those who decry child advocates often depend on the agendas they are pursuing. It is not unusual for a parent who « chooses » an advocate for their child during divorce proceedings to expect this « second advocate » to put forward a point of view identical to their own. If not, the parent will express astonishment or search for another advocate to look after the interests of the child as the parent understands them. Some magistrates have denounced advocates who put forward views that it is barely credible that their young clients hold. The reason for their anger is usually that the child advocate is there to defend the young person's interests and not to support a solution that the young person may have put forward but that runs counter to his interests.

Moreover, the young person's counsel now appears in a range of jurisdictions, civil and protective. This multiplicity has implications for the range of skills that advocates must have in order to do their job well.

The roles attributed to child advocates- or at least the ideal that people who are involved with young people have of them- are highly varied and as a result lead to uncertainty.

¹ Proposition de loi instituant les avocats des jeunes, Doc. Parl., Sénat, SO 2000-2001, n°2 256/1 à 7.

Legal developments

Before setting out the main features of what should, in my view, be the role of today's child advocate, it seems useful to look back over its development within the framework of the law of 8 April 1965²

Historically, this Act was the main channel of assistance by lawyers to young people. Studying it explains the way things went over the next twenty years.

The aim of the 1965 legislation was to make the child advocate more of an advisor than a defending counsel before the youth court³. At first, the 1965 law, by continuing a law of 1912, focused on determining *the interests of the young person* and on putting in place the necessary means for his protection and sound education.

Logically, the group of adults involved should all be working towards the same end: the young person's healthy development. That meant that the advocate had to drop his usual adversarial role in the judicial process. He spoke only at the end of proceedings and often had no choice but to agree with the youth judge's decisions.

However, the 1965 legislation brought the social sciences into the judicial arena. The youth judge is supported by social workers and can ask for the help of child psychologists. However, the advocate is not equipped with these skills as part of his training and that does nothing to promote his standing in the eyes of the court.

As a result, the concept of defending a young person either disappeared or was reduced to the bare minimum. There is absolutely no need to worry about the rights of someone who is the object of so much attention. The « people who know what is best for him » will take care of everything.

But little by little, this approach to youth protection was called into question.

Within the concept of youth protection, some emphasised an underlying wish to protect society that was little different from the child protection in the 1912 legislation⁴. However, the punitive aspects of the 1965 law, which focused on the young offender because youth support in Belgium had been put into the community, took on a position of equal importance to the wish to protect young people.

The recent reform of the law in 2006 clearly takes this line. It has the merit of partially resolving the ambiguity about the real objectives in the 1965 law. However, Parliament wanted young people to take on a greater responsibility for the offences they commit. The concept of the young person's welfare is modified by concern for the victim and for the protection of society. The judge can call upon a range of measures in response to what the young person has done and can make use of alternative or complementary approaches, such as mediation or group therapy.

Given these developments, there has been a refocusing of the discussion around the idea of a young person with *legal rights* and not the subject of *laws with therapeutic overtones*. The young person must play a full part in these procedures and has to establish his rights at every stage.

These battles raise problems because the role of the young person's advocate is not defined in legal texts. Judges, who think of themselves as the primary advocate for the young person, often see them as getting in the way of the solution.

In 1994 Parliament partially recognised the minor gains made by the youth services⁵. But even after that reform, young person's advocates often had to resort to the Court of Appeal or the Supreme Court to establish the clear right of young people to be defended in court.

At present, the right of the young person's advocate to appear before a youth tribunal at any stage seems to be accepted⁶, but at the price of slipping from the protectionist approach to one involving punishment. This change has become irreversible in Belgium and in several other European countries.

In my view, the role of the advocate varies depending on the situation :

- the advocate is acting at the young person's request in proceedings where the law does not require an advocate to be present ; or
- the advocate (who may either have been chosen by the young person or assigned to him) is appearing in proceedings where an advocate's presence is required by law.

It is clear that the role of the advocate in the first situation follows the classical one: in other words, help and support in putting forward the young person's case as the young person wishes.

² A law concerning youth protection, the treatment of young people who have committed an offence and making good the damage caused by this offence.

³ P. Henry, « les droits de la défense des mineurs devant les juridictions de la jeunesse », op cit. p. 2.

⁴ See, for example, M. van de Kerchove: "Des mesures répressives aux mesures de sûreté et de protection. Réflexions sur le pouvoir mystificateur du langage.", Rev. Dr. Pén. Crim., 1976-77, p.245 et seq.

⁵ G. Cappelaere, « Vers un code pénal de la jeunesse », in P. Mary le travail d'intérêt général et médiation pénale, socialisation du pénal ou pénalisation du social ?, Bruylant 1997.

⁶ Art. 52 of the law of 8 April 1965

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The second situation- carrying out a duty- has sparked considerable debate⁷, because the mandate arises from a different source- from the law rather than from the young person.

In the course of these debates, three basic models were identified⁸:

- **advocate as guardian** In this case, the advocate acts as if he were the child's guardian. He represents the young person and puts forward the defence that he considers will have the best outcome for the young person. He also takes the decision about whether to appeal. The advocate goes beyond the straight forward judicial model and takes on psychosocial aspects.
- **friend of the court.** The advocate has greater freedom of action and takes a more active part in working out the solution for the young person. He considers himself endowed with the role of an investigator and brings the results of his inquiries to the tribunal.
- **defence counsel.** This again is a classic role. The nature of his brief has more to do with the way he responds to the young person's age and lack of understanding of the law than with the range of issues dealt with. As guardian of the child's rights and his spokesman, he puts forward the young person's point of view and not his own ideas on the situation the child is in. If the young person either cannot or does not wish to express his point of view, the advocate does not put his own opinion forward. He simply makes sure that the judge has the means to arrive at a decision.

While in theory the distinctions between these models may seem straightforward, in practice this is far from being the case and there are several criteria that can influence the view that the advocate will have of his role. All the same, a willingness to take an educational role vis-à-vis the young person will affect how he carries out the job and often brings greater benefit to the young person than the advocate's speech.

In all of this, it is the young person's age that has the greatest effect. His youth, and resulting inability to formulate and put what he wants into words, rules out the idea of help in the way that it is understood in adult cases. An advocate cannot describe himself as the spokesman of a young person incapable of expressing himself.

The argument has been running for a long time and in their day Georges Hamacher and Bâtonnier Hannequart took opposite sides. The former insisted that the advocate was a defender, acting first and foremost as « someone in whom the young person could confide whatever he wanted and whose role was to defend him as a person and not to look after him »⁹. The latter allowed the advocate complete freedom of action- as a kind of temporary guardian to the young person- to be guided solely by his own conscience¹⁰. More recent authors have taken a more restrictive view of the advocate's role, which should be to stick to the young person's opinion and not to try to seek out his interests¹¹ in other ways.

Aside from these academic disputes, Stéphane Ambry has set out three fundamental reasons for a genuine defence for young people :

1. *respect for defendants' rights is a requirement of any democratic system of justice ;*

Nothing can justify measures, which often place limitations on freedom, outside the scope of the democratic principles enshrined in various national and international laws: the protection of young people is not just a theoretical matter, but a requirement of sound justice¹²

2. *protection of young people is guaranteed by the adversarial nature of the judicial process ;*

It is because of its adversarial nature that each participant can fulfil his role and check that the others are not deviating from theirs.

Within the youth justice framework, where each participant must carry out the function of a teacher, it seems necessary to give young people clear guidance on the aims and boundaries of each player's function.

The judge is not the young person's mentor; nor is his advocate, who has rather the role of amateur psychologist.

⁷ Vincent Sauvage et Patrick Henry, « Débat contradictoire, procédure et défense » / G. Hamacher, « Quelques réflexions sur le mandat de l'avocat du mineur devant les juridictions de la jeunesse », ds Dix ans devant soi, Ed. Jeune Barreau de Liège, 1989, pp. 29 et s. et Y Hannequart, « Le mandat de l'avocat et l'exercice de la défense devant les juridictions de la jeunesse » ibid, pp.11 et s. / Stéphane Ambry, « L'avocat dans la défense des mineurs », / Thierry Moreau, " Le rôle de l'avocat du mineur: les textes et la pratique", J.D.J., février 1999, n°182, p. 11 et seq.

⁸ Fr Tulkens et Th. Moreau, " Droit de la jeunesse", Larcier, 2000.

⁹ In a balanced argument, Me Hamacher emphasises the evolving aspect of the advocate's role. As the child grows and the advocate can put more distance between himself and his client, he becomes his spokesman, his « interpreter » to his hearers, his supporter and advisor. On the other hand, when dealing with a very young child, his advisor would need to give the judge his opinion on what he believes to be his client's best interests.

¹⁰ G. Hamacher, op. cit. pp. 29 et ss. and Y Hannequart, op. cit., pp.11 et seq.

¹¹ Th. Moreau, op cit. p. 463.

¹² S. Ambry, op. cit. p.7.

We often use an analogy that we call « the chess game » which is of great interest because it can show us a lot about the way we present our role and the roles of others. The participants are asked: « *suppose that the support and protection of young people took the form of a game of chess, which piece would you assign to each participant?* » Those involved split into groups and think about the chessboard. Is the child the king or a pawn? What about the judge and the prosecutor? How do the parents fit in? Are there black pieces on the other side of the board?

Unlike draughts, where all the pieces are the same and move in the same way, chess has pieces with different functions and values. Nevertheless, no one piece can win the game on its own, just as no individual has a complete picture of the young person's interests. All the pieces, with their strengths and weaknesses, have to help to put together a solution that meets the young person's interests both from an individual and a community viewpoint.

3. « *acknowledging the young person's right to defend himself helps to confirm his legal rights* »

Listening to what the young person says, given his right to express himself at various stages of the proceedings, helps to establish him within an educational process rather than in the sphere of social work: « With young people the advocate offers much more than advice and a defence. He orchestrates the professionals and this leads to the collective oversight of each participant. He requires of them legal rigour and professional competence. He asks them to review their rights, to rethink their skills and their roles and positions in the youth justice system. Through his control of the legal work the advocate also promotes the overall functioning of the youth court. »¹³

The European Court of Human Rights (ECHR) has issued directions which strengthen the concept of the advocate as defence counsel. The Court has said that for proceedings involving a young person to be fair in the sense of article 6 of the Convention it is not enough for him to be represented by qualified, competent lawyers; from the outset, the young person must be in a position to instruct them¹⁴. In doing so, the Court made it clear that the young person's lawyer must allow him to take a full part in his defence and should not decide the contents of the defence without his input.

Subsequently the Court has specified what is involved in the proper participation of the young person in the proceedings. « He must at least be able to follow the evidence given by witnesses and, if he is represented, be able to explain to his

lawyers his version of the facts, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.¹⁵ Ultimately the steering of the process lies in the hands of the young person and not the lawyers, thus ruling out the *guardian ad litem* and *friend of the court* models. The lawyer must be a defence counsel as that term is normally understood.

Defence counsel and spokesman

The directions of the ECHR and consideration of recent theory leads us to believe that the concept of *defence counsel* currently forms the central plank of the lawyer's mandate. Defending him should be the instinctive reaction of any young person's lawyer, whether he has been chosen by him or assigned to him and whether a lawyer's presence is mandatory or not.

This standpoint affords the young person greater respect as the bearer of rights. A young person, after all, quite probably has a greater need for someone who supports his word, will act as his spokesman and make sure he is heard rather than needing yet another protector.

Therefore, after explaining the details of the case, his lawyer must discover what the young person thinks about the issues before the court. He must also check the legality of the proceedings. This kind of role draws the lawyer into a framework of constant questioning.

Rather than giving an off-the-cuff view of what he thinks the young person's interests are, his lawyer should closely question the others involved about the options they are putting forward: have all the tools available within the law been used? has enough information been gathered for the judge to be able to reach a decision? have the risks identified at the outset been properly assessed? what factors might lead to an extension of any placement? why not restore parental authority and close the case rather than continuing with some ineffective form of supervision? do we need to keep the placement or supervision? could we improve the supervision so that the young person can stay in his own milieu?

Among the various influences on the lawyer's role, we have already emphasised the importance of the age of the young person. There are two significant milestones.

The first comes when the young person can express his views clearly enough for the lawyer to present them to the judge. Even quite young children have this ability. His lawyer's function is to convey these views and requests to the judge and to identify the ones that have been taken into account in reaching the decision- so that he can tell the young person why, from a judicial point of view, some of his requests were accepted but not others.

¹³ P. Benech-Le Roux, « A quoi sert l'avocat du mineur délinquant », CNRS, Bulletin d'information, juin 2004-XVII 3.

¹⁴ ECHR, 16 December 1999, *V. v. United Kingdom*, § 90

¹⁵ ECHR, 15 June 2004, *S.C. v. United Kingdom* § 27

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The second milestone is the age of understanding or discretion- fixed by law at 12 years of age. A young person with discretion has tools which enable him to understand his situation in the round and take external factors into account. His opinions should be less « instinctive » and should be taken account of to a greater degree.

While we do not reject this evolution of the child's mind, it seems to us that the distinction between an ability to verbalise and discretion has little relevance to a defence counsel. In both situations he has to relay what the young person says and take note of adult responses.

Consequently the age of the child corresponds to three kinds of role:

- *before the child can express an opinion*—the child's lawyer checks that the proceedings are appropriate and that the child's rights are being respected. He plays an active part, but does not act as a guardian. In practice, he concentrates on protecting the young person's rights and not on developing a view of the child's interests.
- *once the child is able to express himself*—the lawyer's main aim will be to make his voice heard at all stages of the proceedings, trying to convey his meaning accurately. He will explain the procedure to the young person in an intelligible way so that the young person can respond to the judge or social worker appropriately. His approach will follow the young person's wishes.
- *when the child has reached the age of discretion*- his lawyer must put the child's views forward and cannot dismiss them. Any decisions fall to be made by the young person once his lawyer has clearly explained what he thinks the implications might be. If the young person and his lawyer disagree, the lawyer must put forward the young person's views without criticising them or suggesting an alternative. If the disagreement makes the defence impossible, the only course open to a lawyer who has been appointed is to resign and request the appointment of another lawyer¹⁶.

Appearance at the various stages

The young person's lawyer appears before the youth court at four different stages:

1. Opening of the proceedings

When he has been appointed the lawyer alerts the young person to his involvement by writing to him. This first written contact will often be decisive and the choice of words used in the message is extremely important. The young person's age has a bearing on the contents of the message or on

whether the first contact should be face-to-face rather than in writing.

The lawyer tells the young person about his role and defines it as clearly as he can. The professional confidentiality by which the lawyer is bound and his independence from the other participants are the key elements. It is important that the lawyer is capable of explaining these ideas to the young person.

The lawyer may suggest an interview with the young person to discuss his opinion and hand over contact details.

2. Preparation stage

During the preparatory phase which precedes the public hearing, the lawyer has five different functions :

The first is to *inform the young person* about his rights and obligations and about the procedure and the way the court works. The lawyer's initial choice of words can clarify the judicial process (or not) for the young person, his parents and quite often for the social workers.

Next comes the role of *advisor*. Under the cloak of professional confidentiality, the young person's lawyer can work up his defence with him and explain what is at stake and the reaction there might be if he adopts any particular position. He will study the files and explain to the young person- with whom he will share his thoughts and opinions- what another position might entail. He will set up interviews with the young person, which will involve making contact with the relevant social workers. He will sit in with the young person in any interviews and satisfy himself later that the young person has understood everything that was said. He will also be concerned about the possibility of an appeal.

He must also *check the legality of the procedure* (in terms of *delay, possible bias, etc*).

He must also *probe the judge, prosecutor and social workers* on the progress of the case.

Finally, when the case comes on, he must *contact the parents*.

3. Public hearing

When the case arrives at a public hearing, the lawyer checks the legal validity of the procedure and that the rights of the defence have been observed.

He supports the young person by reviewing the files with him, looks at the offences that he is charged with and the effect they have had and works out with him what attitude he will adopt in open court.

¹⁶ On the question of choice of lawyer and his independence from the other parties, see A. de Terwangne, « Avocat du mineur : libre choix et contradiction d'intérêts », J.D.J. n° 190, April 2000, p.5.

The lawyer defends the young persona at the hearing:

- If he is under 12, the lawyer will be his spokesman if the young person is able to express his opinions. His aim is to examine how well founded the positions of the other participants are, in order to strengthen the basis for the judge's decision.
- If he is 12 or over the lawyer acts as spokesman, faithfully conveying what the young person has said to him. He cannot go against his client's wishes.

4. Remedies

- If he is under 12, his lawyer will follow young person's wishes or will take the initiative if the child is not able to express them ;
- If he is 12 or over, his lawyer must follow the young person's instructions.

Conclusions

Acting as a child's lawyer is a formidable undertaking. This demanding, delicate work that requires skills that go beyond the usual judicial training is a daily enrichment of the lives of practitioners in the field of youth justice.

Well handled, it can be a milestone (albeit painful) in the young person's life. It offers the opportunity to learn about their rights and the limits they must observe.

By giving him a voice in judicial discussions (as well as in mediation), his counsel gives the young person training in citizenship and democracy.

He learns that no one view has inherent priority over others and that decisions about him are taken at the end of a debate in which it has been possible for several different views of his best interests to be expressed.

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Are children simply small adults?**Judge Len Edwards(ret)**

This sounds like a foolish question. We all know that this is not true, yet do we design our public policy to reflect the reality that children are not small adults? For example, do our criminal and juvenile justice laws reflect the fact that children are different from adults? The answer is %No,+but times may be changing. That is what this article is about.

The juvenile court was founded on the perception that children are different than adults. At the time (1899), the field of psychology (then quite new) asserted that children were developing beings whose future could be redirected towards a productive life and away from a life of crime. The founders believed that the juvenile court could rehabilitate errant children. From the outset, the juvenile court resembled a problem-solving clinic more than a court of law. The juvenile court and juvenile corrections were separated from the adult criminal system. There were no attorneys and little due process; instead probation officers and service providers worked with the judge to redirect offending children. Proceedings and records were confidential so that a youth would be offered a fresh start and the stigma of a law violation would not make rehabilitation more difficult.

Much of that changed during the last half of the 20th Century in the United States. The courts and state legislatures modified the juvenile justice system, making it resemble the criminal justice system and sending more and more children into the criminal courts. The reasons for these changes included a loss of faith in the notion of rehabilitation, a perceived rise in violent crime committed by children, extensive media attention to youth crime, and a conclusion by some that the juvenile court did not work and did not adequately protect society from crime. Some even called for its abolition¹.

Significant political rhetoric accompanied these changes. For example, the Director of the Office of Juvenile Justice and Delinquency Prevention (the federal agency overseeing juvenile justice in the United States), stated that the country needed to %get tough+ on juvenile crime, as juvenile offenders %are criminals who happen to be young, not children who happen to be criminals.² The rhetoric reached fever pitch when Professor John Dilulio, Jr., Director of the Brookings Institution for Public Management, invented the term %super-predators+ to describe what he called a growing number of %totally out of control+ %brutally remorseless+ children of all ages who will create %a demographic crime bomb+ that will wreak havoc on our country.³ His conclusion was that, %we will have little choice but to pursue genuine get-tough law-enforcement strategies against the super-predators.⁴

Perhaps the earliest sign that the juvenile court was changing was the case of *In re Gault* 387 U.S. 1 (1967). *Gault* brought due process into the juvenile court, the United States Supreme Court declaring that children accused of crime were entitled to timely notice of the charges, an attorney at state expense, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. Identifying the failures of the juvenile court, the majority opinion stated that %there is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children.⁵

But state legislatures were not concerned about due process or the rights of children. Driven by media stories of violent children, the perception that youth violence was increasing exponentially⁶, and general public dissatisfaction with the juvenile justice system, state legislatures have over the past 40 years modified juvenile court statutory schemes to remove more and more children to the adult criminal system and make the juvenile court look more like the criminal court.⁷

The legislation has taken many forms.

Some states lowered the age when a child can be prosecuted as an adult, some have given greater powers to prosecutors to file charges against a child directly in criminal court, some mandated that certain crimes be prosecuted directly in the adult criminal court, others have restricted judicial discretion to keep a child in juvenile court when serious charges are filed, and still others opened juvenile proceedings to the public, and made record sealing more difficult.⁸ Moreover, prosecutors - never part of the original juvenile court - are now an integral part of the juvenile court.⁹ All of these changes were deemed

necessary in order to accomplish the goals of getting tough on juvenile crime+ and adult time for adult crime.+

In several states most youths 15 years-of-age and over accused of felony crimes are automatically transferred to the adult criminal court and treated as adults for all purposes.¹⁰ In California, the prosecutor can file criminal charges in the adult criminal court directly against a 14 year old if the crime alleged is serious as described in the Welfare and Institutions Code.¹¹ Criminal court procedures make possible adult criminal sentences for these youth.

Many of these legislative changes were the result of sensationalized media attention to children committing crimes, inaccurate data, and myths about juvenile crime. In addition to the myth about super-predators, others involved a juvenile violence epidemic occurring in the late 1980s and early 1990s, juveniles frequently carrying guns and trafficking in them, juvenile offenders committing more and more violent crimes at younger ages, the public no longer supporting rehabilitation of juvenile offenders, and the juvenile justice system in the United States being viewed as a failure because it cannot handle today's more serious offenders.¹²

In the past decade there has been modest movement in the opposite direction. The United States Supreme Court has taken the lead in this movement, concluding that there are certain sanctions that are prohibited when applied to children even when those children are prosecuted in the criminal court for serious law violations. In order to reach these conclusions, the court has revisited the reasoning that resulted in the creation of the juvenile court . that children are different from adults.

While the Supreme Court has stated that "[o]ur history is replete with laws and judicial recognition that children cannot be viewed as miniature adults,"¹³ yet it permitted the execution of some children for serious law violations.¹⁴ Recent scientific developments in neuropsychiatry along with actions by a few states curtailing the death penalty led the court to declare unconstitutional the death penalty and life without possibility of parole for children under 18 when the crime was committed.¹⁵

In 2002 the Supreme Court held that individuals with mental retardation could not be executed.¹⁶ *Atkins* laid the foundation for cases involving juveniles. Thereafter, *Roper v Simmons*¹⁷ and *Graham v Florida*¹⁸ established that children are constitutionally different from adults for sentencing purposes.

In these cases the court found that children's lack of maturity+ and under-developed sense of responsibility+ lead to recklessness, impulsivity, and heedless risk-taking. Children are more vulnerable to negative influences and outside pressures,+ including from their family and peers; they have limited control over their own environment+ and lack the ability to extricate themselves from horrific, crime-producing settings. Because a child's character is not as well formed+ as an adult's, his traits are less fixed+ and his actions are less likely to be evidence of irretrievable depravity.+

Roper and *Graham* emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. *Roper* and *Graham*'s foundational principle is that imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children. Our society views juveniles as categorically less culpable than the average criminal.¹⁹ In 2012 *Miller v Alabama* the Supreme Court went further, holding that life without the possibility of parole cannot be automatically mandated for children even for homicide convictions, but that the trial court must exercise discretion in making that decision.²⁰ Some state court judicial decisions have followed the Supreme Court's lead and have struck down long sentences for children convicted of serious crimes as cruel and unusual punishment.²¹

Most of these Supreme Court decisions have been decided in the last decade. Up until the 21st Century, a 16 or 17 year-old could be executed or sentenced to prison for life. The seriousness of the crime committed was a sufficient basis for treating the juvenile the same as an adult offender. The Supreme Court decisions cited above have slowed down the process of treating child law-breakers the same as adults,²² but several other changes should be considered.

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First, the process for transferring children to the criminal court, the waiver or fitness hearing, should be reexamined. At a waiver hearing,²³ the judge hears evidence from the prosecution, the defense, and from the probation officer who has completed an intensive social study. The judge has the opportunity to look carefully at all aspects of the offense and examine the youth who is before the court. With a thorough social study and a judicially supervised hearing, a judge is in the best position to determine whether a child should be prosecuted as an adult or retained in juvenile court. The judge can identify the children who have the best chance for rehabilitation. Neither the legislature nor the prosecutor should make the waiver decision.

The legislature does not have the benefit of any particularized facts, while the prosecutor has only the police investigation on which to base his decision.

Second, the legislature should reexamine the possible penalties for youthful offenders who appear in the adult criminal court. We know now that a youth's brain development continues until the mid-20s.

The chance for rehabilitation remains possible. Forty, fifty and sixty year sentences are almost the same as life imprisonment. They go beyond public protection and reflect retribution. Moreover they disproportionately impact young people who will live longer than a 40 year old convicted of the same crime.

Lowering prison sentences has not been popular. It is difficult to recall the legislature ever reducing sentences for crimes. Being tough on crime has been an important political slogan for decades. Yet it is time for state legislatures to acknowledge the differences between children and adults and to recognize that children should have the opportunity to rehabilitate. It is time to recognize that laws relating to the punishment of children were poorly conceived and based on public hysteria and myths about youth crime. Paying attention to the scientific developments that persuaded the United States Supreme Court should lead state legislatures to restructure the length of sentences for juveniles convicted of crime even when those juveniles appear in adult criminal court. Public support for such legislative changes exists, but it must be translated into legislative action.²⁴

Third, juvenile records should be automatically sealed at 18 years of age. A record can follow a person through life. If available to employers or schools, it can limit a person's ability to secure employment or positions of trust as well as make it difficult to avoid a life of criminality.²⁵ If social policy is to acknowledge and reflect that children are different from adults and that rehabilitation of youth is a goal, then access to juvenile records should be restricted.

The current record sealing process requires the youth to petition the juvenile court to have his or her juvenile record sealed. Studies show that most youth do not take the time to do so.²⁶ Indeed, it is the serious law breakers who are more likely to ask for their records sealed. At the California Department of Juvenile Justice (formerly the California Youth Authority) special attention is paid to sealing a youth's juvenile record upon completion of the program. No such counselling is provided to the children committing less serious crimes who are placed on probation in the community. The best policy is to automatically seal all juvenile records when the child reaches 18 years of age. These records could be unsealed should the youth end up in criminal proceedings, but for the great majority of youth, it would mean that they would know that their records are sealed when they reach 18 and that they can respond to an employer that they do not have a juvenile record.

The juvenile court came under attack during the last decades of the 20th Century. Public fear combined with political pressure and myths about youth crime led state legislatures to change their juvenile codes so that children were more likely to be prosecuted in criminal court. What was forgotten was that children are different from adults, are more susceptible to peer pressure, have less mature thought processes, and can and should not be held as responsible as adults for the crimes they commit.

The United States Supreme Court has started a movement back towards the original juvenile court. It remains to be seen if state legislatures will acknowledge that they overreacted to the media hysteria of the late 20th Century and will have the courage to modify their laws so that the rehabilitative ideal can be achieved. No, children are not little adults. They are children, developing human beings. Our justice system should reflect this reality.

Autumn 2013

Judge Leonard Edwards* (Retired.)
Santa Clara Superior Court, California, USA

Endnotes

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4. *Id.* Professor Delulio has since retracted his statements about super-predators and admitted he was incorrect. Juvenile arrest rates have dropped significantly and as Professor Zimring has written, *His theories on super-predators were utter madness*. Baker, Elizabeth, *As Ex-Theorist on Young Super-predators, Bush Aide Has Regrets*, *The New York Times*, <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aid...>
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6. This is one of the untrue myths concerning youth crime. See Zimring, Frank, *The Youth Violence Epidemic: Myth or Reality?*, *Wake Forest Law Review*, Vol. 33, Fall, 1998, at p. 727.
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8. *Id.* At pp 19-34
9. Sagatun, I., & Edwards, L., *The Role of the District Attorney in Juvenile Court*, *Juvenile and Family Court Journal*, Vol. 34, No. 2, May, 1979.
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11. California Welfare and Institutions Code section 707(d)
12. All of these myths and more are discussed in Howell, James, *Preventing and Reducing Juvenile Delinquency*, SAGE, (2009), Chapter 1, pp. 3-16.
13. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) *Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.*
14. *Stanford v Kentucky*, 492 U.S. 361 (1989)
15. *Roper v Simmons*, 543 U.S. 551 (2001) and *Graham v Florida*, 130 S. Ct. 2011
16. *Atkins v Virginia* (2002) 536 U.S. 304
17. *Roper v Simmons*, *op.cit.*, footnote 13
18. *Graham v Florida*, *op.cit.* footnote 13
19. *Roper v Simmons*, *op.cit.* footnote 13 at 567
20. *Miller v Alabama*, 132 S.Ct. 2455 (2012). In still another case the Supreme Court held that age is relevant when determining police custody for *Miranda* purposes. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).
21. In the case of *People v Caballero*, 145 Cal.Rptr.3d 286, the California Supreme Court struck down a sentence of 110 years to life for the crime of attempted murder holding that the sentence did not provide the juvenile defendant with a realistic opportunity to obtain release through demonstration of growth and maturity.
22. Some critics assert that *Roper* was incorrectly decided and argue that the death penalty may be appropriate for some juveniles. See Rowe, J., *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of Roper v Simmons and the Future of the Juvenile Justice System*, *California Western Law Review*, Vol. 42, Spring, 2006, p. 287; Jovanovic, A., *Hoping in Roper: The Problem with Bright Line Rules in Juvenile Death Penalty Cases*, *Michigan State University Journal of Medicine & Law*, Vol. 14, Spring, 2010, pp 281-311.
23. Different terms are used in various states. Waiver refers to the juvenile court waiving a minor to the adult criminal court. Fitness refers to the judicial determination whether a youth is *fit* to remain in the juvenile court. Other terms include transfer, certification, remand, removal, and declination of jurisdiction. This article will use the term fitness hearing.
24. *Public Willing the Pay More for Rehabilitation of Juvenile Offenders*, *ModelsforChange*, <http://www.modelsforchange.net/newsroom/18>
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26. *Id.*

Sentencing an aboriginal young offender in Canada—a delicate exercise of balance Judge Daniel Bédard



Introduction and context

Across Canada, a young person accused of a criminal offence under the Criminal Code sees his situation dealt with, in accordance with the Youth Criminal Justice Act¹, a federal law whose application can, for some criteria, vary from one province to another, even if the principles for sentencing a young person remain the same.

In the province of Quebec, more specifically in the northern part, is the homeland of the Cree First Nations, designated as the James Bay territory, and higher north the Inuit territory known as Nunavik. There are 9 Cree communities and 14 Inuit communities. The Cree communities, except for one, are all accessible by road and the Inuit communities by plane only, except for maritime transportation of goods.

These 2 nations signed in 1975 a treaty known as the James Bay and Northern Quebec agreement, a modern treaty that includes a chapter for the administration of justice on their respective territory. One of the highlights of this chapter is the creation of the Itinerant Court, an extension of the Court of Quebec, whose judges when nominated can have jurisdiction in the criminal, civil and youth division, depending on the volume of work, the needs and the district of nomination.

At present, there is no resident judge in the James Bay or Nunavik territory. Consequently, all judges that render justice in these communities are judges that are assigned an average of 5 weeks per year to travel and spend the week in one or more community. These judges all come from the same area or districts and receive compulsory

and ongoing training on Cree and Inuit customs and traditions.

The Cree communities totalize more than 16,000 people whereas the 14 Inuit communities represent more than 12,000 people.

For 2013, the judges of the Court of Quebec will spend a total of nearly 65 weeks in the communities. All sittings are held in English with translation in Cree or Inuktitut available at all times.

The youth population (persons under 18) constitutes between 40 and 50% of the total population. Considering the importance of traditional activities such as hunting, firearms are easily accessible. Crimes such as assaults, breaking and entering, threats, aggravated assaults and murders are often, as anywhere else, related to alcohol and substance abuse.

In each territory, an organised and structured social health agency offers social and medical services in every community or outside the community if necessary. Directors of Youth Protection in each agency, designated as provincial directors under the Youth Criminal Justice Act, are the ones who are the main actors when a youth faces criminal justice. They provide services and have decisional power in many areas as for example for custody facilities, rehabilitation services, and assessment of the youth, before the judge renders a decision, if requested, or compulsory when custody is envisaged.

Much more could be said but the purpose of the above is to provide a frame for understanding the context in which the judge renders a sentence when presiding in a community outside an urban setting even if the same principles, as we will see, apply when a young aboriginal faces justice in an urban area.

The main difference resides in the fact that a judge rendering a decision in a community is a judge who sits in a courtroom filled with people from the community, a community that he has learned to know over the years and appreciate. He is much more sensible to the social tissue, economical difficulties, customs and traditions. Consequently, he cannot bypass in his analysis to reach a decision, the acquired knowledge and sensibility. He is forever impregnated, as he would be in his own community. He acquires permanent point of references continuously subject to evolution. This is by far, the biggest advantage of rendering justice in an aboriginal community for years, when it is not your community of origin.

¹ Youth Justice Criminal Act S.C. 2002 modified Bill C-10, 2012

Sentencing

When an aboriginal adult is sentenced for a crime, the judge not only must consider the objectives of sentencing, he must also guide himself with numerous principles outlined in the Criminal Code, namely the one that states that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders². Consequently, the aboriginal ancestry of the offender modifies the analysis usually applied by integrating a principle that does not override the others but definitely impacts on the weight of the others.

In the Youth Criminal Justice Act, an identical section³ applies when an aboriginal young person is sentenced.

In 1999, the Supreme Court in *R. v. Gladue*⁴ ruled that judges when sentencing an aboriginal offender must consider systemic and historical parameters that can explain the presence of the aboriginal in court. Furthermore, judges can take judicial notice of systemic and historical parameters. They must consider cultural heritage in relation with an approach linked to restorative justice. The lack of resources or specific programmes does not prevent the judge from considering the principles of restorative justice.

The analysis when integrating the above might result in a sentence less severe in nature or a reduced quantum when detention is imposed.

The *Gladue* decision was also interpreted as meaning that the more serious and violent the crime, the higher the possibility that the sentence imposed on an aboriginal person be similar or identical to the one imposed to a non-native offender.

Thirteen years later came the decision of the Supreme Court in *Ipeelee*⁵. The Court outlined that judges have been at times hesitant to take judicial notice of the systemic and background factors affecting aboriginal people in Canadian society. Once more the Court emphasised that judges must acknowledge such matters as the history of colonialism, displacement, residential schools and how these historical factors continue to translate into lower educational attainment, lower income, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples.⁶

Finally, *Ipeelee* puts an end to the erroneous interpretation, according to the Supreme Court, that had prevailed since the *Gladue* decision, as for violent and serious crimes. Indeed it is now clear that even a serious and violent crime is not an obstacle to the principles outlined in *Gladue*, thus a sentence imposed on an aboriginal offender for a serious and violent crime can strongly differ from the sentence imposed on a non-native, for the same crime, when considering historical and systemic parameters linked to aboriginal ancestry.

The *Ipeelee* decision can be viewed as a clear indication that the judges must do more to lower the rate of incarceration that aboriginal peoples face. This rate is still too high and in direct relation with the nature of sentences imposed.

Does the same argument apply for young aboriginal offenders?

As detailed earlier, section 38(2)(d) of the Youth Criminal Justice Act is identical to section 718.2(e) of the Criminal Code. It must mean that the judge has to consider and take judicial notice of the systemic and historical parameters as he does with aboriginal adults. Some could argue that residential schools do not exist anymore, that many obstacles have disappeared and that young aboriginal persons do not experience displacement, colonialism and discrimination, as their parents and grandparents did. Consequently, even if the disposition is identical, its weight should not, in the analysis, be the same.

Others could argue the fact that an identical disposition for both adult and young aboriginal persons implies that historical and systemic parameters are still present and if not, still impact on the probability that a young aboriginal finds himself in court. Thus there is a higher possibility of incarceration unless the judge applies the disposition with the same weight as would be the case for an adult.

There is an additional sentencing principle that not only favours an identical application but imposes it. Indeed section 38(2)(a) of the Youth Criminal Justice Act, states that the young person shall not be subjected to a sentence or punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence in similar circumstances. Evidently, it becomes quite clear that comparison must be done with an aboriginal adult. The sentence must also be similar to other sentences imposed on other young offenders in the region.

Thus, the judge should take notice of the sentences imposed on adult aboriginals in the region, for identical offences committed in similar circumstances and ascertain that the young aboriginal is not sentenced to a harsher punishment. The region should be limited to the Cree territory for young Cree and to the Nunavik territory for young Inuit.

² Section 718.2(e), Criminal Code

³ Section 38(2)(d) Y.J.C.A. S.C. 2002, modified Bill C-10, 2012

⁴ *R. v. Gladue* 1999 1 S.R.C.688

⁵ *R. v. Ipeelee* 2012 1 R.C.S. 433

⁶ Id. par.60

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Needless to say that, the respect of these sentencing principles is better achieved by assigning the same judges on a regular basis.

In every community whether Cree or Inuit, a justice committee composed of persons from the community can intervene before the sentence is imposed. Their responsibilities include meetings with the offender and, if the case requires it, with members of the extended family and victim. They can also propose verbally or in writing services in the field of restorative justice including services based on their customs, traditions and heritage. They can prepare for the Court a report that will contain the history of the youth and his parents in relation with historical and systemic parameters. The justice committee can make recommendations to the judge as for the appropriate sentence. A member of the committee can ask to testify, address himself directly to the judge and provide important information that will help the judge in his decision.

Under the Youth Criminal Justice Act, the nature of the sentences varies in nature, ranging from a reprimand to committal to custody. What needs to be understood is that committal to custody is a step that is not easily attained. Numerous criteria⁷ must be met before a judge can consider a custodial sentence. And even then, the judge must conclude that there exists no other alternative⁸ than committal to custody.

The above applies to every young offender in Canada. When the young offender is of aboriginal ancestry, the judge must see it as an additional criteria in the sense that even if he would decide on a custodial sentence for a non-native offender, after having applied section 39, he can conclude differently, if the offender is aboriginal.

The end result should be a lower rate of custodial sentences for young aboriginal offenders compared with young non-native offenders, for identical crimes committed in similar circumstances. Is it the case? It is not the case for adult aboriginal offenders according to the statistics, as stated in the *Ipeelee* decision.

Statistics are not available for the Cree and Inuit young aboriginal offenders.

Since the *Gladue* decision in 1999, the judge can order what is called a *Gladue* report. This report prepared before the sentence is rendered, includes every aspect of the aboriginal offender's life namely historical and systemic parameters relative to his community, his parents and finally him. Lack of resources, community awareness and discontinuity in social services often renders impossible the availability of a *Gladue* report. Notwithstanding this, the judge as stated in the

Supreme Court decision can take judicial notice and integrate this knowledge in his analysis.

For young aboriginal offenders, the preparation of a *Gladue* report is not, at this time, a tool that has acquired significance. It is not yet integrated in the daily practice.

Considering that sittings are held in the community of the aboriginal offender in most cases, and taking into account that presiding judges receive ongoing training and are assigned in the community on a regular basis, year after year, the unavailability of a *Gladue* report is compensated by their acquired knowledge of systemic and historical parameters affecting the community as a whole their impact on the life of the young offender.

Conclusion

A judge sentencing a young aboriginal offender is, as with an adult, bound to consider any other alternative than a custodial sentence, that is reasonable in the circumstances. It also means that if the judge concludes that there is no alternative to a custodial sentence, he can consider a lesser quantum. Indeed, the disposition not only permits consideration of alternatives to custody, it also permits a reduction of the number of weeks or months of custody.

As we have seen, *Gladue* reports are not always available for adults and nearly never for young aboriginal offenders.

Nevertheless, the principle remains as the resulting obligation for the judge. The presence of the justice committee in the community and the acquired knowledge of systemic and historical parameters by the judge linked to his regular and continuous presence in the community compensate for the lack of a *Gladue* report.

It is hoped that in the near future, human and financial resources and community awareness will enhance the input of information provided to the judge and permit him to fully integrate section 38(2)(d), in his analysis when imposing a sentence on a young aboriginal offender. Finally, the situation can vary across Canada, because the administration of justice is provincial.

Daniel Bédard* is a Judge of the Court of Quebec presiding in Criminal, Civil and Youth Divisions.

⁷ Section 38 Y.J.C.A. S.C. 2002, modified Bill C-10, 2012

⁸ Section 39 Y.J.C.A.

The crossover between youth justice and care and protection

Judge Andrew Becroft



It is no secret¹ that young people who regularly appear in the Youth Court (the serious persistent offenders particularly) almost always present with care and protection issues. In New Zealand we know, in fact, that three quarters (73%) of youth justice clients have been the subject of Child, Youth and Family notifications . i.e. there have been concerns of abuse or neglect at some point in their lives². Research suggests a similar gross overrepresentation in Australia³.

These young people present a difficult challenge to the criminal justice system. On the one hand their backgrounds of abuse and environmental dysfunction categorise them as vulnerable victims in need of help. On the other, their offending demands accountability and creates damaged victims. In reconciling these conflicts, two fundamental questions must be answered. They are the great imponderable questions that should dominate Youth Justice debates. We can never discuss them too much. These are:

1. When and on what basis, should offences committed by young people be seen primarily as a result of care and protection failures (requiring resolution in the Family or Care Courts).

Further, when and on what basis should offences be dealt with as intentional breaches of the criminal law by autonomous, responsible individuals requiring resolution in the criminal courts? This raises the issue of how care and protection issues are to be recognised and importantly, how it is to be concluded that those issues have been causative of offending. It also raises the profound risk of criminalising what is essentially a welfare issue.

2. At the stage when the law does require that young offenders are dealt with in the criminal Court, to what extent should any underlying care and protection issues that may have contributed to their offending be addressed in the Criminal Court

How does the New Zealand legal system manage the interface?

In New Zealand, almost all young offenders under 14 years of age (except when facing murder or manslaughter charges), are dealt with on the basis that care and protection issues are the primary cause of their offending. They are dealt with in the Family Court (under care and protection provisions of the Children Young Persons and their Families Act 1989) and cannot be charged in any Criminal Court. In other words, by definition, most offending by an under 14-year-old is seen as being of a care and protection origin. However, the net of children whose offending is seen to be requiring a punitive response appears to have recently widened. Since 1 October 2010, the jurisdiction of the Youth Court has extended to 12 and 13-year-olds who commit purely indictable offences or who seriously reoffend. This was done in the face of trenchant criticism from the United Nations Committee on the Rights of the Child. New Zealand, along with countries such as Azerbaijan and Mongolia, featured on a list of countries asked to address deficiencies in their legislation⁴. However, the legislation affords the flexibility to refer the child back to the informant to consider care and protection proceedings if that is considered to be the overwhelming need⁵.

¹ This section contains excerpts from Judge Andrew Becroft *Addressing the Underlying Causes of Offending: What is the Evidence? Are There Lessons to be Learned from the Youth Justice System?* (Institute for Governance and Policy Studies Forum, Victoria University of Wellington School of Law, 26 February 2009) <<http://igps.victoria.ac.nz/>>.

² Centre for Social Research and Evaluation Te Rokapu Rangahau Arotake Hapori *Crossover between Child Protection and Youth Justice, and Transition to the Adult System* (July 2010), p 8 as cited in Judge Peter Boshier *Achieving Equity: Our Children's Right to Opportunity* (Wellington, 2012), p 4.

³ Judge Mark Marien SC *Cross-over Kids – Childhood and Adolescent Abuse and Neglect and Juvenile Offending* (Australia, 2012) www.childrenscourt.lawlink.nsw.gov.au/aqdbasev7wrf_assets/childrenscourt/m41005111/nat%20juv%20just%202012%20crossover_kids_2012.pdf ..

⁴ United Nations Committee on the Rights of the Child Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: New Zealand (CRC/C/NZL/CO/3. 4, 11 April 2011) at [56].

⁵ Children, Young Persons and their Families Act 1989, s 280A. After 14 years of age, all youth offenders can be charged in the Youth Court. But, even then, there is a process whereby care and protection issues may be referred to a Care and Protection Family Group Conference Co-ordinator at the direction of the Youth Court Judge (with the option of appearing in the Family Court).

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After 14 years of age, all youth offenders can be charged in the Youth Court. But, even then, there is a process whereby care and protection issues may be referred to a Care and Protection Family Group Conference Co-ordinator at the direction of the Youth Court Judge (with the option then of further referral to the Family Court). When that happens, the criminal charges can be adjourned, and then the offender discharged absolutely.

When young people are charged in the Youth Court, the twin emphasis is on accountability and addressing the underlying causes of offending (the latter was included in the core principles in the legislation in 2010⁶); but there is also an explicit principle that provides that a young person should not be brought to the Youth Court specifically to address welfare needs.⁷

This system appears philosophically sound. Indeed it is frequently considered as world leading. In practice, it faces problems of adequate resourcing and difficulties in adequately meeting both the accountability and welfare needs of child and youth offenders.

Strengths and Weaknesses of the New Zealand System

Strengths

The New Zealand system avoids an unhelpful, rigorous split between the youth justice and care and protection provisions by allowing a cross-over between the two parts. Former President of the Children's Court of New South Wales, Judge Mark Marien SC warns against a rigorous split in the Australian context, noting that 'Over the past 25 years there has been a widespread trend (particularly by government and government agencies) to view these two jurisdictions of Children's Courts as quite separate and distinct. However, they are not separate and distinct. There is a considerable overlap between the two jurisdictions because many young offenders who come before the Children's Court in its criminal jurisdiction have a history of being in care. We also see in our criminal jurisdiction young offenders who should have had interventions from the child protection agency but have slipped through the cracks in the child protection system.'⁸

Flexibility between the two systems allows youth offenders with care and protection issues to be dealt with appropriately and allows room for discretion as to whether an incidence of offending is really care and protection based. This enables the justice system to concentrate on justice issues and avoid getting involved in care and protection work, which it is poorly equipped to carry out.

The system does not criminalise most behaviour of children between 10 and 13 years of age and, as with youths 14 years and over, allows offenders to be dealt with according to the true causes of their offending. The focus of the Children, Young Persons and their Families Act 1989 encourages the rebuilding of families and assists in empowering families to take control of their young person's offending. Essentially, this is a more enlightened approach that does not blur the distinction between child offenders and care and protection issues.

Finally, the Youth Court has the advantage of specialist courts, designed to address the underlying needs of the young people before it, as well as providing a justice response to the offending. A strong example of this is Auckland's Intensive Monitoring Group (IMG) Court. Judge Tony Fitzgerald set this up in 2007 to provide therapeutic justice to young people considered to be at particularly high risk in terms of mental health concerns and/or alcohol/drug dependence. Prior to referral to the IMG Court, a therapeutic plan is prepared at the Family Group Conference (FGC). The young person's case is then separated out from the regular Youth Court, and they begin the IMG process. Once in the IMG system, the young person is assigned a Judge, and there is an unbroken, continuous involvement of the Judge in monitoring the progress of the young person with their plan. The young person meets regularly with that Judge, as well as with a social worker who is assigned to their case, and a group of professionals who assist that young person to meet their plan. In addition to the professionals who surround a young person in the main Youth Court, the IMG professional team includes service providers, a representative from Regional Youth Forensic Services and Ministry of Education representatives (who are available in some but not all Youth Courts). Before each sitting of the IMG, the professional team sit down together and go through the cases set down for the day. At each meeting, the social worker assigned to the young person's case is required to file a written progress report on the young person's compliance with their plan and related issues for the team to discuss. This intensive therapeutic support for the young person is an effective way of addressing some of the needs which may have driven his or her offending.⁹

⁶ Children, Young Persons and their Families Act 1989, s 208(fa)

⁷ Children, Young Persons and their Families Act 1989, s 208(b).

⁸ Judge Mark Marien SC Cross-over Kids . Childhood and Adolescent Abuse and Neglect and Juvenile Offending (Australia, 2012), p 5

⁹ This paragraph excerpted from IMG Court+in IMG Court in the Act (newsletter of the Principal Youth Court Judge) (Vol 56)+, p

Weaknesses

The difficulty with the New Zealand system is that if care and protection issues are dealt with badly, young people and children are not held to account for their crimes. Further, a heavy burden is placed on the care and protection system that is not always adequately resourced to cope with the workload. This leads to the refusal to carry out some care and protection work, poor communication and even patch wars as a result. Police are, at times, tempted to prosecute youth offenders to access welfare services when faced with huge delays in referrals to welfare agencies.

Historically, referrals out of the Youth Court to Care and Protection Co-ordinators have been unproductive and there is no easy mechanism to ensure that referral results come back to a Youth Court Judge.

A further issue is the lack of awareness that the Youth Courts sometimes have of the care and protection needs of young people appearing before them. This is vital not only because it enables the Judge to identify whether the overwhelming need is in fact care and protection (and thus a different response is warranted), but it also enables the Judge to tailor the most effective responses in the Youth Court. Since July 2007, there has been in effect a protocol which allows for the Youth or Family Court to request the young person⁵ file in another Court. Prior to this, a Judge may have gone into Youth or Family Court proceedings entirely unaware of issues in the other jurisdiction (even current issues). Further promotion and awareness of this protocol is still needed.

Looking to the Future

Judge Mark Marien SC points out that in order to effectively prevent the flow on from care and protection to the juvenile and adult justice systems, we must ensure that child protection agencies play a role in the juvenile justice system and do not abandon young offenders with serious welfare concerns who have entered that system.

He notes, citing a recent report on this issue, that:¹⁰ '[m]altreated adolescents across Australia need early intervention and support, in part at least to try to reduce the risk of their later offending. We need to understand how many children in care are involved in offending and what interventions and services are successful in preventing later offending (Jonson-Reid, 2002, 2004), especially for maltreated children and adolescents. It seems very likely that some prevention measures are working, but we have little information about who these work for and under what circumstances. It is important to build this knowledge and to increase the focus on adolescent and child protection, on the understanding that intervening early means intervening early in the pathway as well as early in life. The window for effective intervention, especially in relation to offending behaviours, is not closed after early childhood, though it is likely to be more expensive to intervene at later ages. Crucially, state parental responsibility for children and young people in care must not stop once they have offended and become troublesome as well as troubled.+

Judge Andrew Becroft*, Principal Youth Court Judge, New Zealand

This article is taken from a paper¹¹ presented at the Australasian Youth Justice Conference: *Changing Trajectories of Offending* which took place in Canberra, Australia in May 2013.

⁵ <www.justice.govt.nz/courts/youth/publications-and-media/principal-youth-court-newsletter/principal-youth-court-judges-newsletter>.

¹⁰ Judge Mark Marien SC *Cross-over Kids – Childhood and Adolescent Abuse and Neglect and Juvenile Offending* (Australia, 2012), p 21

<www.childrencourt.lawlink.nsw.gov.au/agdbasev7wrr/_assets/childrencourt/m41005111/nat%20juv%20just%202012%20cross_over_kids_2012.pdf>.

¹¹ From Little Things, Big Things Grow+ (with thanks to Paul Kelly) Emerging Youth Justice Themes in the South Pacific by Judge Andrew Becroft

Annual Meeting of the South Pacific Council of Youth and Children's Courts

Emily Bruce



Emily Bruce



Judges and Magistrates at Hoani Waititi Marae

On Sunday 22 September, Judges and Magistrates of the Pacific, Australia and New Zealand had the privilege of entering the grounds of the beautiful Hoani Waititi Marae, West Auckland in a p whiri (welcoming ceremony). A traditional element of every p whiri is %whakawhanaungatanga% the establishing of relationships or connections. Every person present spoke to the group about their origins, where they came from, and acknowledged those around them and those who had come before. From this beginning, a week of great learning, and sharing of learning occurred.

i) About the South Pacific Council of Youth and Children's Courts (SPCYCC)

The Judges and Magistrates present at the p whiri were all in Auckland for the annual meeting of the South Pacific Council of Youth and Children's Courts (SPCYCC). The SPCYCC is an independent and autonomous judicial grouping of the Heads of Youth/Children's Courts, open to all self-governing countries of the South Pacific, and the states and territories of Australia. Where there is no Youth/Children's Court in a member country, the country may be represented by the Judge or Magistrate with a leading role in developing the law relating to children or youth in that country, as approved by that country's relevant Head of Jurisdiction.

The SPCYCC, which first met in 1995 and which adopted its present name in 2004, meets annually. It is chaired on a rotating basis, usually alternating between Australia/New Zealand and Pacific island venues. Council meetings are hosted by the Chair of the Council for that year. This year, the role of Chair was assumed by Judge Andrew Becroft as the Principal Youth Court Judge of New Zealand, together with Judge Ida Malosi, an experienced Youth Court Judge

currently seconded by the New Zealand Government to Samoa.

This year's meeting brought together representatives from New Zealand, all Australian states (with the exception of South Australia) and eight Pacific states (Samoa, the Solomon Islands, Kiribati, the Cook Islands, Niue, Tonga, Papua New Guinea and Vanuatu), with apologies from Palau, Fiji and Tokelau. The attendance of eight Pacific delegates was funded by NZ Aid and other conference costs by the New Zealand Ministry of Justice.

ii) "Learnings" of the Meeting: From New Zealand, From Each Other, From International Initiatives

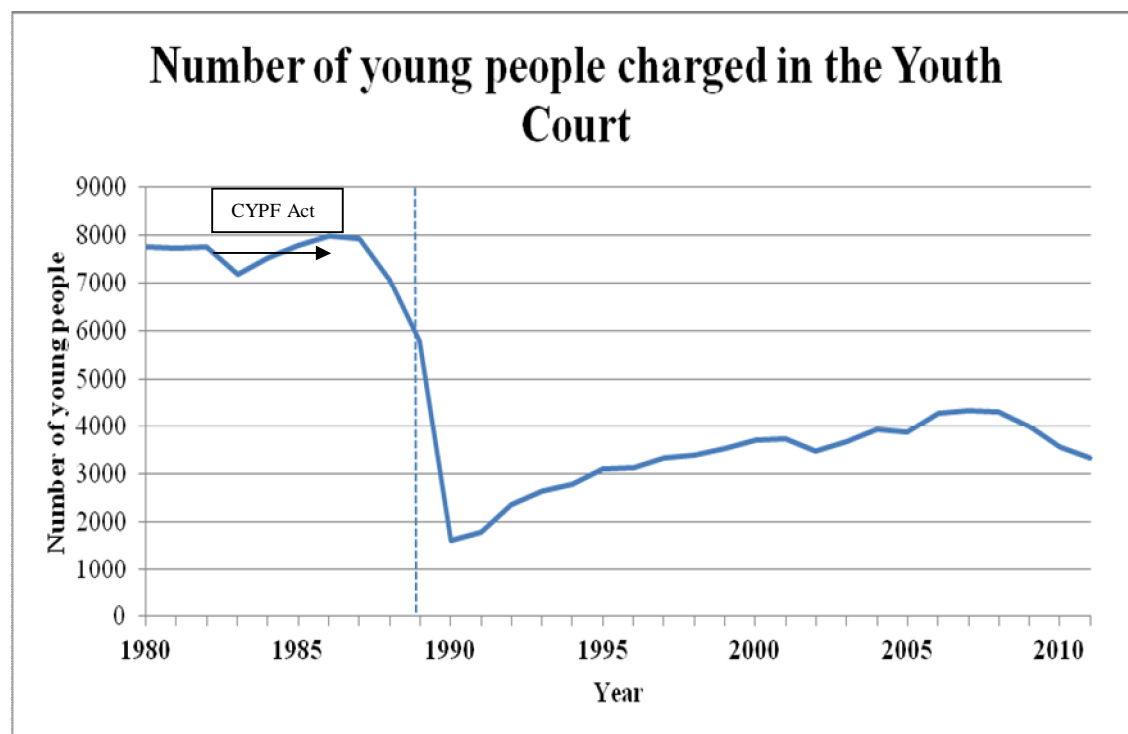
A key emphasis of this year's meeting was to learn from one another in several different ways: through watching the New Zealand youth justice system in operation, through discussing and learning from each other's youth justice systems, through growing knowledge of different initiatives that operate in the South Pacific to support youth justice and through hearing from experts in working and communicating with young people.

Learnings from New Zealand

Delegates were exposed to three core aspects of the New Zealand youth justice process:

• Non-Charging/Alternative Responses

A key principle of our Children, Young Persons and their Families Act 1989 is that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter. Between 1989 when this Act was introduced and 1990, the number of cases involving young people appearing before the court promptly plummeted from around 10,000 to just over 2,000, as depicted in the graph below.



In recognition of this principle¹, today approximately 72% of youth offences (i.e. offences by 14-16 year olds) never come to court.² Instead, a young person can be given a warning or, if it is decided that further action is needed, can be referred to Police Youth Aid (a branch of the Police force specially trained to work with young people) for 'alternative action'. Alternative action involves creating a plan administered and monitored by Police Youth Aid that may include, for example, an apology, reparation and/or community work. There is scope for the plan to be as creative and imaginative as the minds of those who devise it. Usually components of the plan will draw heavily on local resources.

Delegates at the meeting spent the week with and heard a presentation from Acting Inspector Kevin Kneebone (Prevention Manager, Youth and Community) about Police Youth Aid. This presentation had a focus on diverting young people from the formal criminal justice system, and the way in which this is done in New Zealand.

Family Group Conferencing(FGC)

When young people appear before the Youth Court in New Zealand, they are asked to deny or 'not deny' a charge (this is a curious double negative but it does unlock the FGC process without the need for a formal admission). If they do 'not deny' it, they are referred to a Family Group Conference. FGCs allow the offender, the offender's family, the victim, the Police and other people working on the young person's case to meet and formulate a plan to address the young person's offending. This is usually approved by the Judge and then monitored by the Judge on a regular basis. (NB: FGCs are also convened for a variety of other reasons in the youth justice process).

FGCs are advantageous in that they empower families and communities to take some responsibility for the young person and their offending, they can foster a sense of ownership and legitimacy in the plan for the young person, they can allow for a more creative and/or culturally appropriate response to offending and, if victims attend such a conference, they can be meaningfully involved and may even feel vindicated.

SPCYCC delegates heard from and spoke to CYF social workers about Family Group Conferencing. They also watched plans being monitored in Court.

¹ Graph adapted from Jin Chong Youth Justice Statistics in New Zealand: 1992 to 2006 (Wellington, Ministry of Justice, August 2007); and Ministry of Justice Child and Youth Offending Statistics in New Zealand: 1992 to 2007 (February 2009) at 29.

² Calculated using National Annual Police Apprehensions Statistics, available from Statistics New Zealand (www.stats.govt.nz).

Specialist Youth Courts

Once a Family Group Conference has made a plan for the young person, the young person usually appears regularly before a Judge in the Youth Court to monitor progress with the Plan. At this stage in the process, New Zealand also has specialist Youth Courts which are responsible for monitoring FGC Plans. These include, for example, Rangatahi and Pasifika Youth Courts (Youth Courts which incorporate M ori and Pacific customs and protocols), an Intensive Monitoring Group Court (which works with young people who also have care and protection needs) and a specialist Youth Drug Court (based in Christchurch).

Delegates at the meeting sat in on the Hoani Waititi Rangatahi Court (which is held on Hoani Waititi Marae, where guests were also welcomed), the Mangere Pasifika Court, the Intensive Monitoring Group and heard a presentation on the Christchurch Youth Drug Court.

Impressions

Many of the delegates commented that seeing these New Zealand initiatives in practice was a powerful and useful experience for them. The group were unified in agreeing that approaches which focus on diverting young people from the criminal justice system and which delegate some responsibility to families and the community are positive and worthy of further development. Many commented that this type of approach is consistent with adolescent neuroscience research, which they also learnt about at the meeting (see below under **Learnings from Experts**).

Visits to the Rangatahi and Pasifika Courts in particular furthered discussion about practical ways to address disproportionate indigenous representation in youth justice systems. This is an issue for many countries represented in the SPCYCC. Delegates were impressed by the effect of incorporating M ori and Pacific cultural processes into the formal youth justice process. They noticed that this added a powerful new dimension. The delegates also commented that the presence of elders from M ori and Pacific communities in these Courts, who sit on the bench next to the Judge and give advice to the young people in Court, seemed truly empowering for the young person and for the community involved.

Learnings from Other Youth Justice Systems

It was not just the New Zealand youth justice system which delegates discussed (although as host country, New Zealand was expected to take the lead). They were also updated on developments and key issues facing the Australian states and territories, such as the closures of Youth Drug and Koori Courts in Queensland.

They also learned a lot from sharing the ways in which their criminal justice systems interact with young people. For examples, in countries where there is no separate youth justice system, a significant first step is separating files concerning young people from files concerning adults. One practical way of doing this is to colour code charging files so that it is clear whether they relate to children/young people or adults. This simple and effective mechanism presented by one Pacific delegate was applauded by many delegates who do not have such a system, and they took this idea home with them to consider implementing.

Learnings from Initiatives in the South Pacific

The meeting was also made aware of the work of the Pacific Judicial Development Programme (PJDP) and the assistance that the PJDP is able to give countries to develop their youth justice and youth and child protection systems. Judge Peter Boshier*, who is one of the Judges assigned to the Programme and a trainer in the Pacific, was present throughout the week and gave a well received presentation on the PJDP and its services.

The Pacific delegates also enhanced the meeting's awareness of Non Government Organisations (NGOs) and organisations doing important work in the Pacific. Save the Children, for example, was an organisation that several Pacific countries referenced as playing a key role in the development of youth justice systems.

Learnings from the Experts

The meeting strived to upskill delegates in working with young people, and in particular in working with young indigenous and Pasifika people. A standout workshop for many delegates was a presentation on adolescent brain development by New Zealand's Brainwave Trust†, a charitable trust which educates the community about child and adolescent brain development based on emerging brain science research (<http://www.brainwave.org.nz/>). The presentation began by exploring the vast growth of the child's brain in the first three years of life, which emphasised to delegates the importance of supporting a child in his or her early years to prevent entry into the youth justice system or adult criminal justice system later in life. They then charted the adolescent brain, and showed the scientific data establishing that young people's brains are in a process of maturing and that they are scientifically proven to be more prone to risk taking than adults. The presenters examined effective ways of communicating with young people. It caused the delegates to think carefully about the behaviours of young people in court, and consider whether their own actions in court are effective in delivering messages to young people.

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For New Zealand Judges, it was also helpful to learn more about trends in offending by young Pacific people in New Zealand. Dr Ian Lambie and Dr Julia Ioane of the University of Auckland provided an insightful presentation on communicating with young people, with an emphasis on young Pasifika people who commit violent offences.

The Future of the SPCYCC

On the final day of the meeting, the delegates discussed the future of the SPCYCC and ways in which delegates can be even more effective in supporting one another to develop effective separate youth justice systems. Consequently, a %5 Point Assessment of a Youth Justice System+ was created. This assessment provides a simple tool for New Zealand, Australian states and Pacific countries to evaluate their youth justice systems (or, where there is no youth justice system, the way in which young people are dealt with in the adult criminal justice system). These assessments are with delegates and member countries now. Once these assessments have been completed, decisions will be made as to both substantive areas of future focus for the SPCYCC, and as to which states could be provided greater support by the SPCYCC.

If any Pacific countries (or English speaking members of IAYFJM) who may not have received this assessment tool would like to fill in the assessment and/or to join the SPCYCC, we would warmly welcome you to do this. You can email me (Emily.bruce@justice.govt.nz) for a copy of this. We would also welcome any suggestions that any %Chronicle+ readers may have as to how we could improve youth justice and youth and child protection systems. Again, I can be emailed.

Next year's meeting of the SPCYCC will be hosted in Samoa. Samoa will therefore also assume the role of Chair for that meeting. New Zealand will act as secretariat for the Council in the year leading up to the meeting.

It was an honour and a privilege to be involved in hosting this meeting in New Zealand. It was exciting to meet Judges from across the Pacific, all of whom are striving to ensure that their systems work in a way that ensure the best possible outcomes for young people. To the delegates who took part, thank you for coming to New Zealand and we look forward to continuing our conversations into the future.

Emily Bruce was until recently the Research Counsel to Judge Becroft. In that role, she provided legal and other research assistance to Judge Becroft, and other Youth Court Judges of New Zealand..

Fifteen Point Assessment of a Youth Justice System

South Pacific Council of Youth and Children's Courts



A. Introduction

This document emerged following the 18th meeting of the South Pacific Council of Youth and Children's Courts (SPCYCC) in Auckland, New Zealand. The meeting identified a need for an assessment tool which could assist the Council to determine the needs and current status of the youth justice systems of countries/states in the South Pacific.

The fifteen points in this assessment result from consultation with SPCYCC members and are based on Principal Youth Court Judge of New Zealand Judge Andrew Becroft's paper '10 Characteristics of a Good Youth Justice System', created for the Pacific Judicial Development Programme, and Penal Reform International's 'Ten Point Plan for Fair and Effective Criminal Justice for Children'¹ (We would have liked to produce a 'Ten Point' plan, if only for numerical simplicity. However, we believe that there are fifteen important criteria by which any youth justice system can be assessed).

B. How Does This Work?

Please consider each question, then under 'Rating', tick one of the colours in the box reproduced below which best applies to your state.

Red = no compliance

Orange = partial compliance

Green = full compliance.

C. Notes

1. Many countries/states will not have formal youth justice legislation (but yet operate in respect of children in a way that is nevertheless consistent with what would be best practice legislative principles). For the purposes of this assessment, this only constitutes partial compliance. Full compliance will be achieved when there is appropriate legislation in place.

2. There is a comments box under each question. It would be helpful to get any thoughts which you think appropriate, particularly if you have ticked the orange box (partial compliance).

3. This information will then be used to:

- a) Identify which states may be a priority for receiving SPCYCC support; and
- b) Identify subject area priorities for the SPCYCC.

4. The term 'child' is used at all times in the assessment (rather than 'young person' or 'youth'). Consistent with the United Nations Convention on the Rights of the Child, the word 'child' here means anyone under the age of 18.

5. As SPCYCC is comprised of both countries and also states and territories within Australia, the assessment refers to 'countries/states' to make clear the distinction.

¹ www.penalreform.org/resource/tenpoint-plan-fair-effective-criminal-justice-children/

D. The Questions

1. Is There a Whole of Government “Crime Prevention Strategy for Children”?

Does the country/state have early intervention policies which target children at risk of coming into conflict with the law (e.g. marginalised children from lower income families and those in the care system) and which aim to prevent a child ever entering the justice system?

Rating: Red Orange Green

Comments:

2. Minimum and Maximum Ages for Jurisdiction of Children

Does the country/state have an age of criminal responsibility of 12 or higher?

Does the country/state specify for the purpose of criminal proceedings that being treated as an adult begins at 18th birthday?

Rating: Red Orange Green

Comments:

3. Is There A Separate Criminal Justice System for Children with Trained Personnel?

Does your country/state have a separate criminal justice system for children or are children dealt with in the adult system?

Are personnel who work with children (e.g. Police, Judges, lawyers and governmental and non-governmental social service providers) specially and specifically trained in working with children?

NB: if your state has a separate criminal justice system but it was not created by legislation (i.e. informal features such as separate court hearings and a specialist Judge/Judges have been developed for children), this would amount to partial compliance (orange box).

Rating: Red Orange Green

Comments:

4. Limitation Upon Charging Children

Is there a legislative directive not to charge children unless there are no other alternatives available?

Are the majority of children who commit crime dealt with outside of the court system; is there a diversion system in place to deal with less serious crime outside of the court system?

Is there an option to discharge a child without a formal criminal record if he or she performs well in court?

Rating: Red Orange Green

Comments:

5. Provision for (partial) delegation of decision making to families, victims and communities

Are families, victims and communities given the opportunity to participate in and make decisions at key steps in the youth justice process? (e.g. decision to charge, custody decisions and resolution of charges including punishment).

NB: this method of decision making, exemplified for instance in New Zealand, by the FGC, is still subject to the approval and supervision of the Court.

Rating: Red Orange Green

Comments:

6. Ensuring that children have the right to be heard and are encouraged to participate in proceedings

Are children given the opportunity and the appropriate support both to express their views and to have them taken into account in all matters affecting them?

Is participation by children in proceedings not only supported and encouraged, but is there a duty on lawyers and Judges to ensure participation?

Is there mandatory provision of legal counsel for all young people (with or without means testing)?

NB: one means of ensuring child participation in the process outside of Court is set out in point 5 above.

Rating: Red Orange Green

Comments:

7. Prohibition and prevention of all forms of violence against children in conflict with the law

Have punishments involving physical violence against children been abolished (e.g. whipping, lashing, flogging and corporal punishment); and Is there zero tolerance of violence against children under arrest or detained?

Is there an independent complaints procedure for children held in custody?

Rating: Red Orange Green

Comments:

8. Abolition of Status Offences

Has the country/state abolished status offences (i.e. the criminalisation of conduct based not upon prohibited action or inaction but on the fact that the offender is of a certain category of child or occupies a specified status)? NB: this often means acts which would not be criminal if committed by an adult but are offences if committed by a child based simply on age, e.g:

- Truancy
- Running away
- Violating curfew laws (nb: this means curfews that are placed on children universally in a state/country. It does not mean court imposed curfew orders)
- Possessing alcohol or tobacco

Rating: Red Orange Green

Comments:

9. Timely decision making and resolution of charges

Are decisions affecting the child made and implemented within a timeframe appropriate to the child's sense of time?

If charges are not resolved within a reasonable timeframe for children, or have been unnecessarily or unduly protracted, is there provision for the Court to dismiss them?

Rating: Red Orange Green

Comments:

We would also be interested to know here . are there specified timeframes for what is reasonable for children in terms of days, weeks or months?

10. "Evidence-based" approaches to offending?

Does the country help children to address the underlying issues relating to their offending by referring them to programmes that are evidence-based? (i.e. is there research to say that the programmes relied upon actually work?)

Rating: Red Orange Green

Comments:

11. Keeping the child with their family or community

Where possible, is the child kept with, and treated within, the context of his or her family and in the community?

Rating: Red Orange Green

Comments:

12. Ability to refer case to care and protection/welfare system where child may be in need of care and protection

If at any stage of the proceedings it appears that the child has care and protection needs, is there the ability to refer to care and protection services, and if necessary, to discharge the case from the youth justice process?

Rating: Red Orange Green

Comments:

13. Use of Incarceration/Custodial Sentences as a Last Resort

Is there legislation in place that specifies detention as a last resort?

If there is no legislation, is there nevertheless a principle of detention as a last resort developed by appellate authority?

Is there in practice limited use of detention in juvenile facilities and in adult prisons?

Are there specialist prisons/residences for children?

Rating: Red Orange Green

Comments:

NB: we would be interested here to know whether the principle of detention as a last resort was developed by legislation or appellate authority.

14. Development and Implementation of Reintegration and Rehabilitation Programmes for Children in Detention

Where it is appropriate to detain children, do institutions have rehabilitation and reintegration of the child as the main objective of all policies and processes from the moment the child arrives?

NB: rehabilitation will work most effectively in settings which are small enough for individual treatment to be provided, where children feel safe and secure, where adequate medical care is provided and where it is easy for children to be integrated into the social and cultural life of the community where the facility is located. Institutions should encourage contact with family and other social networks to support children; it should provide them with opportunities to obtain life skills through educational, vocational, cultural and recreational activities; and it should promote services to help with their transition back into society. The individual needs of children should be addressed such as mental health issues, substance abuse, job placement and family counselling.

Rating: Red Orange Green

Comments:

15. Accurate Evidence and Data on the Administration of Criminal Justice for Children

Does the country have a system for separating data on children and adults and collecting specific data on children which helps it to understand offending trends and what works to prevent children from offending and to ensure that they do not re-offend? At a minimum, does the country have?

- Caseload data for children (number of incidents reported to police; number of children apprehended and charged;
- Police data recording the number and nature of diversionary responses;
- Data recording Court outcomes and nature of resolution;
- Number of children detained and in which category of facilities etc;
- Case characteristics data (types of offences; age of offenders; gender; magnitude of sentences given; education levels etc); and
- Resource data (the costs of administering the system for children)

Rating: Red Orange Green

Comments:

South Pacific Council of Youth and Children's Courts* (SPCYCC) Annual General Meeting, September 2013

Ten-Point Plan for Fair and Effective Criminal Justice for Children

Penal Reform International & Interagency Panel on Juvenile Justice

Introduction

The majority of children - defined as those under 18¹ - in conflict with the law come from deprived and marginalised communities and their exposure to crime often reflects the failure of the state to protect or provide for them.² In many countries there is a blurring of the boundaries between children who commit offences, and children who are in need of protection such as those living on the street, those with mental illnesses and child sex workers. The result is that children in need of support from child protection and welfare agencies can find that their conduct is instead criminalised. Furthermore, there is often a public fear of crime committed by the young, frequently fuelled by the media, which is disproportionate to the reality. In many countries the under-18 population exceeds 50% and yet offending by children is usually relatively low and it is adults who are responsible for the greatest proportion of crime.³

Accusations of being soft on crime can encourage states to disregard the increasing body of evidence that harsh treatment of children in conflict with the law is counter-productive and does not reduce offending.⁴

The stigma of association with the criminal justice system can damage a child's long term prospects.⁵ Depriving children of their liberty can lead to long term and costly psychological and physical damage, whilst overcrowding and poor detention conditions threaten their development, health and well-being.⁶ Girls are particularly at risk of sexual abuse and likely to suffer mental health problems as a consequence of detention. The removal of children from their family and community networks as well as from educational or vocational opportunities at critical and formative periods in their lives, can compound social and economic disadvantage and marginalisation.

Yet in many countries, children are arrested for relatively minor offences, detained for long periods before trial, receive long custodial sentences and are treated as adults within criminal justice systems. UNICEF estimates that there are over one million under-18s deprived of their liberty worldwide, many of whom are detained alongside adults.⁷

Penal Reform International (PRI) and members of the United Nations Interagency Panel on Juvenile Justice (IPJJ) believe that a fair and effective criminal justice system for children should be in conformity with international standards, promote the well-being of the child and react proportionately to the nature of the offence taking into account the individual characteristics of the child. It should aim to prevent crime, take decisions which are in a child's best interests, treat children fairly and in a manner which is appropriate to their development, address the root causes of offending and rehabilitate and reintegrate children so they can play a constructive role in society in future. As far as possible it should deal with children outside of the formal criminal justice system.

¹ UN Convention on the Rights of the Child, Article 1.

² Research from a large number of different jurisdictions bears this out; see, amongst others, evidence from *The Right Not to Lose Hope: Children in Conflict with the Law – A policy analysis and examples of good practice* (Save the Children: 2005) at p 18. Amongst other examples, this cites a study of children in conflict with the law in three districts in Uganda which found that 70 per cent of children had given the need to meet their own needs, including food, as the main motivation for stealing. See also evidence from *Blind Alley: Juvenile Justice in India* (Haq: 2010) p16 which cites statistics from the National Crime Records Bureau which establish that children in conflict with the law in India are overwhelmingly from poor backgrounds. See also *Punishing Disadvantage: a profile of children in custody* (Prison Reform Trust: 2010) p viii which finds that children in conflict with the law in the UK 'experience multiple layers of different types of complex disadvantage.'

³ *The Right Not to Lose Hope: Children in Conflict with the Law – A policy analysis and examples of good practice* (Save the Children: 2005) at p. 11. In a study in Europe, it was estimated that less than 15% of crime had been committed by children under 18.

⁴ Studies demonstrate that the rate of reconviction for children who have previously been in detention is not much different or is higher than the rate for those children who have received non-custodial sentences. See for example, *Juvenile reconviction: results from the 2003 cohort* (Home Office Report: 2005).

⁵ The UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) state in para 5 (f) that 'in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons.'

⁶ The UN study on violence contains extensive evidence of the sort of damaging impact detention can have upon on children's rights - Paulo Sérgio Pinheiro, *World Report on Violence against Children*, UN Secretary-General's Study on Violence against Children, Geneva, (2006).

⁷ This figure comes originally from Defence for Children International *Kids Behind Bars: A child rights perspective - Conference Report* (DCI/Kids Behind Bars: 2005) at p.7.

The following Ten-Point Plan focuses on ways that law and policy makers and criminal justice practitioners can respond effectively and positively to children in conflict with the law by focussing on: prevention, diverting children from the adult justice system, rehabilitation and promoting alternative sanctions to imprisonment. It is based on relevant international instruments including the United Nations (UN) Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice, the UN Rules for the Protection of Juveniles Deprived of their Liberty, the UN Guidelines for the Prevention of Juvenile Delinquency, the UN Standard Minimum Rules for Non-custodial Measures, the Guidelines for Action on Children in the Criminal Justice System, the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders which include specific standards for girls.

1. Develop and implement a crime prevention strategy for children

The importance of preventing children from coming into conflict with the law cannot be over-emphasised.⁸ A child protection system which includes a focus on crime prevention through addressing the root causes of social problems such as poverty and inequality, and through emphasising inclusion and access to basic services, can be very important for children. However, policies should also specifically target children at risk of coming into conflict with the law as a particular group. They should encourage children to be socialised and integrated through their families, community, peer group, schools, voluntary organisations and vocational training and work. They should include support for particularly vulnerable families and promote the teaching of human rights in schools and through the media. It is particularly important to ensure that such interventions reach those children most at risk of being involved in offending such as marginalised children from lower income families and those in the care system.

2. Collect accurate evidence and data on the administration of criminal justice for children and use this to inform policy reform

It is vital that states understand what works in their context to prevent children from offending and to ensure that they do not re-offend. It is therefore important that states collect accurate, disaggregated data on the practice and administration of criminal justice for children. At a minimum it is necessary to record and make strategic use of data and information such as: caseload data for children (number of incidents reported to police; number of children charged; number of children detained and in which category of facilities etc); case characteristics data (types of offences; age of offenders; gender; magnitude of sentences given; education levels etc) and resource data (the costs of administering the system for children). This helps states to identify offending trends and measure the effectiveness of measures and programmes. The ¶5 Juvenile Justice Indicators⁹ compiled by UNICEF/UNODC (2006)⁹ provide a basic framework for measuring and collecting specific information in order to adequately present and assess the situation of children in conflict with the law. Regular monitoring and evaluation of measures and programmes ensures that states are targeting resources efficiently and constantly improving interventions. States should address widespread public misconceptions about children in conflict with the law by responsible dissemination of relevant data and information about crime as well as about programmes and initiatives that have worked to reduce child offending. The media should be encouraged to rely on accurate data and evidence when portraying children who offend.

⁸ For extensive guidance on prevention see the UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), General Assembly resolution 45/112 of 14 December 1990; see also UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, paras 15-21.

⁹ See the Manual for the Measurement of Juvenile Justice Indicators, UNODC and UNICEF (2006).

3. Increase the age of criminal responsibility

States should set as high a minimum age of criminal responsibility as possible bearing in mind the emotional, mental and intellectual maturity of children; the Committee on the Rights of the Child have stated that it should be no lower than 12 and preferably higher.¹⁰ Children below the age of criminal responsibility should not be taken through the criminal justice system in any circumstances. Some countries retain the use of *doli incapax*, where it must be proved that children within a certain age bracket above the minimum age of criminal responsibility have the required maturity to be deemed criminal responsible. Given widespread misuse of the legal principle of *doli incapax*, states should revoke this principle in favour of a fixed minimum age of criminal responsibility no lower than 12.

4. Set up a separate criminal justice system for children with trained staff

In many countries, children in conflict with the law are dealt with within an adult criminal justice system which makes little or no allowances for their age, vulnerability and right to special protection.¹¹ A separate system for all those over the age of criminal responsibility and under the age of 18 should be set up and this should be engaged from the moment of first contact until all involvement with the system is concluded. It should apply regardless of the nature of the offence and, taking resources into account, should consist of separate and specialist authorities and institutions, including separate units within police stations and separate courts, which are furnished and arranged in a child-friendly manner and staffed by specialised judges. All those working in the criminal justice system for children - including lawyers, judges, the police, the probation service, prison service and social services - should receive regular, ongoing specialised training.

5. Abolish status offences

Status offences include truancy, running away, violating curfew laws or possessing alcohol or tobacco. Such conduct would not be a criminal offence if committed by an adult but a child can be arrested and detained simply on the basis of their age. Status offences focus disproportionately on regulating the actions of girls, as well as girls and boys who are poor, disadvantaged or who work or live on the streets and therefore spend much of their time outside of the home. These offences should be abolished and the related conduct should be addressed instead through multi-

agency child protection mechanisms that include referral systems and prevention measures.¹²

6. Ensure that children have the right to be heard

Article 12 of the Convention assures to all children who are capable of forming a view the right to express that view freely in all matters affecting him or her; and these views must be given due weight in accordance with the age and maturity of the child. Children should in particular be given the opportunity to be heard in any judicial or administrative proceeding affecting them. The criminal justice system as a whole can be daunting and intimidating for children in conflict with the law and they will require help to exercise their right to be heard. This is particularly the case for children who face obstacles such as having a disability or needing an interpreter. Children should receive legal or other assistance to ensure they can express themselves at all stages of proceedings. To this end, police, prosecutors, defence lawyers, guardians, social welfare officers, probation officers and judges should be trained to engage with children.

7. Invest in diverting children from the formal criminal justice system

When children admit offences and freely volunteer to participate in diversion measures, then diversion away from the formal criminal justice system can have many positive benefits: it can reduce rates of re-offending; avoid the labelling of children; encourage reparation to communities; and is often much cheaper than court procedures and detention. Diversion should not be confined to first time offenders or to minor offences but should be widely used with children. The police, prosecutors and judges should have the power to divert children immediately after the first contact and up to the first court hearing. These powers should be regulated and reviewed to ensure that discretion is being applied in the child's best interests. Diversion measures should be community-based and, where appropriate, make use of restorative processes. Diversion should be gender-sensitive in line with the Bangkok Rules.

8. Use detention as a last resort

The vast majority of children deprived of their liberty are detained pre-trial. This kind of detention should only be used in exceptional circumstances (where it is necessary to ensure the child's appearance at the court proceedings or where the child is an immediate danger to himself/herself or others) and only for limited periods of time. Bail and other forms of conditional release should be accompanied by measures to support and

¹⁰ See UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, paras 30-35.

¹¹ See UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, paras 90-95.

¹² For more information on holistic child protection systems see UNICEF Child Protection Strategy. E/ICEF/2008/5/Rev.1. (2008).

supervise the child during this period. Detention following conviction must also only be used as a last resort and for the shortest possible time in situations where a child is convicted of a violent offence or has been involved in persistent serious offending and there is no other appropriate response. Children should never be sentenced to life imprisonment without the possibility of release or the death penalty. Where these sentences are available in law, steps should be taken towards their abolition. The particular vulnerability of the girl child should also be taken into account during sentencing.

While children may be unable to commit crimes whilst in detention, there is little evidence to suggest that detention actually reduces re-offending or acts as a deterrent to future offending. The judges sentencing code of conduct or practice guidance should require that consideration always be given to the use of non-custodial alternatives before making an order for a custodial sentence. All children must be held in separate facilities from adults, and girls must be separated from boys. Detention facilities where they are held must be inspected and monitored by independent bodies which are not under the same administrative authority as the prison system and children should have proper access to grievance mechanisms.

9. Develop and implement reintegration and rehabilitation programmes

Where it is appropriate to detain children, institutions should have their rehabilitation and reintegration as the main objective of all policies and processes from the moment the child arrives. Rehabilitation will work most effectively in settings which are small enough for individual treatment to be provided, where children feel safe and secure, where adequate medical care is provided and where it is easy for children to be integrated into the social and cultural life of the community where the facility is located. Institutions should encourage contact with family and other social networks to support children; it should provide them with opportunities to obtain life skills through educational, vocational, cultural and recreational activities; and it should promote services to help with their transition back into society. The individual needs of children should be addressed such as mental health issues, substance abuse, job placement and family counselling.

10. Prohibit and prevent all forms of violence against children in conflict with the law

It is well documented that children who are arrested and held in detention are vulnerable to violence, abuse, neglect and exploitation at the hands of police, fellow detainees and staff in

detention facilities.¹³ There are a number of contributing factors to such violence including the fact that abuse frequently goes unreported and remains invisible; perpetrators are not held accountable; the issue is rarely a priority for policy-makers; professionals are not properly qualified; and there is a lack of effective oversight and inspections systems in detention facilities.

Proven measures for preventing, identifying and remedying violence against children in detention include¹⁴: mandatory attendance of parents and/or appropriate adults and access to lawyers whilst in police detention; reducing the numbers of children committed to detention; separation of children from adults in all detention settings; provision of adequate healthcare; having properly trained, qualified and remunerated employees working in detention facilities; prohibition of corporal punishment as a disciplinary measure for children deprived of their liberty systematic recording of instances of violence against children; access to child friendly complaints mechanisms; monitoring places of detention through inspection visits; and providing compensation and social reintegration services to children who have experienced violence.

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PRI is an international non-governmental organisation working on penal and criminal justice reform worldwide. PRI has regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus. To receive the Penal Reform International (PRI) **monthly newsletter**, please sign up [here](#).

The **IPJJ** is a coordination panel on technical advice and assistance in juvenile justice composed of 13 UN agencies and non-governmental organisations actively involved in juvenile justice. To receive the IPJJ newsletter, please sign up [here](#).

¹³ See, *passim*, Paulo Sérgio Pinheiro, *World Report on Violence against Children*, UN Secretary-General's Study on Violence against Children, Geneva, (2006). See also *Sexual Violence in Institutions, including in detention facilities*, Statement by Manfred Nowak, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (2010).

¹⁴ For a detailed exploration of measures to address violence against children in detention see *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, A/HRC/21/25 (2012).

Surrogacy in India—a changing framework**Anil Malhotra**

A burgeoning surrogacy industry is propelled by the absence of cohesive legislation and mushrooming of the necessary clinical facilities. In Vitro Fertilisation (IVF) & Assisted Reproductive Technology (ART) clinics advertise ~~wombs~~ for rent¹

The unregulated reproductive tourism industry promoting surrogacy is booming with India being the first country proposing to legalise commercial (ie for profit) surrogacy. Whilst the new *Assisted Reproductive Technology (ART) (Regulation) Bill and Rules, 2010* are still in development (see appendix) the non-statutory *Indian Council of Medical Research (ICMR) Guidelines, 2005*, rule the roost. The Indian entrepreneurial spirit has propelled the business of providing ~~wombs~~ for rent¹ into a huge trade valued at Twenty Five thousand Crores of Rupees (25 billion Rupees). Despite legal, moral and social complexities that shroud surrogacy, economic necessity stimulates women to shake off their inhibition and fear of social ostracism to be lured by agents or corporate surrogacy consultants active in international markets. The wide availability of

- a large pool of women willing to be surrogates,
 - a good medical infrastructure,
 - low costs,
 - less waiting time,
 - close monitoring of surrogate mothers by over two hundred thousand IVF Clinics and
 - no legal check restricting single, gay or unmarried couples becoming parents by surrogacy,
- has made this unethical trade in India skyrocket to spiralling heights.

New Indian Medical Visa Regulations (MVR) will cap surrogacy

However, the business of surrogacy will soon plummet as the result of administrative changes. Since 15 November, 2012, all foreigners visiting India for commissioning surrogacy have been required to apply for ~~Medical Visas~~¹ and cannot use simple tourist visas for surrogacy purposes. Using powers under **Section 3¹ of the Foreigners Act, 1946** the Ministry of Home Affairs in a letter of 9 July, 2012, has stipulated mandatory conditions for such medical visas, which if not fulfilled, will lead to visa rejection. These new MVRs stipulate that a letter from the Embassy in India of the country of the potential foreign parents or the Foreign Ministry of that country should be enclosed with the visa application stating clearly that

- the country concerned recognises surrogacy and
- that the child to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child of the couple who will
- undertake to take care of their surrogate child.
- In addition,
- the treatment will be done only at a registered ART Clinic recognised by ICMR and
- the foreign commissioning couple must produce a duly notarised agreement between them and the prospective surrogate Indian mother and
- after the surrogate baby is born, the commissioning couple must, before leaving India, obtain an exit permit from the Indian Foreigners Regional Registration Office (FRRO) verifying the issuance of a certificate from the ART Clinic confirming discharge of liabilities by the Indian Surrogate mother and declaring that the commissioning parents have custody of the child.

Clearly, administrative safeguards, checks and balances as well as moral and ethical dimensions, which until now have remained unaddressed by legislation, have been put in place to properly regulate the surrogacy industry.

The conditions for medical visas will prevent unrestricted surrogacy which had distressed and blighted India by deeply affecting women's health, their basic dignity and fundamental human rights.

¹ ~~Section 3~~ Section 3. Power to make Orders: The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure therefrom, or their presence or continued presence therein"

Medical Visa Regulations will harmonise with existing Indian law and the law of the countries of the foreign commissioning parents

Commercial surrogacy is illegal in the United Kingdom (UK), though permissible under British Law on payment of reasonable expenses to the surrogate mother. In most US States, compensated surrogacy agreements are either illegal or unenforceable. In some Australian States, arranging commercial surrogacy is a criminal offence and surrogacy agreements giving custody to others are void. In New Zealand and Canada, commercial surrogacy is illegal, although altruistic surrogacy is allowed. In Italy, Germany and France, commercial or other surrogacy is unlawful. In Israel, commercial surrogacy is illegal and the law only accepts the surrogate mother as the real mother.

India, in total contrast, accepts commercial surrogacy and no law declares it illegal. The Supreme Court on 29 September, 2008, in *Baby Manji Yamada Vs. Union of India and Another*, *All India Reporter 2009 SC 84*, observed that *Commercial Surrogacy+ reaching industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: wombs for rent, outsourced pregnancies or baby farms.+* However, the new Indian MVRs by disallowing Indian visas to foreigners whose countries prohibit surrogacy will ensure that we harmonise and fall in tandem internationally with those foreign nations whose overseas citizens wish to wrongfully patronise surrogacy in India. We have banned foreign single, unmarried or gay parents by restricting surrogacy to couples constituted by a foreign man and woman who have been married for at least two years. Operations of unethical, unregistered and unrecognised ART facilities cannot be used any more.

Reactions and responses of foreign governments

Most foreign embassies have indicated on their websites that the Indian Government now requires medical visas for foreigners coming to India for surrogacy. There are also stringent DNA tests in place to establish genetically the parentage of a surrogate child. Indian Consulates and Visa Facilitation Services (VFS) overseas have also given notice that foreign nationals must ascertain beforehand whether their country permits surrogacy and that they cannot enter India for surrogacy purposes using tourist visas.

The British High Commission in New Delhi in its letter of 30 October 2012 to the India High Commission in London stated that the British Government recognises surrogacy and that legislation makes provisions for commissioning couples for children born overseas through surrogacy. The UK Human Fertilization and Embryology Act, 1990 is cited in support. The Act allows surrogacy if one parent is genetically related to the surrogate child and no money other than reasonable expenses is paid in respect of the surrogacy arrangement. In addition the letter also says the Act provides for parental orders being made to the commissioning parents. This letter paves the way for the consideration of applications by British couples for medical visas for the purposes of surrogacy in India as per requirements of the new Indian MVRs.

Conclusion

Rather than Parliament catching up to make a law to regulate the unscrupulous surrogacy trade, the new MVRs have stepped in to do what the law ought to have done. Rather than permitting surrogate children to be born in India with the risk of being stateless persons and being denied entry into foreign countries where their commissioning parents reside, it is both proper and necessary that such unethical practices leading to such disastrous situations must be pre-empted and prevented. The Indian Government,, in its administrative wisdom has stepped in at a time when regulatory law is nowhere on the horizon.

Recent instances of surrogate children from Germany, Japan and Israel born in India and leaving upon court intervention should well spur legislators into enacting a strict surrogacy monitoring law. Due to the lack of a codified law on surrogacy and due to the absence of any legal remedy under any statutory law governing surrogacy, issues of parentage, nationality, citizenship and legal status of surrogate parents remain undetermined.

Desperate surrogate parents invoke the judicial review remedy under the constitution of India by filing a writ petition either in the State High Court or directly in the Supreme Court of India.

In such a situation, the superior court in a judicial review petition realising the helplessness of a stateless child, often invokes its extra ordinary jurisdiction and issues a direction (Writ of Mandamus) ordering the Government to issue an emergency travel document to enable the child to leave India on purely humanitarian grounds. The court thereby deals with the void which ought to be filled by a law on the subject.

In addition to being in conflict with existing family laws the ART Bill, 2010, itself has legal lacunae for example it lacks the creation of a specialist legal authority for determination and adjudication of the legal rights of parties. These drawbacks should not stymie a law which is yet to be born because surrogacy needs to be checked and regulated by a proper statutory law; until then, the much needed MVRs will hopefully provide succour and relief. What should not go on must not be allowed to go on merely because there is no law.

Anil Malhotra*LLM (London) is a Fellow of the International Academy of Matrimonial Lawyers (IAML) and can be reached at: anilmalhotra1960@gmail.com.

Please go to the next [page \(54\)](#) for information on Anil Malhotra's book on *Surrogacy in India*.

Appendix

The Assisted Reproductive Technology (Regulation) Bill & Rules 2010, is awaiting debate in the Indian Parliament. The draft Bill would provide for the regulation and supervision of ART and would legalise commercial surrogacy. Under the Bill's provisions, the parties would enter into an enforceable surrogacy agreement and the surrogate would receive monetary compensation as well as health care treatment expenses during pregnancy. A surrogate mother is to be aged between 21 and 35 years old and should have no more than five children, including her own. The child would be regarded (in India, at least) the legitimate child of the commissioning married couple.

Once the agreed payment has been made, the surrogate would relinquish all parental rights and these would vest in the commissioning party or couple whose names(s) would appear on the child's birth certificate. The child would not be an Indian citizen and foreigners seeking fertility treatment in India would be required to demonstrate that they had registered with their own Embassy and that they would be able to take the child to their country of origin or residence. Foreigners would also be required to appoint a local guardian to take care of the surrogate during the pregnancy and of the child, should the commissioning party or couple be unable or unwilling to receive the child. Whilst the Bill has still not become a law, the Indian Council for Medical Research Guidelines, 2005 provide the only non-statutory provisions which are neither justiciable nor enforceable in a Court of law.

Treasurer's column

Avril Calder

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In February 2014 I will send out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 55 for the year 2013 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

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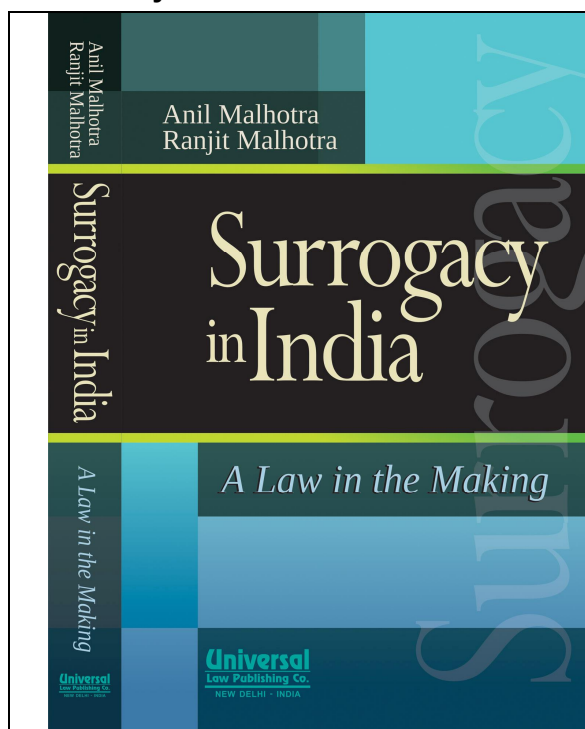
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Without your subscription it would not be possible to produce this publication.

Avril Calder

A book by Anil Malhotra



The Assisted Reproductive Technology (Regulation) Bill & Rules 2010, is awaiting debate (as at May 2013) in the Indian Parliament. The draft Bill provides for the regulation and supervision of ART and would legalise commercial surrogacy.

This book describes the new Indian surrogacy law in the making, takes readers through the difficulties and issues involved and describes the hoped for outcomes, guiding would be parents through the steps along the road to parenthood.

Contact Corner**Avril Calder**

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Child Rights Connect	A global child rights network connecting the daily lives of children to the United Nations Up to date news on OP3 CRC	Find it here
CRIN	Website	Find it here
The Child Rights Information Network	Email See Toolkit on the OP CRC for a complaints mechanism here: (Also available in Arabic, French, Russian and Spanish forthcoming)	info@crin.org Find it here
Defence for Children International	Website	Find it here
IAYFJM	Website	Find it here
IDE	Website	Find it here
International Institute for the Rights of the Child	Contact	Find it here
IJJO	Website	Find it here
International Juvenile Justice Observatory	Newsletter	Find it here
IPJJ	Website	Find it here
Interagency Panel on Juvenile Justice	The IPJJ is a coordination panel on technical advice and assistance in juvenile justice composed of 13 UN agencies and non-governmental organisations actively involved in juvenile justice. Newsletter	Find it here Find it here
OHCHR	Website	Find it here
Office of the High Commissioner for Human Rights		
PRI	PRI is an international non-governmental organisation working on penal and criminal justice reform worldwide. PRI has regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus. To receive the Penal Reform International (PRI) monthly newsletter , please sign up at find it here	Find it here Find it here
Penal Reform International		
Ratify OP3 CRC	Campaign for the ratification of the OP3:	Find it here
TdH	Website	Find it here
Fondation Terre des Hommes	Newsletter	Find it here
UNICEF	Website	Find it here

Council Meeting 14th September 2013, Friburg, Switzerland



Godfrey Allen, Joseph Moyersoen, Theresia Hoeynck
Daniel Pical, Anne-Catherine Hatt, Petra Guder, Avril Calder, Hervé Hamon
By Skype: Imman Ali, Oscar d'Amours, Viviane Primeau, Eduardo Rezende Melo,

Bureau/Executive/Consejo Ejecutivo 2010-2014

President	Honorary Judge Joseph Italy	president@aimjf.org
	Moyersoen	
Vice President	Judge Oscar d'Amours (Retired)	Canada vicepresident@aimjf.org
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Council—2010-2014

President —Joseph Moyersoen (Italy)	Gabriela Ureta (Chile)
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Imman Ali (Bangladesh)	Andrew Becroft (New-Zealand)
Françoise Mainil (Belgium)	Judy de Cloete (South Africa)
Antonio A. G. Souza (Brazil)	Anne-Catherine Hatt (Switzerland)
Viviane Primeau (Canada)	Len Edwards (USA)

The immediate Past President, Justice Renate Winter, is an ex-officio member and acts in an advisory capacity.

Chronicle Chronique Crónica

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Association- English, French and Spanish. The aim of the Editorial Board has been to develop the Chronicle into a forum of debate amongst those concerned with child and family issues, in the area of civil law concerning children and families, throughout the world

The Chronicle is a great source of learning, informing us of how others deal with problems which are similar to our own, and is invaluable for the dissemination of information received from contributions world wide.

With the support of all members of the Association, a network of contributors from around the world who provide us with articles on a regular basis is being built up. Members are aware of research being undertaken in their own country into issues concerning children and families. Some are involved in the preparation of new legislation while others have contacts with colleagues in Universities who are willing to contribute articles.

A resource of articles has been built up for publication in forthcoming issues. Articles are not published in chronological order or in order of receipt. Priority tends to be given to articles arising from major IAYFJM conferences or seminars; an effort is made to present articles which give insights into how systems in various countries throughout

Editorial Board

Dr Atilio J. Alvarez
Judge Viviane Primeau
Cynthia Floud
Prof. Jean Trépanier
Dra Gabriela Ureta

Voice of the Association

the world deal with child and family issues; some issues of the Chronicle focus on particular themes so that articles dealing with that theme get priority; finally, articles which are longer than the recommended length and/or require extensive editing may be left to one side until an appropriate slot is found for them

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages- it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. Items of Interest including news items, should be up to 800 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,

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International Conference 25 Years CRC

17-19 November 2014

Leiden Law School, Leiden University

The Netherlands

The conference is part of a whole week of festivities
from
Monday 17 November until Thursday 20 November 2014
organized by
Leiden University, the City of Leiden, UNICEF The Netherlands
and
the Dutch NGO Coalition on Children's Rights.

This programme also includes

- the Leiden Children's Rights Summit on Universal Children's Day, 20 November 2014;
- the Leiden Freedom Lecture; and
- an international moot court competition on children's rights for students

We are looking forward to welcoming you all in Leiden!

[Prof Ton Liefwaard](#), UNICEF Chair of Children's Rights

[Prof Julia Sloth-Nielsen](#), Leiden Chair of Children's Rights in the Developing World

[Prof Mariëlle Bruning](#), Head of the Department of Child Law

For more information please go to: www.25yearsarc.nl