CHRONICLE CHRONIQUE CRÓNICA

Contents **Page**

Editorial

Avril Calder*

Children's Rights

You will remember reading about the UN 3rd Optional Protocol to the CRC in an earlier edition so I am pleased to update members with an article from **Child Rights Connect** of which we are a founder member. You will see what progress has been made in signing and ratification and how national human rights institutions are raising the profile of OP3 in countries such as Germany and Malawi.

You will also remember reading in the January 2017 edition about a book written by **Professors Stalford** and **Hollingsworth** addressing judgements from a child rights perspective. In this edition the Professors elaborate on the content of the book showing that while some judgements would have been different, those with a childõs rights approach were the same as those of the contributors to the book.

Overlap between youth and family courts

I have long been interested in children who appear in both youth and family courts, sometimes without that information being shared between the two jurisdictions. Three articles examine such overlap from the point of view of a judge, a social worker and a former clinical social worker recently involved in Acts passed in South Africa addressing child protection. The three are: **Judge Tony Fitzgerald** of New Zealand, **Owen Lawton** of London and **Joan Niekerk** of South Africa. Their complementary perspectives are enlightening and show what can be done to guard against õlosing the child between the systemsõ

Youth Court

Dr Dorris de Vocht. Assistant Professor of Law at Maastricht University describes how, in the European Union (EU), more needed to be known about the level of legal protection offered to juveniles in contact with the justice system and the outcome of research she and others undertook into it.

This topic of legal representation was also the subject of a talk, encompassing the EU Directive on Children Suspected or Accused in Criminal Proceedings given by **Dr Michael Sommerfeld** at the 100th anniversary conference of the Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfe e V.(DVJJ) held in Berlin last autumn. The EU Directive represents a strong step forward for children and protection of their rights. A second article arising out of the Conference is that on extremism written by **Michaela Glaser**, a senior researcher at the German Youth Institute, whose expertise in extremism has led to her being a member of the European Commissionõs Expert Group on marginalisation and radicalisation. Her article sets out characteristics that lead to involvement in extremism and paves the way for the World Congress in Paris at the end of May 2018. But before these two articles, **Achim Wallner**, an Executive Committee member of DVJJ has kindly contributed a resumé of the DVJJ centenary conference which I was very pleased to attend, representing our Association. Achim notes that the conference emphasised that juveniles should always be dealt with by experts.

In writing about features such as over representation of Aboriginal children in detention and poor standards and lack of respect for childrenõs rights while in detention in some Australia Territories, **James McDougall** is describing characteristics known only too well in many justice systems around the world. Following a Royal Commission Report on the Northern Territory published in November 2017 and the call by a Coalition of NGOs for a National Youth Justice Plan, it is hoped that the Australian Government will address the challenges about effective monitoring and compliance in places of detention across the country.

IAYFJMõs immediate past President, **Joseph Moyersoen** briefly relates the recent challenge to the specialisation of Youth Courts in Italy, which after much lobbying for remain in place.

Vivere is a not for profit organisation campaigning against the death penalty for under 18s and over 18s who committed the related offence when under 18 years of age. **Bernard Boeton,** a founder member, summarises the situation around the world in a compelling way.

Family Court

Based on his own experience and research involving interviews with 30 judges in England and Wales, social worker, **David Lane**, argues strongly for making a childõs experience the centre of decision making when judgements about care and adoption orders are made in family courts, reflecting that this approach has become an integral part of respecting childrenõs rights.

Pauline Miceli, the Commissioner for Children in Malta, echoes the principles expounded by David as she sets out, with full reference to the UNCRC Articles, the role entrusted by law to her office to foster the development of alternative care for children who need it, highlighting that financial and human resources are essential to make provision for such permanency planning.

In France, *childbirth under secrecy*, which allows a mother to give birth and leave the child without giving any of her details, presents a very difficult issue when looked at from both a womenõs rights perspective and a childõs rights perspective, the latter becoming more significant since the recognition of children as being holders of rights.

Four experts, **Flora Bolter,** a political scientist, **Judge Elsa Keravel, Milan Momić,** a demographer, all at the French observatory of child protection (ONPE) are joined by **Professor Dr Gilles Séraphin** former director of ONPE in writing a superb article. Their account covers four centuries of the practice of childbirth under secrecy starting in 1638, bringing us up to the present time with preparations for reform, clarifying statistics and recent leading cases.

Human Rights Education for Legal Professionals (HELP) is the Council of Europeôs highly effective training programme. **Eva Pastrana**, Head of the HELP Unit within the Directorate General of Human Rights and Rule of Law, gives us a fascinating account of the range of courses designed and delivered by the Unit across 47 countries and beyond.

Delivering quality of service to and in the courts is a tenet of Courts Watch, Poland. Founders, **Bartosz Pilitowski** and **Stanislaw Burdziej,** along with **Martyna Hoffman** outline the work of the Foundation which encourages and trains members of the public to observe and report on aspects of judicial systems.

It is an innovative approach and one which the Polish Judges to whom I spoke recently at their annual conference welcome.

Justice Clarence Nelson of Samoa, Vice Chairperson of the CRC Committee, in his succinct review of ôIntroduction to South Pacific Law, 4th edition (2017)ò sets out for us the laws and evolution of laws of the smaller island states of the South Pacific, where there is a myriad of courtsô

I should like to thank to Radhi Shah and Andrea Conti most warmly. Without their help, at this very busy time with World Congress preparations, this edition might still be ôin the pipelineô

May I send you very best wishes for 2018 when I hope to welcome as many of you as possible to our XIX World Congress at UNESCO House in Paris, 28-30 May. Please see page 4 for details.

Avril Calder
chronicle@aimjf.org
Skype account: aimjf.chronicle

Former IAYFJM President honoured by her country

It is a great pleasure to bring you the news that Justice Renate Winter*, our President 2006-2010, has been awarded the Austrian honour:

Das Grosse Goldene Ehrenzeichen für die Verdienste um die Republik Österreich[1],
in recognition of her capacity as President of the Special Court of Sierra Leone.

The formal presentation, shown above, was made in The Hague, the home of the International Criminal Court, by the Austrian Ambassador in the name of the of the President of the Republic of Austria.

[1] Great Golden Emblem with Star of Merit (English translation)

UNESCO house - Paris

WORLD CONGRESS ON JUSTICE FOR CHILDREN

28-30 MAY 2018

Challenges including disengagement from violent extremism

Early bird registration ends 26 February 2018

www.j4c2018.org

Outline programme

Monday 28th May 2018

Challenges and trends in Justice systems for youth and their families: maintaining children's rights including in cases of violent extremism.

- ***Child and Family Justice international challenges and trends***
- ***Children and extreme violence: definitions, characteristics, pathway and developmental approach.***
- ***Preventing engagement in all forms of violence including extreme behaviour : the role of families and communities.***

Tuesday 29th May 2018

Strengthening youth and family justice systems around the world: Concrete and promising practices concerning child protection, youth crime prevention, diversion and alternatives programmes to detention, after care and reintegration.

*26 simultaneous Workshops will present **strategies or experience to strengthen juvenile and family justice systems**, always taking into account **child participation.** Twelve topics will be addressed by speakers **from the perspective of legal reform, scientific research, or validated practice**. Presentations will bring best-practices, meta-analyses and research from evidence based policies and practice.*

Wednesday 30th May 2018

Strategies to improve youth and family justice systems: overview of promising practices

- ***Adopting appropriate child-and family specific procedures for children involved in extreme violence.***
- ***Promising practices: community based and disengagement programmes, alternatives to custody programmes,***
- ***Make it change! International Strategies and campaign for change: inspiring thoughts***

Further Information: Cédric Foussard . *info@j4c2018.org*

Organised by

Judicial Training Institute of Belgium (IGO- IFJ) | Child Rights International Network (CRIN) | Penal Reform International (PRI) | Terre des hommes Foundation (Tdh) | Defence for Children International (DCI) | The International Association of Youth and Family Judges and Magistrates (IAYFJM)

Supported by

United Nations Educational, Scientific and Cultural Organization

Information for All Programme

ISSN 2414 - 6153

Optional Protocol 3 to the UN Convention on the Rights of the Child (UNCRC)

Child Rights Connect

How can National Human Rights Institutions support children's access to effective remedies? - OPIC in focus

OPIC stands for Optional Protocol 3 to the UN Convention on the Rights of the Child (UNCRC) on a communications procedure. So what is it, and why and how is it relevant for National Human Rights Institutions (NHRIs) in their work as children's rights defenders, to protect and promote the rights of every child?

What is Optional Protocol 3 to the UNCRC (OPIC)?

Adopted in 2012 and entered into force in April 2014, OPIC is an international human rights treaty and complaints mechanism, which States can ratify to allow children to bring a communication to the UN Committee on the Rights of the Child (the Committee) when their rights have been violated, as set out in:

- The UN Convention on the Rights of the Child (UNCRC)
- The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC)
- The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC).

OPIC provides two new ways for children to challenge violations of the rights committed by States:

1) A communication procedure, which enables children to bring complaints about violations of their rights to the Committee, if they have not been fully resolved at the national level;

2) An inquiry procedure for grave or systematic violations of child rights, which do not have to be linked to individual victims.

Before the adoption of OPIC, the UNCRC was the only core international human rights treaty that did not have a communications procedure.

OPIC is a ground-breaking accomplishment in offering children an additional and unique, child-friendly means to seek justice for the violation of their rights and be heard directly by the expert body on children's rights. It is arguably a huge step forward in the international recognition of children as equal and individual rights holders. As quoted by former UN High Commissioner for Human Rights Navi Pillay, "Children will now be able to join the ranks of other rights-holders who are empowered to bring their complaints about human rights violations before an international body".

Thanks to OPIC, children can access a communications mechanism adapted to their specific rights, which will provide concrete recommendations to States on how to remedy the violations incurred, will get international recognition of the violations they have suffered, and will eventually help improving the implementation of the CRC, the OPSC and OPAC on national level.

OPIC: State of play

As of November 2017, 36 State Parties have ratified OPIC; 51 State Parties have signed, outlining a willingness to proceed to ratification, and 106 have yet to act. An International Coalition on the ratification of OPIC was set up to raise awareness about OPIC, to disseminate information, tools and ideas to enable interested partners to engage in the ratification campaign, and to pursue the rapid entry into force of the OPIC.

OPIC entered into force on 14 April 2014, and three years later the Committee has registered a total of 35 communications. Of these, the Committee has decided that 3 individual communications were inadmissible and it has discontinued the consideration of one communication. The list of pending cases under consideration is now available online and highlights the State against which the communication has been brought; the subject matter of the communication and the UNCRC Articles that are allegedly violated. It is interesting to note that most of the cases are about migrant children and are against Spain.

What can be the role of NHRIs in relation to OPIC?

As indicated in the OHCHR report to the 29th meeting of Treaty Bodies Chairpersons, NHRIs can play a unique role in cooperating with the UN Treaty Bodies, and in particular in promoting their recommendations. NHRIs have a mandate to

monitor their governmentsô compliance with international human rights law, including their compliance with the Treaty Bodies Concluding Observations and views.

In its second General Comment adopted in 2002, the Committee stated clearly that NHRIs are an important mechanism to promote and ensure the implementation of the Convention and its Optional Protocols and OPIC reiterates that NHRIs can play an important role in its implementation:

ñRecalling the important role that national human rights institutions and other relevant specialized institutions, mandated to promote and protect the rights of the child, can play in this regard,ò

The SDGs Goal 16 comes to reinforce this by calling on States to provide access to justice for all build effective, accountable and inclusive institutions. NHRIs are specifically mentioned for their important role in violence prevention, through regular monitoring, reporting and protection measures.

Within this broad role, some NHRIs can undertake investigations, conduct inquiries, and support child victims of human rights violations to be heard and to access justice, ensuring effective remedies for breaches of their rights. Moreover, NHRIs can act as a link between government and civil society, including children, thanks to their unique human rights approach and advisory role to actors including local and national governments, lawyers and non-government organisations.

Until now, there has been a higher level of engagement by NHRIs in the UN Treaty Bodiesô reporting processes than in other areas of work, for example the individual communications and inquiry procedures. As highlighted in the OHCHR report Common approach to engagement with national human rights institutions, NHRIs do not engage systematically in the individual communications procedures of the Treaty Bodies, including OPIC.

Are there specific examples of activities that NHRIs can carry out in order to fulfil their ómportant roleô as stated by the Committee (above)?

Examples of how NHRIs are working with OPIC: Examples from Portugal, Germany, Malawi and Colombia

There are varied activities unique to the mandate of NHRIs which can significantly help to promote OPIC at national level, to strengthen and support the recommendations and procedures of the Committee and to guarantee that children within their countries can seek redress for violations of their rights at the international level.

1) NHRIs can encourage ratification of or accession to OPIC

NRHIs could call upon their States to ratify the necessary instruments, as provided for under the Paris Principles. Annual reports of NHRIs constitute an important vehicle in which to give effect to calls for the ratification of various instruments and the lifting of reservations.

The Malawi Human Rights Commission (MHRC) attended a meeting with NGOs in Ethiopia, where they were sensitized on OPIC and its content. MHRC is now collaborating with civil society organisations to lobby government, the general public and Parliament for ratification of OPIC. It recently met with the Ministry of Gender and Children to raise the importance of having an option for addressing human rights violations. Thanks to this advocacy, OPIC has now become part of ongoing discussion.

In January 2017, Malawi received a Concluding Observation from the Committee whereby it was recommended that the State ratifies OPIC (this is now a routine recommendation from the UN Committee to all State Parties who have not yet ratified). MHRC is using this as an advocacy tool to continue lobbying the government to ratify the Protocol.

In Colombia, the Ombudsmanôs Office has provided the government with advocacy arguments regarding ratification of OPIC, highlighting that there is nothing preventing the State from acceding the Protocol. This is because it would only operate when the national mechanisms for protecting childrenôs rights in the internal order have not been able to satisfy the guarantees of the Constitutional provisions and the UNCRC. In addition, the Ombudsman for the People of Colombia underlined that ratification would not require any economic effort on the part of the national government but it rather an additional tool to implementing already existing obligations.

2) NHRIs can help to raise awareness and understanding of OPIC, among children and adults and across all levels of government.

All NHRIs have a mandate to engage in human rights education and awareness raising and many conduct such activities, including providing training to legal professionals.

In Portugal, the Ombudsmanôs Office is promoting awareness-raising initiatives directed to children and institutions that deal with childrenôs rights, to increase understanding of OPIC and create a ófriendly environmentôin which accessibility to the communications procedure is fully understood.

3) NHRIs can advise victims on the procedures of OPIC and connect them to relevant NGOs and lawyers.

As recommended by OHCHR, NHRIs could be more proactive in ensuring that alleged victims are aware of the communications procedures. They could also be more creative in finding effective ways of doing so, like for example by using already existing national structures and projects in place to offer legal (and other) assistance and advice to children and it is through these that OPIC could be mainstreamed.

In Germany, the German Institute for Human Rights offers advice, information, mediation and if necessary, jurisdictional orientation for children and adults working with children. The advisors consider the best interests of the child and are on their side: they have the knowledge to guide every child or the people the child trusts, to find the right place to get the best counselling they need. The Institute for Human Rights has also mapped out existing childrenôs offices, childrenôs commissioners and childrenôs ombudspersons, of which there are approximately 80 in a total of 11000 local areas, with some offering complaints mechanisms and advice.

In Malawi, the MHRC uses Community Based Organisations, Child Rights Clubs, Students Councils and stakeholders such as NICE Trust (spread in all districts in Malawi) to provide information and receive complaints.

It is key that NHRIs who are in contact with victims or alleged victims provide the necessary advice and connections to ensure that children can access OPIC in the most effective way. The complementary role of NHRIs and NGOs is of particular relevance when it comes to referring cases brought in front of an NHRI that does not have the mandate to deal with individual complaints.

4) NHRIs can assist victims in bringing individual communications and inquiries under OPIC

NHRIs are in a unique position to support victims to bring cases under both the individual communications procedure and the inquiry procedure of OPIC. Thanks to the special powers provided by the Paris Principles, based on which NHRIs could ñhear any person and obtain any information and any documents necessary for assessing situations falling within its competenceò, some NHRIs can also represent victims and bring cases directly on their behalf. The power to access documents, records, people and places has been noted as the ñlifeblood of oversight institutionsò. Although the degree of access to information varies from NHRI to NHRI, it is something that civil society organizations and other non-governmental actors usually miss or enjoy it to a different extent.

Whether or not an NHRI has quasi-judicial competence, they can provide key information to the Committee on individual cases, through amicus curiae (see section 5), as well as on an inquiry, through for example meetings during a country visit of the Committee. NHRIs can also request the Committee to conduct an inquiry, by providing ñreliable information indicating grave or systematic violations by a State party of rights set forth in the Convention or in the Optional Protocols. It is important to note that the Committee has recommended that NHRIs ñconduct inquiries on matters relating to childrenôs rightsò and ñprepare and publicize opinions, recommendations and reports, either at the request of national authorities or on their own initiative, on any matter relating to the promotion and protection of childrenôs rightsò. The role that NHRIs can play in the framework of the inquiry procedure is as crucial as the one that they already playing in relation to the Treaty Bodies reporting process. NHRIs could utilize OPIC to gain publicity on the issue and leverage their advocacy through expert recommendations from the Committee.

For example, in Malawi the MHRC deals with complaints through investigations and public inquiries into systemic violations. Complaints have sometimes led to comprehensive research such as research on culture and human rights. Complaints have also led to regular monitoring of places prone to human rights violations such as child care institutions, police cells, hospitals, and schools.

5) NHRIs can provide information to the Committee through *amicus curiae*

At any time after the receipt by the Committee of a communication, and before a determination on the merits has been reached, the UN Committee may consult or receive, as appropriate, relevant documentation from NHRIs. This is among a broad list of any other relevant organs, bodies, agencies or organisations from the local to the UN and international level with a mandate to promote and protect the rights of the child.

GANHRI and OHCHR have encouraged NHRIs to submit amicus curiae to the UN Treaty Bodies. That is to provide a full picture of the legal and factual situations and assist in developing targeted and specific views and decisions addressing a structural problem underlying an individual case. Several NHRIs have, individually or through their regional networks, experience as amici curiae in court proceedings on the domestic and/or regional levels.

OPIC offers a unique opportunity for NHRIs to influence the Committeeôs decisions on individual communications so as to develop a strong international jurisprudence. As the Committeeôs Concluding Observations, the Decisions on

individual communications can help the effective implementation of the UNCRC and its Protocols at national level by clarifying legal provisions. The Committeeôs work on communications address the most hidden implementation gaps that only individual cases can shed light on and they specific recommendations that can help States to better understand their obligations. These relate closely to the core functions of NHRIs (recognising that national mandates vary) to handle complaints and to make recommendations on law reform.

6) Monitoring governments' compliance with OPIC

In the words of the Committee, NHRIs can ñkeep under review the adequacy and effectiveness of law and practice relating to the protection of childrenôs rightsò and ñreview and report on the Governmentôs implementation and monitoring of the state of childrenôs rights (é)ò.

Many NHRIs play an important role in the follow-up to the Committeeôs Concluding Observations, by conducting monitoring, reporting, advocacy and awareness-raising activities. Indeed, NHRIs can do the same type of work in relation to the Committeeôs views and decisions under OPIC. These are not directly enforceable on national level and therefore need ï like the Concluding Observations ï particular efforts by all relevant stakeholders, including NHRIs.

In Malawi, the MHRC uses information collected on childrenôs rights violations to produce position papers which have been submitted to supplement law review processes, used to offer advice to parliament when Bills are being considered and to advise government in development of policies and regulations. This activity provides an example of where Committee decisions and recommendations on OPIC could be used to justify and strengthen the NHRIôs positions and advice.

In Germany, the German Institute for Human Rights has a National Monitoring Mechanism on Childrenôs Rights, which seeks to strengthen the position of children within the jurisdictional system and improve the existing system by running studies and providing advice. These are functions which could be expanded to monitor how governments are complying with OPIC, in coordination with other monitoring bodies, such the National Mechanisms for Reporting and Follow-up and civil society, including children.

Thanks to their advisory role, NHRIs can remind States about their obligation to disseminate OPIC and the Committeeôs decisions in accessible formats to all children . They can also undertake more forefront advocacy to ensure that the relevant authorities effectively apply the ñinterim measuresò that the Committee may request to protect victims at risk of irreparable harm.

In addition to working on national level, NHRIs can cooperate with the Committee in the follow-up phase. While the Committee does not have a follow-up procedure to monitor the Statesô compliance with its Concluding Observations, OPIC provides a follow-up procedure for individual communications as well as inquiries. This is a unique opportunity for NHRIs to support the Committee in assessing the level of implementation of its recommendations by the government ï although the specific modalities of engagement are yet to be defined by the Committee. In this regard, OHCHR has recommended that Treaty Bodies develop specific guidelines on how NHRIs could better engage in the follow-up to their decisions on individual communications.

Conclusions

NHRIs are childrenôs rights defenders! All NHRIs, with or without the power to deal with individual complaints, can engage with OPIC. Such engagement can take a variety of forms which reflect key aspects of the Paris Principles and the unique and valued role of NHRIs as outlined by UN Treaty Bodies.

NHRIs can play a crucial role in the progress made to implement SDG 16 by ensuring that children have access to OPIC as an essential remedy available to children if they have exhausted all means to seek access to justice at national level. NHRIs can advocate for the ratification of OPIC and thus build the accountability of States to take action and ultimately, to protect and progress the full implementation of the CRC and its Optional Protocols. OPIC can contribute to strengthening domestic case law in relation to children and can increase the public awareness on childrenôs rights.

Child Rights Connect is an independent, non-profit network of 84 national, regional and international organisations, networks and coalitions.

Towards a Children's Rights Judgement: five factors that Judges might wish to consider

Professors Helen Stalford and Kathryn Hollingsworth

Professor Helen Stalford

Professor Kathryn Hollingsworth

Introduction

In January 2017 we published a short article in this Chronicle introducing a two-year project, Childrenôs Rights Judgments, funded by the Arts and Humanities Research Council. That project has now been completed: it involved nearly 60 academic experts and legal practitioners working in the field of childrenôs rights across the world. This presented a unique collaborative opportunity to bring childrenôs rights scholars and legal practice together, providing the latter with access to the latest theoretical and empirical intelligence from childhood research, and the former with a more profound appreciation of judgesô unique experience of transposing rights from abstract expressions into meaningful, fruitful and enduring commitments in relation to children implicated in legal proceedings.

Contributors were tasked with revisiting existing judgments and redrafting authentic, alternative versions in an attempt to illustrate, on judgesôown terms and adhering to judicial conventions, how they might have looked if reasoned through a childrenôs rights lens. The resulting collection features 28 judgments and accompanying commentaries spanning seven domestic jurisdictions (14 from England and Wales; and one each from Australia, the Netherlands, the USA, South Africa, Canada and Pakistan), as well as eight judgments from the international courts. The judgments also cover a range of legal areas, including public and private care proceedings, medical decision-making, public order, immigration and asylum, criminal justice, housing, media privacy and parental child abduction. More broadly, the project aimed to confront some of the legal, political, economic, cultural and personal issues that so often limit judgesôability to endorse childrenôs rights more boldly in the courts.

In an attempt to develop some constructive suggestions as to how to overcome these limitations, we identify five main factors that characterise a childrenôs rights-based approach to judgment writing and illustrate, through the rewritten judgments, what difference their application can make to the adjudication of cases involving children. Those five factors involve:

(i) Explicitly using childrenôs rights principles, including the UN Convention on the Rights of the Child, to inform judicial decision-making;

(ii) Drawing on theoretical and empirical scholarship to inform (and challenge!) established notions of children and childhood;

(iii) Applying and advocating child friendly procedures to maximise childrenôs participation in the legal process;

(iv) Placing the childôs voice, interests and experiences at the heart of the judgment narrative;

(v) Communicating the judgment in a child-friendly way.

The following discussion summarises some of the limitations inherent in judicial approaches to cases involving children before exemplifying how each of the above childrenôs rights factors were applied to the rewritten judgments included in the project. Whilst some, perhaps predictably, apply a different reasoning or different sources of childrenôs rights to arrive at a different outcome to the original, other equally interesting contributions arrive at the same outcome as the original but via a more explicit childrenôs rights reasoning.

Of course, we recognise the limitations of our attempts to rewrite judgments, some of which were spelled out in our first article. As a group composed primarily of career academics, our judicial 'experience' was limited to 30-minute training session with Sir Mark Hedley at the beginning of the project, supported by some feedback from Lady Hale, Sir Mathew Thorpe and Sir Mark Hedley on a handful of draft judgements. Given the large number of contributions, we had to limit re-drafted judgments to 5,000 words, requiring some of our 'judges' to focus on specific aspects of the original and present only the most essential details in terms of factual background and supporting evidence. For the sake of authenticity, each case could only draw on the legal, evidential and children's rights sources available at the time of the original, and had to conform as closely as possible to the judicial conventions of the relevant court. Again, this posed something of a challenge, particularly for those judgments that predated any serious recognition of children as rights-holders (including a child burglary case dating from the 1780s).

1.What prevents judges from engaging with children's rights?

Whilst it may be a trite statement, it is important to remind ourselves that judges play an ever more critical role in giving effect to children's rights. They step in where those responsible for children, including state actors, parents and medical practitioners, fail in their duties or cannot agree on what is best for a child. They uphold basic standards for children in the face of what may be hostile political, economic and legal regimes and confront populist and neoliberal trends that threaten to undermine their rights. It is in the courts [and tribunals] that children, theoretically at least, acquire an independent legal voice that is denied them in other private and public decision-making processes.

Notwithstanding their function as children's rights enablers and activators, judges are all too often prone to poor decision-making tendencies and processes, often with damaging consequences for children as individuals and for children's rights more broadly. Our analysis of specific cases and of the extensive literature on children's experiences of the legal process during the course of this project revealed a number of specific tendencies on the part of the judiciary which hamper their capacity to endorse what we, as children's rights scholars, define as a children's rights based approach. These include: a resistance to seeing children as rights-holders; unsupported or rigid conceptualisations of children and childhood; obscure and inconsistent approaches to assessing best interests; the tendency to side-line children in court proceedings; and a lack of support for children's autonomy.

We explain each of these limitations and tendencies in turn before moving on, in section 2, to illustrate how these can be addressed.

i. Resistance to seeing children as rights-holders

Even though children's rights are now embedded in international, regional and domestic law, many judges remain resistant to applying the language and tools of children's rights in their case work. Perhaps most notable is a widespread judicial reluctance to refer explicitly to the UNCRC to support their interpretation of children's entitlement unless they are explicitly advanced in the legal arguments put before them by counsel or manifested in the domestic legislation at issue. Our project includes many examples of this, including the House of Lords' majority decision in Begum (R (On the application of Begum) v Head teacher and Governors of Denbigh High School [2006] UKHL 15). This concerned a Muslim schoolgirl, Shabina Begum, who wished to attend school wearing a jilbab in contravention of the school's uniform policy. Begum claimed that the policy violated Articles 9 and 2 of the ECHR, but the court focused almost entirely on the authorities' discretion to derogate from such rights. There was virtually no consideration of what these rights entailed for the child herself and whether this was proportionate in the light of her circumstances, and certainly no attempt to engage directly with the corresponding provisions of the UNCRC to inform this assessment.

ii. Fixed or rigid judicial conceptualisations of children and childhood

Another symptom of judging children's cases in a rights vacuum is that we see judges replacing children's rights ï and an understanding of what each of those rights should entail ï with other constructs of children and childhood which are, more often than not, informed by the judges' personal and professional experience, instincts and even prejudices. Such an approach typically constructs children as vulnerable, highly dependent, immature and lacking rationality.

This is compounded by the fact that the prescribed age-based boundary between adulthood and childhood is fixed (somewhat arbitrarily). The process of gaining the wisdom, insight and maturity needed to determine the direction of one's own life is presumed to occur in seemingly predictable developmental stages. Where children do not act in conformity with those prescribed stages, one of two approaches are usually taken: they are either no longer regarded as children in need of special attention (for instance, children who commit criminal offences); or, they must go beyond what is required even for adults in similar circumstances in order to acquire entitlement to self-determination.

For example, a high threshold of capacity must be reached before a child can influence decisions around parental care and custody, or their own medical treatment.

Rigid age-based or socially-embedded presumptions exert a significant influence on judicial decision-making.

Take, for instance, the original ruling of the Dutch Supreme Court (Hoge Raad, ECLI:NL:HR:2014:3535 5 December 2014), rewritten for our project by Professors Marielle Bruning and Ton Liefaard of Leiden University. In prescribing that ócompetentô children only have a right to be heard in court proceedings if they are 12 years or older, Dutch law significantly limits younger childrenôs ability to have a say in family-related decisions, no matter how competent they might be. Whilst judges have discretion to allow younger children to be heard in such proceedings, we are told that permission is rarely granted, such that the judiciary perpetuates and promotes an entirely arbitrary age threshold as if it were a verified point of transition into higher maturity and resilience.

Being prepared to confront such presumptions and engage more critically with empirically and theoretically-informed perspectives of children and childhood is key to empowering children in the justice process.

iii. Obscure and inconsistent approaches to assessing best interests

A related, common concern around judgesô reasoning on substantive childrenôs rights issues is their treatment of the best interests principle. This is a cornerstone of decision-making in cases involving children and has become neat shorthand for promoting the best outcome for children. One does not have to look too hard to find some reference to best interests in most cases involving children, but the project exposed significant variance and a lack of transparency and, in some cases, rigour, in best interests assessments by the judiciary, even in relation to factually and legally comparable cases. This is compounded by the blurry distinction between ówelfareô (a common legal concept in England and Wales, particularly in family proceedings) and best interests. The conflation of these two concepts has obscured and even undermined the currency of best interests as a distinct órightô or a concept supporting other childrenôs rights (as we know from Article 3(1) of the UNCRC and the accompanying General Comment No.14). Instead, best interests or welfare assessments are commonly characterised by narrower paternalistic assessments in a manner that is exclusive of, rather than informed by childrenôs views.

A good example of a vacuous assessment of childrenôs best interests is found in the case of Collins v Secretary of State for Communities and Local Government [2013] EWCA Civ 1865 CA. This case concerned an appeal by an extended family of Irish Travellers, including 39 children, against the refusal of planning permission to stay on their land. There is little evidence in the original judgment of the court considering the impact that forced eviction and relocation would have on the childrenôs educational, emotional, social and financial best interests.

Instead the court entirely conflates the interests of the adult parties with those of their children.

iv. Side-lining children in court proceedings

The project identified the judicial tendency to marginalise children in court proceedings, both in terms of their active participation in proceedings, and in their propensity to consider questions relating to the child from a distinctly adult perspective.

This is perhaps unsurprising given the legal, procedural and practical obstacles to engaging children directly in court proceedings: it is logistically difficult for children to bring a legal claim on their own behalf. In some cases they are legally barred from doing so or they may require permission of the court to be party to proceedings. Legal proceedings before the international courts have little or no mechanism for involving children directly in proceedings (an issue addressed in our project by the rewritten version of Lubanga, the seminal óchild soldiersô case heard by the International Criminal Court in 2012). Children generally have limited knowledge about their legal rights and therefore often have no idea that they have been infringed, and they usually lack the knowledge or financial resources to access appropriate legal advice and representation.

Consequently, adults usually pursue challenges on childrenôs behalf with little or no direct participation of children in proceedings. The onus is entirely on adults, therefore, to ensure that childrenôs interests are not distorted or instrumentalised in pursuit of their own adultist agendas. A good example of the risks arising from this is provided by the case of AAA v Associated News [2013] EWCA Civ 554. This concerned a claim for damages and an injunction to prevent disclosure of paternity in a newspaper by a woman who had óconfessedô to a publisher to having a child as a result of an affair with a high profile public figure. The original claim was pursued unsuccessfully on the basis of the motherôs right to privacy, with no consideration that the child had an independent right to privacy that could not simply be waived by the motherôs indiscretion.

v. A lack of conviction in children's autonomy.

Perhaps the most common shortcoming on the part of the judiciary is to minimise or even obstruct children's active participation in decision-making, or to pay mere lip service to their views and wishes. This is commonly justified on the basis that giving too much credence to children's views would undermine their welfare, particularly if the child is perceived to have little or no insight into the implications of what they are asking of the judge.

The project revealed that, in the absence of a hard and fast age-threshold by which they acquire legal autonomy, a high threshold of understanding and capacity is required of children before they are deemed sufficiently reliable as autonomous decision-makers - higher, in some cases, than that expected of adults. Even when this threshold is reached, judges are extremely resistant to contravening the advice and opinions of adult professionals and their parents, particularly in matters of life and death. This is illustrated by the child protection case of P-S (Children) [2013] EWCA Civ 223 in which a 15-year-old boy's expressed desire to withdraw from foster care and return to his mother, was ignored. In her short meeting with the child at the trial, the judge did not afford him an opportunity to express his wishes and feelings, limiting her communication with him to an explanation of the court process. When the child applied to give evidence via video link, his application was refused on the basis that it would be detrimental to his well-being and potentially make him feel responsible for the resulting decision.

2. What does it mean to adopt a children's rights based approach to judicial decision-making?

The project recognises the plethora of cultural, jurisprudential, evidential, institutional, constitutional and political constraints that limit judicial freedom. Nonetheless, we suggest that judges can navigate the pitfalls identified above and adopt a more explicit children's rights-based approach. We have already alluded to five broad strategies to support this, and we now elaborate on each in turn by reference to some of the rewritten judgments.

i. Bringing children's rights principles to bear on judicial decision-making

The first strategy, and the one adopted by the majority of our fictive judges, is to draw more explicitly on children's rights principles when reasoning and deciding disputes. These principles ï which include: recognising the child as a rights-holder; facilitating and giving effect to the voice of the child; prioritising the child's best interests; protecting against non-discrimination; and supporting the child's familial relationships - are often to be found within national law. Sometimes, as is the case in South Africa, they are even embedded in the constitution.

However, the principles are most comprehensively articulated in international children's rights standards, most notably the UNCRC but also, for example, in Article 24 of the Charter of Fundamental Rights of the European Union. Even where these international standards are not directly enforceable in a particular domestic or supra-national legal system (for example, in the European Court of Human Rights (ECtHR) or the International Criminal Court), they can nonetheless be utilised by judges to push the boundaries in the interpretation, development and application of the law.

Laura Lundy's rewritten ECtHR judgment in Valsamis v Greece (App no 21787/93, 18 December 1996) makes extensive use of the UNCRC as well as its 'soft law' which can be derived from the Committee on the Rights of the Child's General Comments, Concluding Observations, and other UN rules (which can be used to flesh out the bare bones of the ECHR and to assist judges in interpreting and understanding the articles of the UNCRC). By doing this, Lundy was able to 'cross pollinate' children's rights standards, in a comprehensive and detailed way, to support the child's educational, religious and political freedoms.

Similarly, Kirsty Hughes' rewritten judgement in the tortious damages claim in AAA (above) gave prominence to Article 3 UNCRC (the best interests principle), thus extending the Convention's horizontal reach (that is, in actions between citizens) into private law proceedings. Even in those cases where the UNCRC was unavailable to our judges either temporally (because the case pre-dated the Convention; see the 200-year-old case of John Hudson, (t17831210-19) or due to non-ratification (see Barbara Bennett Woodhouse's rewritten US Supreme Court judgement in Roper v Simmons 543 US 551 (2005)) the central principles of the Convention nonetheless infused the judicial approach.

ii. Bringing theoretical and empirical scholarship to bear on judicial decision-making

Children's rights scholars spend much of their time grappling with tricky doctrinal, conceptual and empirically-informed legal issues that affect children. Much of this 'intelligence' does not reach the courtroom however, and though it is not uncommon for judges to cite doctrinal scholarship (where counsel have drawn on it in legal argument) it is much less usual for other types of academic research to be found (explicitly or implicitly) in judgments. And yet conceptual and empirical research can enhance the children's rights credentials of a judgment.

Scholarship informed the decisions of our fictional judges in various ways. In a number of cases, the theoretical work of authors such as Michael Freeman, John Eekelaar, Rosalind Dixon and Martha Nussbaum provided the implicit justification to treat children differently from adult rights-holders: sometimes to set the parameters of the childôs own decision-making (for example in medical cases such as Re W (A Minor)(Consent to Medical Treatment) [1993] Fam 64 and F v F [2013] EWHC 2683 (Fam)); and sometimes to provide the requisite justification for preferential treatment of children over adults (for example, in the South African housing case of Government of the Republic of South Africa and Others v Grootboom 2001 (1) SA 46 (CC)).

Elsewhere the work of relational theorists, including Jonathan Herring, underpins reasoning that challenges the orthodoxy that a rights-holder is a self-contained, rational individual who needs rights to protect against interference from others (a description that is unsuited to children), and which views rights instead as supportive of connection and inter-dependency.

This is seen in Amel Alghraniôs approach in the heart-breaking case of Re A (Conjoined Twins) [2000] EWCA Civ 254. In other cases our fictive judges drew on research to argue that ôbest interestsô must be understood holistically, capturing all of the childôs rights rather than simply reflecting a narrow, paternalistic, conception of welfare. A good example is the rewritten version of C v XYZ County Council [2007] EWCA Civ 1206 which brings the childôs right to identity to bear on the judicial assessment of the childôs best interests in adoption proceedings.

Finally, empirical research was used to fill gaps in judicial knowledge, to assist future predictions about a childôs best interests, and to counter strong political and economic factors that otherwise are used to justify limiting the childôs rights (see, for example, the rewritten version of the immigration case of Zambrano (Case C-34/09 Gerardo Ruiz Zambrano v Office national de lôemploi (ONEm) [2011] ECR I-01177 8 March 2011).

Space precludes a comprehensive explanation of the multiple ways in which the judiciary might draw on academic intelligence. Suffice to say, given the wide amount of available childrenôs rights scholarship it is incumbent on academics to ensure they disseminate their research to judges and to legal practitioners in ways that are useful to them, so that it can, where appropriate, inform judicial thinking whilst also being subject to the scrutiny and challenge within the court context.

iii. Endorsing child friendly procedures

Central to a childrenôs rights judgement is facilitating the childôs participation prior to the decision being made and the judgement written. All judicial and administrative proceedings should conform to child-friendly principles including those set out in the 2010 Council of Europe Child-friendly Justice Guidelines and, more recently, in the Guidelines on Children in Contact with the Justice System, published by the International Association of Youth and Family Judges and Magistrates in 2017. Both reinforce the duty of judges to ensure that childrenôs voices are genuinely heard and, where possible, given effect to.

Our judges were somewhat constrained in this regard in that they could not retrospectively include new evidence or processes which were not part of the original proceedings (even where, as in the rewrite of Begum, our authors had interviewed the child (now adult) at the heart of the proceedings). Nonetheless, the substantive focus of a number of our cases was childrenôs participation in legal proceedings (including P-S and Hoge Raad above), and (fictional) dicta emphasised that children much be enabled to participate and that their views and wishes should inform the decision, rather than mere lip service paid through their symbolic inclusion.

iv. Placing the child's voice, interests and experiences at the heart of the judgment narrative

The fourth strategy we identify concerns the way in which the judgement is written ï the ôhowô rather than the ôwhatô We only have to think of Lord Denning to be reminded of how judgements are, after-all, a form of story-telling and that judges use narrative to persuade their audience (the parties, the public, the legislature, or the appeal courts) that they have come to the right decision and have done so on the correct basis.

Judges do this through fact-selection, style, tone, and structure. A childrenôs rights judgement is one where that narrative is child-centric: the facts are told and the decision reasoned from the experience of the child. The adoption of the childôs perspective can expose certain legal principles and concepts as adult-focussed (as our cases on criminal responsibility demonstrate). It also ensures that reasoning is based on the concrete, lived experiences of the individual child rather than abstract principles or generalised presumptions about childhood that otherwise sideline the individual child at centre of the proceedings.

Various techniques can be used by judges to ensure that the child is central to the narrative, and thus to the reasoning and outcome.

First, the legitimate aim to preserve a childôs anonymity should be achieved not by referring to the child with an initial, but through the use of a pseudonym. This brings the child ôto lifeô, humanises her, and ensures we are reminded that there is an actual child at the heart of the case. In judgements where the child is named, for example

in some criminal cases, the use of the childôs first name rather than surname achieves a similar objective, and also helps to reveal the power differential between the child and the state (the rewritten Roper v Simmons employs this technique to good effect).

Second, the facts should focus on the childôs experience and understanding rather than the adultsô or those of the state. This is seen, for instance, in Gas v Dubois v France (App no 25951/07 15 March 2012) where there was a failure legally to recognise the childôs social parent. In these and others ways, the crafting of a judgment - as well as the reasoning, outcomes and proceedings - can become a vehicle for the childôs right to be heard and for recognising children as active, rights-bearing agents.

v. Communicating the judgment in a child-friendly way

The final strategy we advocate here is that the judgment should be drafted in a way that addresses the child, or children in general, as the audience. This may be in the primary judgment or, if the case involves complex legal reasoning, in an adjunct version written in a child-friendly way. Certain areas of law, for example many family cases which involve the application of discretion to a well-settled area of law, lend themselves to child-friendly versions. There are a number of examples emerging in real-life; some of Lord Justice Peter Jacksonôs recent judgments stand out amongst the English judiciary for example. But these remain the exception rather than the rule and there is far greater scope for judgments to be written for children.

Some of our judges wrote additional versions specifically for children (Valsamis v Greece; Grootboom, Re T (A Minor) (Wardship:Medical Treatment) [1997] 1 FLR 502); others attempted to adopt a more child-friendly tone throughout the main judgment. But even amongst our judges there was considerable disparity, as there is in real life. We recently reviewed 30 child abduction cases and found some judges adopted simple, clear, language and structure that might readily be understood by an older child. Others, however, employed idioms and similes that even we did not recogise (!), or had a tone that was authoritarian, old-fashioned, or patronising. Such an approach alienates any child reading the judgment, and potentially harms a childôs trust in, and respect for, the law and the legal system. An essential element of the rule of law is not only that the law is correctly interpreted and applied, but that it can be understood by those seeking to enforce it. The judiciary play a crucial role in this regard.

Conclusion

We approached this project as academics with lots to learn and with an enthusiasm to bridge the academic/practice divide by sharing our findings with practitioners and members of the judiciary. With the endorsement of some leading judges (including the President of the UK Supreme Court, Lady Hale, who has written the Foreword for the published collection of rewritten judgments), we hope that our insights into childrenôs rights norms, methods and research offer a new and interesting perspective for judges and magistrates and a platform for more constructive, open dialogue and collaboration. Certainly, by stepping outside our academic comfort zone and genuinely trying to put ourselves into the shoes of the judiciary, we have learned a great deal about the challenges of crafting persuasive judgments that can respond to a diverse range of interests, often in the face of acute evidential, ethical and resource-related concerns.

The main output of the project, the book Rewriting Childrenôs Rights Judgement: From Academic Vision to New Practice, is now available from Hart Bloomsbury. Our focus turns now to working collaboratively with judges to develop training materials in order to influence real-life judicial practice.

If you would be interested in getting involved or receiving the training materials that emerge from this follow-on work, please contact

Stalford@liverpool.ac.uk and

Kathryn.hollingsworth@newcastle.ac.uk

Professor Helen Stalford, School of Law and Social Justice, University of Liverpool

Professor Kathryn Hollingsworth, School of Law, Newcastle University

Children in both Youth and Family Courts: New Zealand

District Judge Tony Fitzgerald*

Hera

Hera is 14 years old. A young MÕori woman born into poverty and a childhood of abuse and neglect, she came to the notice of our welfare agency, Oranga Tamariki (ñOTò)[1] at an early age as had her older siblings. Eventually proceedings were brought to the Family Court regarding Heraôs need for care and protection because of the abuse and neglect she had suffered. A declaration to that effect was made by the Family Court plus an order granting custody of Hera to the Chief Executive of OT. Still Hera remained in her impoverished, neglectful, abusive home continuing to use synthetic drugs as did everyone else living there.

As she approached adolescence Hera increasingly came to the attention of the Police. When she was old enough to be charged with offending she was, and came before the Youth Court charged for the minor part she played in an aggravated robbery. Because she was likely to abscond from any community placement other than home, and was at risk of committing further offences if she stayed there, she was inevitably remanded in a secure Youth Justice residence after having spent time detained in police cells. She stayed on remand in the secure residence for four months, far longer than she would ever have received as a sentence for her offending; in fact she would not have received a custodial sentence if there was a suitable place for her in the community. The residence she was placed in was in the South Island, far removed from her home and family in Auckland toward the top end of the North Island.

During that remand period she could not be sentenced to any community-based programme because there were no suitable placements in the community for her. When bail options were raised in the Youth Court crossover list the advice from the OT care and protection social workers was that there was nowhere at all other than her home available despite extensive searching.

Eventually Hera was released from residence and discharged from the Youth Court on a ñtime servedò basis and would have been returned to her impoverished, neglectful, drug-soaked home had it not been for one of the professionals involved in her case who, in an extraordinary act of kindness, offered to take her in.

When I acknowledged the injustice of the time spent on remand to Hera, she just gave me the ñwhateverò look in return; she was probably the one person in the courtroom least surprised by, and therefore concerned about, the injustice she had suffered at the hands of the system; after all, she has grown up expecting to be treated badly.

For many ñcrossover kidsò it does not end as well as it did this time for Hera. For most there is no option but to go back into the same unsatisfactory situation they were in before being arrested without a careful transition. Many will have spent significant periods of time in custody on remand not necessarily because of the seriousness of the offending, nor any risk they pose to public safety, but simply because no suitable community placement is said to exist.

The extent to which that is happening has been brought into sharp focus ever since the Youth Courts in metropolitan Auckland, and some other courts around the country, started operating ñcrossover listsò. They are a judge-led initiative, the aim of which is to co-ordinate what is happening for the young people caught up in both the youth justice and care and protection systems and to address the serious dysfunction that has characterised how they were being dealt with previously. These lists are not a solution to the problems; they are in response to it. The solutions lie far away from the Youth Court and long before it becomes involved.

Since focussing on what happens to crossover kids in the Youth Court it has become blindingly obvious why they have the worst prognosis of all young people who come before the Youth Court and why little or nothing is currently happening to change the trajectory they are on toward adult offending.

[1] The Ministry for Vulnerable Children/Oranga Tamariki.

This article begins by introducing who crossover kids are. There is then a summary of the legal context in New Zealand and a description of some of the practical problems that led to crossover lists being established. That is followed by a report of progress to date and where we might be heading. For now, what is set out in this article, is the extent to which there is information sharing, or coordination of what is happening, for a young person who is before the Youth Court and has had any involvement in Family Court proceedings.

Crossover kids

73% of OTôs youth justice clients are also known to them for care and protection concerns.[2] These are the young people referred to here as ñcrossover kidsò. They have at least been the subject of notifications to OT about care and protection concerns that have been investigated but not necessarily progressed to the point where applications have been made to the Family Court.

ñDual statusò is the label given to those who are before the Youth Court and are also the subject of care and protection proceedings in the Family Court (and therefore a subset of the crossover kids). Hera was a dual status crossover kid. This group have the worst prognosis of any appearing in the Youth Court, with about 9 out of 10 progressing to adult offending.[3] 83% of those imprisoned in New Zealand who are aged 17,[4] 18 and 19, had a previous care and protection record with OT.[5]

They present the Youth Court, and all of the agencies and professionals involved, with their biggest challenges. For most, the trouble they get into that brings them to court is an almost anticipated result of the traumatic life of abuse and neglect they have suffered. Most abuse substances to self-medicate, dulling down the pain their trauma causes. In addition to that life experience, most have left education early and spend their days with others in a similar situation. Many become involved in gangs which usually leads to offending.

The reason many have left school early is due to a learning disability and behavioural problems that are a direct consequence of a neuro-disability they have such as FASD,[6] traumatic brain injury, ADHD,[7] Autism and a variety of other mental health concerns.

As a result of such disabilities they are very heavily over-represented in the cases where fitness to stand trial is an issue and where communication assistance is needed. They spend long periods of time on remand in Youth Justice residences while those complex proceedings drag on through the court process. Some are placed far from their home and family so that contact is limited, and commuting to and from court arduous. Their behaviour is difficult for the residence to manage and so these already traumatised young people often end up spending time in solitary confinement known as ñsecure careò.

As was the case with Hera, the time spent in residence often means they are eventually discharged from the Youth Court on a time served basis to go back to hopeless unsupported situations in the community they came from. Most therefore do not get the benefit of a careful transition home or the community based support and wraparound programmes they need. Nor is the necessary scaffolding built around their home situation to address the concerns so as to make placing them back there acceptable. Having been set up to fail in that way, many are back before the court soon afterwards facing further charges. The nature of their home life, and the disabilities many suffer, make compliance with court requirements such as bail conditions difficult at best. Being non-compliant, repeat offenders they rapidly become deeply entrenched in the Youth Justice system before moving into the adult criminal justice system when they reach age 17.

A disturbingly large proportion are MÕori or Pasifika.

Law

The Oranga Tamariki Act 1989 (ñthe Actò) governs the New Zealand Youth Justice system as well as the law regarding children[8] and young people[9] in need of care and protection. The care and protection provisions are set out in Part 2 of the Act and the Youth Justice provisions in Part 4 and there are very clear signs of an intended interface between those two parts.

---

2 Centre for Social Research and Evaluation; *Crossover between child protection and youth justice, and transition to the adult system*, (Ministry of Social Development, July 2010) at 8.

3 See Mark Lynch and others ñYouth Justice: Criminal Trajectoriesò (2003) 265 Trends and Issues in Criminal Justice (Australian Institute of Criminology, Canberra, 2003). This refers to research carried out in Australia which involved following 1503 young offenders for 7 years to track their trajectories. 91% of those who had been subject to a care and protection order, as well as a supervised justice order, had progressed to the adult corrections system and 67% had served at least one term of imprisonment.

4 Despite being a party to UNCROC (see n 24 below), NZ does not include 17 year olds in the Youth Justice system.

5 Above n 2 at 9.

6 Fetal Alcohol Spectrum Disorder.

7 Attention Deficit Hyperactivity Disorder.

8 Child is defined as a boy or girl under the age of 14 years.

9 Young person in relation to the Youth Justice provisions is defined as a person of or over the age of 14 but under the age of 17 years.

About 80% of young people who offend are not charged or brought to Court. Instead they are dealt with by alternative action in the community by a specialist division of our police force named ñYouth Aidò Of the remaining 20% who are charged and brought to Court, about ½ to ¾ come from multi-problem backgrounds, with a large number of offending-related risk factors emerging at an early age. To be before the Court, these young people are generally facing serious charges, and/or are repeat offenders, and present with a complex range of issues underlying their offending which the Court is required to see addressed wherever possible. It is this group that occupies much of the Courtôs time and the resources of all the agencies involved. A large proportion are crossover kids.

Essentially, all important decision making, on issues governed by the Act, passes through the Family Group Conference (ñFGCò) process. Under the Youth Justice provisions that includes whether a young person suspected of having committed an offence (but who has not been arrested) should be charged, as well as making recommendations about how those young people who are before the court should be dealt with. Combined with this are the general and specific youth justice principles that emphasise the need to involve and strengthen family whÜnau[10] HapÎ ,[11] and Iwi[12] in the process, decision making and outcomes. It is clear that, unlike adults, young people are to be seen and dealt with, wherever possible, in the context of their family and family group which should be involved in the decision-making about the young person.

In addition to holding young people who offend accountable, and encouraging them to accept responsibility, the Youth Court is required to ensure that their needs are acknowledged,[13] and the underlying causes of offending addressed.[14]

Emphasis is placed on timeliness, a key principle being that decisions should, wherever practicable, be made and implemented within a timeframe appropriate to the young personôs sense of time.[15] Not only is this included as a general principle, it is an important theme throughout all of the youth justice provisions.

Important duties for the Court (and counsel) include explaining the nature of the proceedings to the young person in a manner and in language that can be understood, being satisfied he/she understands,[16] and encouraging and assisting him or her to participate in the proceedings.[17] The extent of the challenge these particular obligations pose for the Court has only started to become apparent in recent times with growing awareness about the prevalence of neuro-disabilities in youth offenders and the impact this has on their comprehension and communication skills. Again, a very large number of the young people with significant needs of this sort are the crossover kids.

One of the general objects of the Act is to promote the well-being of children, young persons and their families and family groups by encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children, young persons and their families.

These statutory requirements are reinforced by obligations we have under the UNCROC,[18] which New Zealand ratified in March 1993, and the Beijing Rules,[19] which both emphasise a young personôs right to due process, to not be detained pending trial except as a matter of last resort, and then only for the shortest possible period of time,[20] and to having their cases determined without delay.[21] Given the disproportionate overrepresentation of MÜori in the Court, and the large number of young people appearing in the Court who have neuro-disabilities, the UN Declaration on the Rights of Indigenous People,[22] (ñthe Indigenous Peopleôs Declarationò), ratified by New Zealand in April 2010, and the UN Convention on the Rights of Persons with Disabilities,[23] (ñthe Convention for People with Disabilitiesò), ratified by New Zealand on 30 March 2007, need to be considered too. Again, a large proportion of young MÜori before the court, and those with disabilities, are crossover kids.

10 Extended family, family group; the primary economic unit of traditional Maori society.

11 Kinship group, tribe, subtribe.

12 Extended kinship group, tribe, nation, people.

13 Section 4(f).

14 Section 208(fa).

15 Section 5(f).

16 Section 10.

17 Section 11.

18 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

19 United Nations Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33 (1985).

20 UNCROC, art 37(b).

21 UNCROC art 40.2(b)(3).

22 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, LXI A/RES/61/295 (2007).

23 United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008.

There is no question about the 1989 Act being a visionary piece of legislation but many of its important features and provisions were slow to be implemented and some have still not been. Two prime examples (in the current context) are, firstly, that the provisions relating to the interface between the two parts of the Act have not been working properly in practice. Secondly those that provide for Iwi Social Services, or a cultural social service[24] to take young people on remand remain dormant. Given that one of the major injustices the Act aimed to address was the institutionalisation of young offenders, largely Mƺori and often far from their homes and whanau, the architects of the Act would be deeply disturbed, I expect, by what still happens today especially with the crossover kids.

It is important to emphasise that the Act is not the problem. The problems, for the crossover kids at least, are caused by what has been happening, and not happening, in practice**.**

Practice and Problems

The way the Youth Court has been operating for most of the 28 years since the Actôs inception is not the type of court the Act describes. Until recently, the Youth Court has operated much the same as the adult criminal court. The work has simply been divided into two categories; ñlist courtsò where often large numbers of young people are pumped through in random order with the same allocation of time (ten to fifteen minutes maximum); and ñdefended hearingò courts for those cases where charges are denied. In courts such as these, young people with high and complex needs, such as the crossover kids, do not receive the care and attention they deserve or that the Act envisaged.

When the Act came into force, despite the very clear interface between the Youth Justice and Care and Protection provisions of the Act, both the Ministry of Justice and OT set up their systems so that there was no interface at all in practice.

So, for example, there was no ability within the Court system to share any information between the Youth Court and Family Court. If a young person with care and protection status in the Family Court came into the Youth Court, the Youth Court registry could not identify that fact nor obtain any information about that young person from the Family Court through any official channels. Young people with dual status could therefore pass through the Youth Court without anyone there knowing about the care and protection proceedings in the Family Court.

Even if they did know, it would not occur to many of the key players in the Youth Court that the information held by the Family Court might have some relevance in the Youth Court. There were even those who argued that it was not appropriate for such information to be shared!

The dysfunction was at its worst in a big city like Auckland. Most of the dual status young people would have two different lawyers, two different social workers and two different plans (one for care and protection issues and the other for youth justice issues) which at times would be at odds with each other. There would then be different hearings in different courts before different judges. Certainly, in the city courts, one group would sometimes not even know the other existed; if they did, they usually did not talk or share information. .As a result, it was not at all unusual for young people to be granted bail by the Youth Court to reside in a home they had been removed from on care and protection grounds; or worse still, in at least one case, bailed to live with a parent against whom the Family Court had made a restraining order prohibiting that parent from having contact with the young person.

In response to this situation an information sharing protocol between the Youth Court and Family Court was established in 2007. The primary purpose was to enable the Youth Court to identify those young people coming before it who have dual status and obtain from the Family Court relevant information and share it appropriately with those entitled to receive it. Having access to such information would then enable the Youth Court to carry out its functions properly. In particular it would help:

- Make sensible bail decisions;
- Inform decisions about obtaining forensic assessments to identify the young personôs needs and underlying causes of offending. In some cases there are already forensic reports on the Family Court file.
- In deciding whether to approve a Youth Court FGC plan and be satisfied it is in harmony with the plans in place in the Family Court and synchronise the Family Court review of plan to coincide with the end of the Youth Court plan or end of Youth Court orders. By doing so the Youth Court involvement could then end in the knowledge that any ongoing welfare and therapeutic needs will be addressed in the Family Court.
- With sentencing decisions (given, for example, that one of the factors the court must have regard to in sentencing is the personal history, social circumstances and personal characteristics of the young person).

[24] S238(1)(d)

OT also created in practice a complete separation between their Youth Justice and Care and Protection divisions with no coordination or co-working arrangements. Children and young people would therefore have two different social workers, one for each issue who did not necessarily communicate about what was happening for the young person and certainly, in years gone by at least, did not work cooperatively with each other.

One of many consequences of that separation was that when a young person with care and protection status entered the Youth Court that was taken as a signal that the care and protection involvement was at an end so they would step back to let the Youth Court deal with the situation. That mindset also infected many lawyers who were acting for such young people before the Family Court

It became standard practice in the Family Court for social workers to recommend the care and protection proceedings be closed and orders discharged because the young person was before the Youth Court, and the young personôs lawyer would advocate for that outcome. There were several consequences of such nonsensical practices and attitudes. Two common examples are:

- In cases where the Family Court involvement continued, there were cases where the Family Court plan did not address welfare or therapeutic needs because it was believed the Youth Court was doing so, while the Youth Court did nothing because it believed the Family Court was.
- In cases where Family Court involvement ended when the young person entered the Youth Court, there was pressure put on the Youth Court to remain involved far longer than it should have, to deal with welfare issues. Instead of the Youth Court plans being time limited and ending soon after accountability and victim related issues were addressed, there was ongoing involvement to see various therapeutic needs addressed. This was another of the inappropriate practices the Act was aimed at overcoming.

In an attempt to improve how the cases of children and young people with dual status were being dealt with, and to at least try and mitigate problems such as these, crossover lists were progressively established in all of the metropolitan Youth Courts starting in 2011.

Crossover lists

From the outset these lists were emphatically and unequivocally limited to enabling appropriate information sharing and coordination of what was happening for children[25] and young people with dual status. Having crossover lists was about identifying these cases early, giving them their own dedicated space, allocating sufficient time to do justice to them and having an approach that was consistent across the various courts involved. A Youth Court Judge who also has a Family Court warrant presides. A primary goal was to ensure that Youth Court involvement ended sooner rather than later (soon after the accountability and victim related issues were addressed) and that there could be confidence about that happening if the young personôs ongoing need and welfare issues were being properly addressed and monitored in the Family Court under the care and protection plan.

However, there was strong opposition from some quarters. In 2012, someone senior in OT referred to crossover lists ñsetting the clock back to before 1989 where young people came before the court for justice matters and then became cast while all the other non-offending matters became the focus and took over the caseò. The complaint was that it would be ñwelfarisingò the Youth Court to bring care and protection issues into it. Of course, the flip side to that is ñcriminalisingò care and protection issues and using Youth Justice powers and facilities to deal with them as is happening. Both are wrong and we need to work in a way that prevents both from happening.

Crossover lists strike the right balance in that respect and have been effective in over-coming much of the dysfunction referred to above. They also give practical effect to the information sharing protocol in the ways I have referred to above, eg; helping inform forensic assessments, synchronising what is happening for the young person in both the Youth Court and Family Court and having necessary information for making disposition decisions in the Youth Court.

But the importance of having access to such information runs much deeper than that. The Family Court files are usually covered in red flags marking issues the Youth Court simply has to be made aware of. To start with is the importance of recognising the impact trauma has on behaviour. The information is also relevant as to whether there might be fitness to stand trial issues or whether communication assistance or other support might be needed for the young person to engage properly in the proceedings. Without access to such information the young personôs needs and the underlying causes of offending go

[25] Both those who are before Family Court under s14(1)(e) of the Act or the Youth Court under s272.

unidentified and therefore untreated or misdiagnosed and mistreated. This is not only completely unsatisfactory for the young person but for the community too if these failures mean the re-offending risks are not identified and addressed properly.

This sharing of information and co-ordination of proceedings must happen in a courtroom that conforms with the requirements in the Act and that is starting to happen more consistently now. This is a courtroom where there is collaboration between the professionals and agencies involved by being all[26] represented in the courtroom and working together in a non-adversarial, co-ordinated way; where all those entitled to be heard can be in a meaningful way; where there is time for judges and lawyers to explain things to young people, and encourage their participation in a manner and language they can understand; where needs and underlying causes are properly identified and necessary assessments obtained; where sufficient time is available to ensure that what is happening in both jurisdictions is properly coordinated; where a young personôs whanau are involved in decision making that happens in a timely way and strengthens the young personôs relationship with whanau, hapu and Iwi.

As crossover lists have started to eliminate the dysfunction, what has come into stark focus is the situation Hera was in which is common to many crossover kids; they come before the Youth Court but there is often nothing constructive that court can do until placement is sorted out. Because placement is a care and protection issue to resolve there has not been a forum previously where the options can be discussed and progress in finding something addressed. Although we now have that forum (in crossover lists) there often are no appropriate placement options and the default position is for the young person to languish in a Youth Justice residence. In finding a solution to this problem, it is to be hoped that the Actôs untapped potential in relation to placing young people with Iwi social services, or an appropriate cultural social service can be realised and that appropriate, well supported community based placements, close to where the young person comes from, can be found.

What next?

What I have described is where things stand at present in relation to the interface between Youth Court and Family Court involvement for young people in Auckland New Zealand. With more time and resources it would be logical to adopt this approach with all crossover kids, not just those with dual status. Given what we now know about the impact exposure to domestic violence and bitter parental conflict can have on a young personôs behaviour there is an arguable case for saying access to relevant information about a young person held on files in Family Court proceedings under the Domestic Violence Act 1995 and Care of Children Act 2004 should be available too. But we are not there ï yet.

District Judge Tony Fitzgerald* sits in both Family and Youth Courts in New Zealand.

[26] Ministry of Justice, Police, OT, Ministry of Health, Ministry of Education, youth advocates, lay advocates, communication assistants when necessary.

Working with looked-after children in the Criminal Justice System: a Child Protection Social Worker's perspective

Owen Lawton

Abstract

I work with families in a London Borough to ensure that their children are safe and free from significant harm. I have a statutory responsibility to the children and families that I serve, implementing what is needed to ensure that these children are safe and free from possible that harm. There are times, however, when children become looked after by the state because those children have suffered and are likely to continue suffering enduring harm in the form of abuse or neglect. 55,910 children were looked after in the United Kingdom in 2016-2017 under Care Orders, or Placement Orders. This means that all of those children had their long term stability and permanence established by the Family Courts utilising S.31 of the Children Act (1989), which allows the state to share parental responsibility for children, and ultimately giving them the ability to make decisions on their behalf. The decision for these children to be looked after was ultimately made by a Judge, evidence was scrutinised in court and the wellbeing of those children was judged to be better met away from their birth families.

The long term outcomes for children who have been looked after due to abuse or neglect are widely known to be significantly more negative as compared to children who have not been looked after. One of those outcomes is the likelihood of being involved in crime and the criminal justice system. Children who are in the care of a Local Authority are over-represented in the criminal justice system as compared to children who are not looked after. 1% of the general population of children in England are looked after, yet, 37% of children in young offendersôinstitutions and 39% of children in secure training units have experience being looked after. 61% of girls aged 15-18 have been looked after at some stage in their lives, and long term, adult prison population figures show a large proportion were previously children who were looked after by Local Authorities, over 25%.

Figures show that if you are, or were a child, whose permanence and stability was scrutinised by a family court resulting in being looked after by the state, there will also be a significantly increased chance you will be involved in criminal court proceedings as a child also. Why are so many children who have been removed from their parents also featuring in criminal justice? Why are so many youths turning to activity and behaviour requiring youth offending involvement? What are the experiences of these children in relation to justice, whether it is in the family courts, or in criminal courts? The independent prison reform trust review chaired by Lord Laming in 2015 looks at these effects, and explores the issues.

Particular features of the recommendations strike a chord with me; namely recommendations referencing enhanced professional communication between childrenôs services and criminal justice agencies, responding to the unique needs of looked after children and children in minority groups, and ensuring looked after children are fairly treated and properly supported.

I have wide and varied experience as a Childrenôs Social Worker working with children looked after by the Local Authority, who are also involved in the criminal justice system. I am tasked with being the ñCorporate Parentò for these children. Regardless of the childôs background and circumstances of why they need to be looked after by the state, I, and more widely the Local Authority become the Legal Guardians of these children. We are tasked to care for these children as a parent would. I provide the child basic care on a day to day level, to be housed, cared for, fed, clothed, and educated. I am also tasked to ensure that child reaches maturity with the wellbeing and development as enhanced, safeguarded and protected as fully as possible. My responsibilities are to provide the child with what their birth parents were not able to, and this is all decided based on what is known, heard and deliberated in court.

The journey of a childôs life is decided in a number of court hearings, in a number of assessments and reports. Very young childrenôs direction can be adoption, many young children will become looked after and their memories, stories and understandings will be radically affected. Often some never see, nor remember those they were removed from. Many older children however, where the courts have deemed have suffered enough abuse and neglect, will retain those memories, narratives and understandings of their previous care. They will be removed from their parent/s who still love them, they will face unprecedented pressure to conform, to change, to accept difference in their new worlds. Ultimately, decisions where this happens are for the childrenôs best interests, leaving them in their families would cause continued suffering. As statistics show, many of these older children subsequently ? become involved in the criminal justice system, receiving youth offending orders to be complied with, sentences in youth offending institutions or training centres. Another statutory arena, where decisions are made about the welfare of children, where they live, what they can do, and who has ultimate responsibility for them.

But how are those children represented and involved in these court processes, and what is the understanding, experience and views of those children? I work in a society which seeks to reduce the numbers of children who are looked after, and also reduce the number of children involved in the criminal justice system. As a Childrenôs Social Worker, I have worked with the most vulnerable children in our society; children who have been abused and neglected beyond what most people will not experience. What I must say however, is that the majority of the children I have worked with who are Looked After, do not go on to become involved in the criminal justice system.

Social Work Theory is grounded in Social Justice, the ability to apply and advance social rights, justice and wellbeing in society. Practicsing in an anti-discriminatory and anti-oppressive manner is essential. One way I do this, learned through my training and my continued development is the ability of reflectivity and reflexivity. It is no good knowing the legislation, the policies, and the procedures in isolation. Continued forced reflection on everyday practice is essential to being reflexive. Reflecting on my specific experiences leads me to learn, to adapt and direct my ongoing practice - and thus being reflexive. I will now provide some case examples of real children I have worked with, who were both part of the Family Court and Criminal Justice Systems and reflect on themes that emerged, and how they link to the recommendations from the Prison Reform Trust I referred to earlier.

The childrenôs names, specific circumstances and characteristics have been changed.

I worked with Ben, a 14 year old boy who had been removed from his parents and was now living in Local Authority foster care until he was 18. He had been removed due to abuse and neglect he experienced due to parental substance use and domestic violence. He had a chaotic childhood, with few boundaries, routines or safety. He had a difficult transition into Local Authority care. He did not wish to be removed from his family, and often expressed his anger at not being able to affect the course of family court proceedings. Although he was provided a Childrenôs Guardian to represent his wishes, views and opinions, he often said he felt angry and upset and did not feel listened to. He was intensely loyal to his family, and like many young children I work with, was distrusting of me. He told me explicitly, he had been told not to talk to me, as Social Workers were ñbadò Before he came into Local Authority care, he had no criminal involvement. During his difficult transition into Local Authority care, he quickly began engaging in behaviours and petty crime which quickly escalated. What followed was court hearings, and youth offending orders, which required certain work, classes and restrictions to be adhered to.

As his ñcorporate parentò, a label he often told me made him angrier than anything, I felt a great sense of frustration and helplessness in being able to safeguard him from these activities. As the legal guardian, it was my responsibility to ensure he was refraining from these crimes, and instead making better decisions. As his Social Worker, I often worked intensely with Police Officers, Youth Offending Officers, Solicitors and other professionals involved in his youth offending. I would often hear derogatory comments about him, judgements being made about his behaviours and outdated opinions that often involved Ben needing to ñearnò And more often than not, it was often tasked to me, as his ñcorporate parentò to ensure he didnôt commit further crimes, often as a birth parent would. I often found that communicating with these professionals about Benôs previous care in his birth family was often forgotten, or in fact ignored. The label that he was ñlooked afterò would for some, mean he was instantly judged and stereotyped. Some would specifically seek to discriminate between his accomplices in some crimes, those who were ñlooked afterò and those who werenôt. My attempts to enable others to understand how his early experiences of care had impacted him were not successful. With regard to the Prison Reform Trustôs recommendations, I refer to the recommendation of understanding a Looked After childôs unique needs in this case. I often felt that Benôs unique needs were not understood, he required a unique and non-judgemental approach when working with him,

one which recognised his understanding of boundaries and the choices available to him were blurred due to the neglect and abuse he has suffered in his early care. I remember at a professionals meeting designed to ensure his safety and wellbeing, I specifically interrupted a policeman who I felt was being judgemental, and said ñlet us not forget what this kid experienced during his childhoodò Not only did I find that his early experiences meant little in a blanket criminal justice response, but actually his ñlooked after statusò meant many professionals often uncritically assumed and prejudged his likely direction, to continue his criminal activity, until his liberties were removed from him.

I worked with Leon, a 17 year old youth, who had been accused of a serious violent crime and was awaiting trial when I began working with him. Leon was articulate, ambitious and intelligent. He was ñlooked afterò by his Aunt, and had a chaotic and unsupervised childhood. Raised in a one parent family, Leon experienced the death of his Father as a small child, and the subsequent neglectful environment his Mother provided whilst she struggled with physical and mental health problems. Leon was distrusting of authority figures, he was a young man of diverse heritage, and often recalled how his ethnicity alone made him a target for authority. Again, I was tasked as his corporate parent to ensure his safety and wellbeing. I however, as identified by Leon himself, was a figure of authority. One aligned with the other figures of authority who created the situation he found himself in, awaiting trial for a alleged violent crime, and who was a victim of persecution and prejudice due to his ethnicity. I spent much time, and attempts to show Leon that I had his best interests at heart, and sought to show him I practiced in the least oppressive and least discriminatory way possible.

Leon was subsequently convicted of the alleged violent crime and sent to a Youth Offending Institution. Leon often reflected to me that he didnôt feel he had choice or control in the court arenas, that he was already found guilty before trial, and that his ethnicity meant that it didnôt matter what he did, it would not be enough to prove innocence. He often felt hopeless, and that there would be no future when he left prison. With regard to the Prison Reform Trustôs recommendations, I refer to the need to ensure children are fairly and respectfully treated, and as Leon being from a ñminority groupò, his specific experiences being discriminated against. I felt as his Social Worker, unable to address Leonôs experiences of structural racism, and direct discrimination from criminal justice agencies, and again felt his early life experiences were not taken into consideration when deciding repercussions for any alleged offences.

My perspective as a Childrenôs Social Worker is obviously more relevant in the family court arena. My practice directly impacts the children I serve and affects the direction of the future care they receive, whether within their own families, or in Local Authority care. I ask myself how I can be effective with the children I serve in the criminal justice court system. I see myself as a tiny cog in the grand machine that drives the statistics I discussed earlier; that children who are looked after, are significantly more likely to appear in criminal justice courts. I believe the way I turn my tiny cog, can affect the next cog, and ultimately affect the entire system that best seeks to support these looked after children in the criminal justice system. It would be naive to believe all children, regardless of their looked after status wonôt enter the criminal justice system, but as identified in the Prison Reform Trustôs review, there is much work to be done by professionals to improve the situation. In my opinion, if criminal justice professionals have more understanding of a childôs previous care experiences including abuse and neglect, then I believe more can be done to effectively engage, treat with respect and enable children to participate in the criminal justice system.

Owen Lawton, Childrenôs Social Worker and Systemic Family Practitioner. Based in a London Borough, working for a Local Authority, providing services for children experiencing significant harm in the form of abuse and neglect, I have worked with a number of children who have been looked after, and who were also involved in the criminal justice system.

Children and multiple court experiences - South Africa

Joan van Niekerk

Nelson Mandela was known for his passion for the children in South Africa and for his desire to ensure better lives for children. During his term of office, he, together with his Cabinet Ministers, embarked on a process of law reform to provide the legal framework that would extend care and protection to all children in South Africa, including those who were in conflict with the law.

The process began with the forming of three expert committees under the aegis of the South African Law Reform Commission, one dealing with law reform for child protection and care, another dealing with law reform for children in conflict with the law and the third dealing with law reform related to sexual offences on and by children. Committee members were drawn from experts in these fields of work with children. Each committee was aided by researchers, as there was a need to ensure that law and policy development would be evidence based as well as fitting the needs of children and families in a society that had been fractured by apartheid policies and by the years of civil unrest and violence that preceded the change of government from an apartheid to a democratic system.

Of note is the fact that during this decade South Africa was beginning to struggle with the advent of the HIV and AIDS pandemic, and in the absence of the availability of anti-retro-virals was experiencing high levels of orphaning. This created enormous pressure on the child care and protection system. Coupled with this was the countryøs level of poverty with over 50% of children living in poverty.

These three committees had regular meetings together as we were aware at the time that many children would be subject to the provisions of more than one act of law at times. So at this stage of the law reform process, the committees discussed the direction that their proposed law reforms were taking and ensure, as far as they were able, that the provisions of the Acts would allow for co-ordination of the legal processes that would flow from the legislation.

All three committees produced individual bills that were then handed to the government ministry that would be responsible for finalising the legislation, taking it through Parliament and ultimately for its implementation.

Perhaps where we (or should I say ñIö) were naïvely optimistic is that the draft Bills would be accepted with only minor changes by the Ministries that had responsibility for their finalisation and implementation. The Ministries made sweeping changes to all three Bills, and many provisions that were seen as important and as assisting implementation and coordination of legal processes that impact on childrenøs lives were removed. Fortunately, our Parliamentary system, when it comes to passing legislation, requires public hearings on bills and so coordinated representations were made to the Parliamentary Portfolio Committees to try and retrieve provisions that had been removed or watered down. Three strong and vocal advocacy groups developed around each of the Bills, the Childrenøs Bill Working group, the Child Justice Alliance and the Working Group on Sexual Offences.

The need to educate political decision makers on the needs of children was very apparent when child rights activists and experts began to make representations in Parliament to motivate for a better deal for children. Many of our new Parliamentarians had a history in the struggle for democracy, and were heroes in their own right. But apartheid separated families, especially men from their families and children, and the needs of children were not always well understood by Parliamentarians who themselves had suffered under apartheid.

The eventual outcome was the passing of three Acts:

- The Children's Act, which looks at child care and protection very broadly and from a child rights perspective. Provisions in the Act speak to child protection inclusive of prevention, early intervention, response and rehabilitation and reintegration. This Act is implemented by the Department of Social Development.
- The Child Justice Act which deals with children in conflict with the law and provides for diversion for children away from the criminal justice system into diversion programmes for children who acknowledge their behaviour, in order to facilitate behaviour change. There are also provisions in this act that provide orders for parents and caregivers to ensure that they support the child's efforts directed at behaviour change. This Act is implemented by the Department of Justice and Correctional Services.
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act which includes a chapter on sexual offences against children (among other provisions) and provided protections for children appearing in court as witnesses to their own sexual abuse. This Act is implemented by the Department of Justice and Correctional Services.

The implementation of the legislation by two separate government departments with different but overlapping functions automatically presented role-players in the field with challenges relating to the integration and coordination of children's experiences in two different Court settings. For example, the definition of a "child's best interests" across the two government departments required continuous consultation on what this means in practice for decision makers in the Children's versus the Child Justice Courts.

The Children's Act and the Child Justice Act provides for specific courts for children, which each have their own functions and procedures. Both stress the need for a child friendly environment and both provide for child participation. The Child Justice Court process is interesting as it is responsible for "Preliminary inquiries" the functions of which are to encourage the child to participate, ask the child if they acknowledge their behaviour and if the child does, and is of the age of criminal capacity the Court may decide whether the child is a suitable candidate for a diversion programme. If the child is below the age of criminal capacity an assessment of the child is completed by a probation officer, who has the responsibility of referring this child to a programme, specifically designed for that age group, to assist the child to change his/her behaviour.

For all children involved in child justice proceedings, an effort is made to include the parent or caregiver of the child and to promote footertheir guidance and support of the child. All children entering the child justice system have to be seen and assessed by a probation officer who submits a report to the child justice court with recommendations for the preliminary inquiry. All children entering the child justice system or involved in a child care and protection enquiry have the right to legal representation.

At any stage of a child justice proceeding, the Presiding Officer may refer the child to the Children's Court if it appears that the child may be in need of care and protection. This does not mean that the child justice response is terminated or suspended – it can proceed simultaneously. Often children living in circumstances that are not conducive to their well-being come to the attention of the child justice system first as children in conflict with the law, and when this system discovers the circumstances of the child, a referral to the Children's Court for an inquiry into the child's need for care and protection is made.

Both the Child Justice Act and the Children's Act see removal of a child from the home and institutional placements either in a secure care facility or a more open child and youth care centre as a last resort and are obliged to seek and explore the appropriateness of other options.

I shall illustrate the system using a case history that I personally was involved in. Bandile, aged 13 years, was referred to me for assessment by her lawyer. She had assaulted her younger sister aged 2 years and the child had died. Bandile was therefore charged with murder. Her legal representative, a senior advocate, had already collected a considerable amount of information about Bandile's circumstances and the situation in which the crime had been committed. This information was provided with the referral.

Bandile lived in a violent home, her mother was an alcoholic and from a young age Bandile had total responsibility for 2 younger siblings, cleaning the family's home, cooking, bathing the 2 year old, and ensuring that she and her younger brother got ready for and attended school. Her mother had a series of male partners, some of whom sexually abused Bandile, with the knowledge of the mother. Bandile was frequently beaten by her mother, who in her drunken rages, believed Bandile was not performing all her "duties" The beatings were usually very severe. Neighbours were aware of mother's behaviour, as well as Bandile's school teacher, who despite mandatory reporting laws, never reported the child to child protection organisations. The assault and murder of Bandile's younger sister occurred one morning after Bandile had been savagely beaten by her mother, who then left the family home for the local

shabeen to continue drinking, leaving Bandile in charge of bathing and looking after her younger sister, who that morning was fractious and difficult to manage.

Bandile was initially arrested and placed in police cells and then transferred to a government place of safety and detention. The investigation of the childôs history and home circumstances, the circumstances surrounding the crime and the childôs mental state were thoroughly investigated. This information was of value to both court systems and sharing the information saved both time as well as Bandileôs exposure to multiple assessments.

With the support of her lawyer, Bandile pleaded guilty to the crime and was sentenced to community corrections, a form of house arrest, with a number of conditions which included a curtailment of Bandileôs freedom, the requirement to attend school and therapy. Community service was also included in the sentence, as by the time the child justice case was finalised, Bandile had turned 14 years, the age at which community service could be part of a childôs sentence. A care and protection inquiry was held in the Childrenôs Court immediately after sentencing and Bandile was placed in a child and youth care centre who agreed to accept her, also with conditions. The centre staff committed to ensure that Bandile fulfilled all conditions of her sentence. The Child Justice Court accepted the decision regarding the childôs placement.

This was an example of cooperation and coordination of two legal processes extending across two specialised courts. Bandile was fortunate in that she was assigned a lawyer for the criminal case with special knowledge and practical experience on the protection of the rights of children, and for whom Bandile was not simply a ñcaseò but a child damaged by years of abuse and inappropriate parenting.

My experience with children, having worked in the field of child protection for about 30 years, has been that many children are involved in multiple court processes but because of a lack of inter-sector working together, a failure to inform the child about the purpose of each court process, and who all the role-players are in the different systems, and their various roles, many children become confused and fearful and demonstrate this via a range of behaviours ï a failure to cooperate, reluctance to talk, belligerent attitudes and superficial bravado, among other behaviours. These responses are not always understood by the various role-players with whom the child interacts and so children acquire labels and sometimes decisions are made in response to the labels and behaviour and not the real needs and potential of the child.

Added to this is the possibility that the children may have to ñtell their storyò multiple times which may reactivate whatever trauma has brought them into care and/or engender an attitude of resistance and frustration with court processes.

Suggestions that I have used that may help children make sense of the dual court processes in which they may be involved:

- Teamwork between the role-players in the different courts is essential. Children experience frustration and confusion when different role-players give different messages about the possible processes and their outcomes;
- Honesty with the child is essential ï especially in relation to sharing information across the two court settings. Children often expect that disclosures will be kept confidential and it is important to discuss why information is shared and with whom.
- I have found it very useful to share information in reports on the child, with the child. This enhances trust and enables one to discuss alternative outcomes with the child and family. Where recommendations as to care (for the child in need of care) and/or consequences (for a child who has acknowledged criminal behaviour or has been found guilty of a crime) making it clear to the child and family that the decision maker is the presiding officer in the court who may accept or reject the recommendations made;
- Information to the child ï explanations as to the purpose of the two court processes, how they are different, the different decisions that they may make is important. The child who is well informed, in language appropriate to their age and level of development, will be more relaxed and assist the child in moving through these processes with the minimum of potential secondary trauma. It is equally as important to prepare the parent or caregiver of children involved in both care and child justice court proceedings. If the parent comes to court anxious and not know what to expect, that anxiety may be transferred to the child.
- Perhaps this recommendation may not be important for those who work in court systems with children who live in deep poverty as we experience in South Africa ï check that the child has had breakfast on the days they have to attend court, and if not try to provide something nutritious for the child. It is difficult for children to participate as expected during assessment or when in court if they are hungry. Practical issues such as ensuring that the child knows where the toilet is and can ask if they feel the need to go to the toilet also reduces anxiety

Suggestions for the Court role-players:

- Information relevant to possible decision making must be shared across both court settings in order to facilitate decision making. It is pointless to recommend foster care in the care proceedings if the presiding officer in the child justice court is planning to sentence the child to a secure care facility;
- Team work, respect for others' roles and competency in one's own role benefits both teams in both courts as well as the child;
- The responsibility for in-depth history taking and assessment of the child and family should be allocated to the court social worker best equipped to complete the assessment, and then the assessment should be shared across both courts to save the child repeating their story.
- Sufficient time must be given for assessments of children. When children are arrested for a crime, or removed from one place of care to another, this is usually experienced as a crisis by the child and parent/care giver. Children may present differently in a crisis situation for which they may have few coping strategies and skills. It is important that initial assessments take this into account and when court decisions have the potential to impact on the child's life in the long term, and decisions are based wholly or in part on an assessment of the child, the assessment is as reliable and valid as possible. However, this must be balanced with the need to finalise decisions in a timely way as children's lives may be put "on hold" between remands. This period of uncertainty should therefore be long enough for an in-depth assessment, but as short as possible to enable the child to move on with their lives.
- Waiting times at court on the days that the child must appear should be as short as possible. In a study completed by Wade a number of interviewees described "waiting to give evidence as being an even more stressful experience than testifying in court". The child should also be shielded from exposure to the general public in a child friendly waiting area/room whilst waiting their court experience.
- Courts dealing with children should evaluate their "child friendliness" on a regular basis, and, if possible, address any issues that appear to negatively interfere with the child's experience of the court process. Monitoring and evaluating children's understanding of the processes in which they have been involved can be of great value to court personnel in their efforts to ensure children feel safe and comfortable in the courtroom.
- To add further complexity, children may also be interacting with other court systems. For example, if the child discloses abuse of him or herself, one might also be dealing with a third court system, with the child being called upon as a victim/witness to the abuse. The criminal justice system has specific rules for giving evidence and the adult criminal court setting is a far more formal system and therefore may be intimidating for the child. However, the above suggestions may prove effective in supporting the child through this process.
- In conclusion, the more judicial systems the child has to interact with, the greater the potential for confusion, fear and secondary trauma. The better prepared the child, the more easily the child will be able to participate in the proceedings of multiple systems. Preparation of the caregiver/parent of the child is equally important as caregiver/parent anxiety and stress may be contagious.

Joan van Niekerk, is a clinical social worker with 30 year history of work in child protection. She is now working as a consultant in this field and was the project leader for SA Law Reform Commission Committee on Sexual Offences and participated in the processes of reform that resulted in the Chidren's Act and the Child Justice Act. She has co-authored a book on the Practical Application of the Child Justice Act, is currently chairing a further project committee for SA Law Reform Commission on Child Pornography and is an Executive Council member of the International Society for the Prevention od Child Abuse and Neglect

- **Useful references**

- LawTeacher. November 2013. The Child Witness Powers And Protections In The Criminal Trial Process Criminal Law Essay. [online]. Available from: https://www.lawteacher.net/free-law-essays/criminal-law/the-child-witness-powers-and-protections-in-the-criminal-trial-process-criminal-law-essay.php?cref=1 [Accessed 22 December 2017].
- UNICEF (2007). The rights of children in conflict with the law. Published by the Ministry of Justice of Montenegro Juvenile Justice Reform Commission UNICEF Montenegro. Available at https://www.unicef.org/montenegro/Prava_Djece_ENG.pdf
- Wade, A. E. (1997). The child witness and the criminal justice process: a case study in law reform. Unpublished PhD thesis, University of Leeds, UK.

Legal assistance for juvenile suspects – a European perspective

Dr Dorris de Vocht

Introduction

It is generally acknowledged that juveniles deserve to be treated differently and separately from adults. However the ways in which juveniles are actually treated differ from country to country. We know very little about how criminal proceedings affect juvenile suspects and defendants and for that reason it is difficult to assess how ï and by whom ï their well-being is best protected. In this respect, the adoption of Directive (EU) 2016/800 on procedural rights for children who are suspects or accused in criminal proceedings is of paramount importance.[1] The Directive formulates minimum rules on several procedural rights with the aim to ensure that children who are suspects or accused persons in criminal proceedings are able to understand and follow those proceedings, to exercise their right to a fair trial and to prevent children from re-offending and foster their re-integration.[2]

One of the most important rights foreseen in the Directive is the right to have access to a lawyer. However, in the context of juveniles, this procedural right raises all sorts of difficult questions. For example: should the assistance of a lawyer be mandatory or should the juvenile be able to waive the right?

How does the assistance of a lawyer relate to assistance by other adults such as the appropriate adult? Does assisting juveniles require a different approach from the lawyer? In this contribution some of these aspects of the juveniles right to legal assistance will be discussed from the perspective of a comparative legal and empirical study co-coordinated by the author.

Young Suspects in Interrogation: a Study on Safeguards and Best Practice

The observation that we have very little knowledge of the level of legal protection offered to juvenile suspects throughout the EU was the main reason for the EU-funded research project *Young Suspects in Interrogation: a Study on Safeguards and Best Practice*. This project was coordinated by Maastricht University and carried out in five EU Member States: Belgium, England and Wales, Italy, Poland and the Netherlands.[3] The project ï focusing on pre-trial interrogation as one of the procedural activities during which the juveniles vulnerability is probably greatest ï consisted of three parts. In the first part, comparative legal research was carried out during which country reports on the existing level of procedural protection offered to juvenile suspects during interrogation were written.

The second part of the project consisted of empirical research using a mixed method approach combining focus group interviews with juveniles and key actors involved in the interrogation of juveniles - such as police, lawyers and prosecutors - with observations of recorded interrogations. The aim of the empirical part of the project was to gain insight into the extent to which practice lives up to the domestic legal framework and ï also ï to identify good practices. To our knowledge, the project was the first European study in which observations of real-life interrogations have been conducted in more than one country using transnational data on the interrogation of juveniles. In the third and final part of the study the results of the legal and empirical study were merged to identify common patterns in the procedural protection of juvenile suspects during pre-trial interrogation.

[1] Directive 2016/800 was published in the Official Journal on 21 May 2016. Deadline for transposition is 11 June 2019.

[2] Recital 1 of the Directive.

[3] The project which was funded by an EU action grant JUST/2011-2012/JPEN/AG/2909 ran from 2013-2015. Coordination was done by M. Vanderhallen, M. Panzavolta, M. van Oosterhout and D. de Vocht. The project team was completed by 4 other academic partners (Jagiellonian University Krakow (Pol), University of Antwerp (Bel), Warwick Law School (UK) and University of Macerata (It) and two supporting partners (PLOT Limburg and Defence for Children).

ISSN 2414 - 6153

This resulted in the formulation of minimum rules (guidelines) suggesting improvements with regard to the current state of affairs in three respects:

1. to reduce gaps between the law in books and the law in practice;
2. to counter the risk of bad or negligent practice; and
3. to promote the good practices emerging from the empirical study which could be beneficial for the European harmonisation of procedural safeguards for juvenile suspects.[4]

The project: some general findings

It falls outside the scope of this contribution to extensively discuss the project findings but a few fundamental similarities found in the selected juvenile justice systems deserve to be mentioned. Generally, the study found that the current level of legal protection offered to juvenile suspects during interrogation leaves much to be desired. The current legal frameworks mainly consist of ôclassicô adult procedural safeguards with only few youth specific additions and amendments.

Overall, the most important youth specific procedural safeguard is the right to be assisted by an appropriate adult. This safeguard exists to some extent in all selected Member States with the strongest emphasis in England and Wales. Another general finding is that the juvenile suspect seems to be ôoverratedô in the sense that most systems assume the juvenile is able to understand proceedings and to make his own decisions. In the majority of systems the juvenile can exercise and waive procedural rights often without any form of assistance (of ï for example ï a lawyer or an appropriate adult). Also, there are very few rules on how to inform juveniles on their procedural rights or how to enhance a proper comprehension of proceedings.

Where rules for the protection of juvenile suspects during interrogation do exist, they often take a ôone size fits all approachô treating all juveniles alike and making no distinction in relevant age categories or level of maturity and intellectual or emotional capacities. Furthermore, the project results illustrated that most systems focus more on protection by people (public actors appointed in the best interest of the child) than on protection by rules. However, it was also found that the focus on protection by people does not always imply the availability of the necessary degree of specialisation and training.

In conclusion, the project findings illustrate that ï although the vulnerability of the juvenile suspect seems to be a self-evident assumption ï existing legal frameworks pay little attention to what exactly defines this vulnerability in this context and therefore no clear views exist on how this vulnerability should be compensated for.

The project: some findings on legal assistance

Focusing on the right to legal assistance the project findings revealed several general patterns. As far as the legal framework is concerned, the right to legal assistance is provided to juvenile suspects and defendants in all selected Member States at varying levels and in varying sources of the law. Generally, it includes the right to consultation before and the right to have a lawyer present during interrogation. Member States seem to agree that providing legal assistance in the phase of police interrogation is less controversial when the suspect is a juvenile (in comparison with adults).

However, systems take a different approach as to whether legal assistance for juveniles is mandatory or not. For example, In England and Wales it is never mandatory for a juvenile to be assisted by a lawyer during interrogation as opposed to Belgium where the mandatory character of the right to legal assistance seems to be strongest. Also, Member States have little (sometimes even no) youth specific rules on when legal assistance should be provided free of charge: often the same rules apply as applicable to adults. Again, Belgium seems to represent the most far-reaching system in this respect: legal assistance is always free of charge for juveniles regardless of their means. In other countries there are few or no youth specific rules in this respect.

As for rules on the lawyerôs role during interrogation, they do exist in the selected Member States but are mainly non-youth specific applying to all suspectsô interrogations. For example: quite specific guidelines exist in England and Wales on the solicitorôs role at the police station (non-youth specific) and in the Netherlands the existing rules mainly focus on what the lawyer is *not* allowed to do. Few to none rules exist on what effectively defending a juvenile suspect entails, especially during interrogation. The existing provisions on the role of the lawyer during interrogation are of a general nature mainly stressing the lawyerôs responsibilities in ensuring that the interrogation is conducted in a lawful manner and assisting the suspect in understanding questions and the course of proceedings. As for professional qualifications, the study shows that in the selected Member States there are only limited obligations for lawyers to have certain qualifications (with respect to specialisation/training) when providing legal assistance to juvenile suspects.

[4] The project results are published by Intersentia in two volumes: M. Panzavolta, D. de Vocht, M. van Oosterhout and M. Vanderhallen (eds.), *Interrogating Young Suspects: Procedural Safeguards from a Legal Perspective*, Intersentia: Cambridge (etc.), 2015 and M. Vanderhallen, M. van Oosterhout, M. Panzavolta and D. de Vocht (eds.), *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective*, Intersentia: Cambridge (etc.), 2016.

As for the empirical part of the study, the project findings clearly document the importance of legal assistance for juvenile suspects. The focus group interviews made clear that lawyers are the most important figure in supporting the juvenile, especially in ensuring the juvenile has adequate knowledge of his rights and of the situation but also that he behaves properly and takes appropriate decisions in the interrogation room.

Assisting juveniles: taking a different approach?

Due to their young age and level of development juveniles will, as a rule, not be able to adequately defend themselves. Thus: juveniles will in principle need the assistance of a legal professional to establish an effective defence. However, considering the general observations on legal assistance, central question is, of course, whether a youth specific approach to the topic of legal assistance is really necessary. In other words: does assisting a juvenile suspect require a different approach by the defence lawyer than providing assistance to an adult client?

The empirical research clearly illustrates that existing views on the role of the lawyer when dealing with juvenile suspects and defendants differ. Some professionals hold a purely formal approach in the sense that the lawyerôs role is considered as pure legal counselling (deciding on the defence strategy). Other professionals take a broader approach, meaning that the lawyer generally has a more educative function leaning towards a more paternalistic approach including psychological support.

Two quotes from focus group interviews with lawyers may illustrate the latter approach. A lawyer in the focus group interview with lawyers in Belgium said: *"Often we are the third, fourth or fifth unknown person in a row, sometimes in the middle of the night. Then it is important to set the juvenile at ease and build trust"*. In the focus group interview with Italian lawyers one participant said: *"We are the first ones who deal not only with the legal aspects but also with the aspects of human life. We are in a middle ground, because the juveniles experience such fear and families don't know what to do. We are the first lifeline"*.

Notwithstanding these competing views on the role of the lawyer, certain parameters should be taken into account in relation to providing effective legal assistance to juvenile suspects and defendants. First of all, it should not be forgotten that communicating with a juvenile requires a different approach and different skills than communicating with an adult. Examples of this can be found in the empirical research. For example, during the observations of recorded interrogations in England and Wales, a juvenile was arrested for the serious offence of rape. He was interrogated without a lawyer. Although he replied to the officerôs question that he did not know what rape was, the officers did not explain the offence of rape and neither did the appropriate adult intervene. Proper legal assistance could potentially have made a difference in this situation. Secondly, the role of the lawyer in juvenile cases may be complicated by the interaction with other professionals such as the appropriate adult and social services. The presence of other professional actors raises questions on division of tasks. For example: who is responsible for informing the juvenile of his procedural rights? How is the confidentiality of the lawyer-client communication affected by the presence of other professionals? What is the role of the other professionals in helping the juvenile to exercise or waive certain rights?

A third aspect of assisting juvenile suspects that should be taken into account is the importance of teamwork. In virtually all systems, the aim of juvenile proceedings is to divert from official judicial proceedings as much as possible and take an individualistic approach towards the juvenile. For this reason an overly antagonistic approach ï emphasizing the role of the lawyer as active defender of individual rights ï may be detrimental for the juvenile. On the other hand, the lawyer who is too much of a team player may encounter problems with trust building with the client. This places the juvenile lawyer for a difficult dilemma. In general, the importance of trust building cannot be underestimated. ôTrustôwas a recurring word in virtually all focus group interviews: building a relationship of trust is important but also especially difficult when it comes to juveniles.

In general, it is clear that the dynamics of trust building may be different when dealing with juveniles than when dealing with adults. This was also indicated by some lawyers in the focus group interviews: they stated that winning the juveniles trust is often difficult because they (the juveniles) meet many people and find themselves in a stressful situation. Also, building trust with a juvenile client will generally take more time than with an adult client. In some of the selected Member States a time limit is set for consultation prior to interrogation. This is for example the case in the Netherlands: 30 minutes, an amount of time which is considered inadequate by many lawyers. In building trust, time is ï of course ï not the only relevant factor: confidentiality of the lawyer-client conversations is at least just as important.

Unfortunately, the project illustrated that confidentiality is not always entirely ensured in the selected Member States, mainly due to inadequate facilities. A lawyer in the Belgian focus group interview stated, ñ*ear prints can be found on the walls/doors, because the police eavesdrop and want to hear everything"*.

In Poland, confidential consultation with a lawyer before interrogation is only possible with approval of the police ï which is only very rarely granted. The empirical research also illustrates several examples of juveniles fearing that their lawyer was working with or for the authorities (since they were ó being friendlyô with the prosecutor or the judge).

Of course, this may all just be appearance but it can nevertheless be detrimental to achieving a meaningful relationship of trust between the lawyer and the juvenile client. Finally, it should be remembered that the vulnerability of the juvenile is determined by many variables: age being the easiest (because it can usually be determined objectively) but definitely not the only one. Other relevant variables are (not exhaustively): the juvenileôs mental abilities, the gender of the juvenile (for example juvenile girls may face extra vulnerabilities due to pregnancy), the gravity of the offence and being a first offender or a recidivist.

The empirical research illustrates that the latter division can be rather important in practice. For example in Italy it was found that the police tend to be more careful in explaining the situation and legal rights to first offenders while being more formal and detached when the suspects is a repeat offender. From the focus group interview with the police in the Netherlands it was found that the police sometimes think that an active lawyer is only important for young first offenders. Obviously, this is a debatable point of view. Recidivist juveniles may have some experience in dealing with law enforcement but this does not mean they are not vulnerable. On the contrary, their possible ó know it all and donô need help or explaining attitudeô may be especially harmful when in fact they often do not know and understand proceedings and their procedural rights as well as they think.

Of course, realising effective legal assistance for juvenile suspects and defendants does not only depend on the above-mentioned parameters but also on certain practical pre-conditions. In this respect, mention should be made of the availability of appropriate funding, an adequate level of quality of lawyers and the availability of lawyer at all times (duty schemes).

The Directive (EU) 2016/800 and legal assistance

Let me return to the topic of the expert meeting: the Directive adopted in May 2016 on procedural rights for children who are suspects or accused. The Directive is part of the so-called Stockholm Programme of 2009[5] and relates to measure E dealing with ósspecial safeguards for suspected or accused persons who are vulnerableô The findings of the project *Interrogating Young Suspects* discussed above clearly stress the need for a European legal instrument and for that reason the Directive should be very much welcomed. It has the potential to contribute to more specific legal protection for juvenile suspects and defendants filling the existing gaps as illustrated above.

As for the scope of the Directive it should be noted that it only applies to children (being persons below the age of 18) and criminal proceedings.[6] This latter restriction is important because it considerably limits the working range of the Directive. After all, in many Member States, juveniles suspected or accused of criminal offences are not dealt with through criminal proceedings. For example, more welfare-based systems such as Belgium and Poland do not follow a purely criminal approach to juvenile justice. It remains to be seen what the effect of the Directive in these systems will be.

In a nutshell, the Directive provides for the following rights: the right to information (art. 4 and 5), assistance by a lawyer and legal aid (art. 6 and 18), the right to an individual assessment (art. 7), the right to a medical examination (art. 8), audio-visual recording of questioning (art. 9), imitations on deprivation of liberty (art. 10-12), the right to protection of privacy (art. 14), presence at court hearings (art. 15 and 16) and training of professionals (art. 20). Focusing on legal assistance, art. 6 of the Directive clearly indicates that assistance should be effectuated without undue delay ónce children are made aware that they are suspects or accused persons. What is positive in this respect is that the Directive acknowledges the importance of effective legal assistance in the early stages of pre-trial proceedings by explicitly mentioning certain specific moments in time during which assistance should be possible.[7]

---

[5] The Stockholm Programme was adopted by the European Council in December 2009 (document number 17024/09). It provides a framework for EU action on matters of citizenship, justice, security, asylum and immigration for the period 2010-2014.

[6] See article 3 of the Directive.

[7] See art. 6 paragraph 3: Member States shall ensure that children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:

The Directive also states what the assistance of a lawyer should include (namely *inter alia* the right to meet in private, the right to have a lawyer present during questioning and during certain investigative or evidence gathering acts). Originally, the Proposal for the Directive said that the assistance of a lawyer was mandatory for juveniles. This part of the Proposal proved to be the most controversial and after lengthy deliberations between the Member States a proportionality clause was introduced. Now, derogation from legal assistance is possible ówhere providing legal assistance would not be proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence the complexity of the case, and the measures that could be taken in respect of such an offenceô[8]

In addition to this general derogation clause, the provision also introduces the possibility of temporary exceptions, which can be used only in the pre-trial stage in case of exceptional circumstances.[9] As for the costs of legal assistance reference should be made to art. 18 of the Directive which states that Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer. Also the training and specialisation of lawyers is dealt with by the Directive: in art. 20 paragraph 3 it is regulated that Member States shall take appropriate measures to promote the provision of specific training to lawyers who deal with criminal proceedings involving children.

Some final remarks

Effective legal assistance is crucial for the protection of juvenile suspects and defendants. The results of the project *Interrogating Young Suspects* clearly indicate that substantial improvement of the standard of procedural protection offered to juveniles throughout the EU is necessary. The Directive (EU) 2016/EU marks an important step in this respect. It provides minimum standards on several fundamental topics and brings this important issue under control of the Commission and the Court of Justice of the EU. Focusing on the right to legal assistance it is important that the Directive stresses the fact that providing the juvenile with legal assistance ï also (or maybe especially) in the early phases of proceedings ï should be the rule and not the exception. The provisions emphasizing the obligations of Member States in the context of legal aid as well as training of juvenile lawyers are also important aspects of the Directive.

All in all, these provisions have the potential of substantially increasing the chances for juveniles throughout the EU to realise the right to legal assistance as effectively as possible. Of course a lot ï if not everything ï will depend on the way Member States deal with the Directiveôs transposition. Obviously, there will be challenges in this process. The Directive leaves quite a lot of discretion to the Member States ï for example in the context of making exceptions to legal assistance ï and it will be interesting to see how the different systems handle this. Hopefully the room left by the scope and the wording of the Directive will not hold back Member States from implementing and executing it in the broadest way possible ï to give it the practical effect it deserves.

This article is based on a presentation given at an experts' meeting on Directive (EU) 2016/800 on procedural safeguards for juvenile suspects and defendants (Brussels 30.05.2017)

Dr D. de Vocht, is an Assistant Professor of criminal law and procedure at Maastricht University

(a) before they are questioned by the police or by another law enforcement or judicial authority;
(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 4;
(c) without undue delay after deprivation of liberty;
(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

[8] See art. 6 paragraph 6. In addition to this proportionality clause two so-called safety nets were introduced: 1. Children should always be assisted by a lawyer when they are brought before a court/judge to decide on pre trial detention and (they should always be assisted) during detention and 2. Deprivation of liberty can only be imposed as a sanction when the child has been assisted by a lawyer.

[9] For compelling reasons such as urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person. See art. 6 paragraph 8 of the Directive.

Centenary of the German Association of Juvenile Courts and guardians ad litem

Achim Wallner*

Introduction

In German politics, society and everyday life common thinking, there seems to be a strong

On September 14th-17th, 2017, 850 experts on juvenile justice gathered for the 30th annual German symposium on juvenile justice (Deutscher Jugendgerichtstag (JGT)) at the Free University of Berlin, amongst them academic researchers, police, guardians ad litem and members of the judiciary. The first JGT took place in Berlin-Charlottenburg in 1909 at a time when the meaning of adolescence and age-appropriate reactions to juvenile delinquency were increasingly recognized. Since then, the symposium has been organized every three years by the German Association of juvenile courts and guardians ad litem (Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. (DVJJ)). It is the pivotal meeting for every one, who is professionally involved in the juvenile justice system, works with juvenile delinquents or does scientific research on the subject. As 2017 was the centenary of the DVJJ, this year's symposium took place at its birthplace in Berlin. The DVJJ is Germany's professional association for juvenile criminal justice. It was founded in 1917 and has about 1.600 members, who all work in the juvenile criminal justice system. The association promotes the interdisciplinary cooperation of all involved professionals and works as an independent advisory body for questions regarding criminal policy and practical approaches to juvenile delinquency. This year's high attendance rate at the symposium shows the strong interest of the professional circles for profound as well as critical analysis of the interactions with juvenile delinquents. The symposium was under the motto ÄHerein-, Heraus-, Heran-, - Junge Menschen wachsen lassenñ which roughly translates to Äet young people growñ The main lectures and talks focused on topics like Limits for growth: the policy of Äpotentialñ and its contradictions (Grenzen des Wachstums: Die Politik mit dem Potenzial" und ihre Widersprüche (Prof. Dr. Stephan Lessenich, LMU München)), The DVJJ and the NS era (Die DVJJ und die NS-Zeit (Prof. Dr. Eva Schumann, Universität Göttingen)) as well as Juvenile criminal law ï ultima ratio of social control for the youth. Wrong penalties and 'proper' punishment (Jugendstrafrecht - ultima ratio der Sozialkontrolle junger Menschen. Falsche Straferwartungen und "richtiges" Strafen (Prof. Dr. Heribert Ostendorf). Furthermore,14 working groups and 18 panels discussed current criminal policy issues. Also the centenary of the DVJJ was a major topic. Three pivotal points were raised in all of the debates:

1. Adolescents are rightly sentenced according to the juvenile criminal code
2. Juvenile delinquency is best dealt with by experts
3. Juvenile Criminal law must always remain the last resort for social and societal problems.

   The topics of three panels were presented in detail:

   - adolescents
   - the EU-directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings
   - Right-wing extremism and Islamistic radicalisation

Achim Wallner* is a social pedagogue who works for ñLOTSE e.V.ò a child and youth welfare organization and is specialized in outpatient social education offers for delinquent young people. He is a board member of the Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V.

In case of inquiries and for further information please contact the DVJJ's chairwoman, Dr. Ulrike Zaehringer (+49 511 34836-41, zaehringer@dvjj.de).

Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. Lützerodestraße 9 | 30161 Hannover, Germany Tel.: +49 511-34836-40 | Fax: +49 511-3180660 | www.dvjj.de | www.jugendgerichtstag.de

The EU Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings

Dr Michael Sommerfeld*

A. Introduction

After more than two years of intensive negotiations (including some tough battles), the European Union Directive on Procedural Safeguards for Children (= person un-der eighteen years of age) Suspected or Accused in Criminal Proceedings, took ef-fect on 11 June 2016 (DIR 2016/800/EU). The deadline for transposition of the Di-rective into National Law is 11 June 2019. Many aspects of German juvenile criminal procedural law are affected by the requirements imposed by the Directive. Subjects addressed by the Directive include rights of information and attendance, certain rights in cases involving deprivation of liberty, treatment of cases, and ensuring a high level of qualification for those who deal with juvenile offenders. Of particular (practical) relevance are the rules on assistance by a lawyer (= compulsory defence counsel), but also the right to an individual assessment and to audiovisual recording of questioning. The requirements must be transposed into national law by 11 June 2019.

My lecture focused on the significant changes necessary in the field German of juvenile criminal procedure law. The emphasis was on reflecting on existing law and on what needs to be amended and/or newly regulated.

B. A Detailed Overview of Selected Subjects Addressed by Directive 2016/800/EU

Some of the many subjects governed by Directive 2016/800/EU were highly problematic and particularly controversial. One of them was Article 6 ("Right to Assistance by a Lawyer") and ï directly relating to that right ï Article 9 ("Audiovisual Recording of Questioning"), as well as the "Right to an Individual Assessment" pursuant to Article 7. In the following, I provide a somewhat broader overview of those provisions.

I. Article 6 (Assistance by a Lawyer)

The right to assistance by a lawyer (Article 6) can justifiably be described as the core element of the Directive.

Article 6 differentiates between the right of access to a lawyer pursuant to Directive 2013/48/EU (paragraph 1) and the right to assistance by a lawyer (paragraphs 2 - 8). Paragraph 3 provides that Member States must "ensure that the children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:

> a) before they are questioned by the police or by another law enforcement or judicial authority;
>
> b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 4;
>
> c) without undue delay after deprivation of liberty; w
>
> d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court."

However, paragraph 6 (1) is of considerable significance; pursuant thereto, the Member States "may derogate from paragraph 3 where assistance by a lawyer is not proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence, it being understood that the child's best interests shall always be a primary consideration."

In principle, the existing section 68 of the Youth Courts Act (Jugendgerichtsgesetz - JGG) is already an exercise of considerations of proportionality. Section 68, no. 1 JGG states that an attorney shall be appointed for the accused if

defence counsel would have to be appointed if the person were an adult. The circumstances under which assistance by a lawyer can be proportionate are substantially consistent with those of existing section 140 para. 2, first sentence, 1st and 2nd alt. of the Code of Criminal Procedure (Strafprozessordnung - StPO): "seriousness of the offence" and "difficult factual or legal situation." In this regard, it is likely that no action is necessary to implement the Directive.

However, the provisions of section 68 JGG do not yet cover all cases in which appointment of defence counsel is compulsory pursuant to Article 6.

1. Assistance by a Lawyer in Cases Involving Deprivation of Liberty

Article 6 para. 6 (2) provides that Member States shall "in any event (...) ensure that children are assisted by a lawyer (...) when they are brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive." Existing law does not yet comply with these requirements. Section 68, no. 5 JGG provides that defence counsel shall be provided with-out delay if remand detention or provisional committal is to be enforced (cf. also section 140 para. 1, no. 4 StPO). In other words, appointment need not yet be made at the point where, following the deprivation of liberty, it turns out that the accused per-son is to be brought for decision regarding detention, but rather only at the point where the detention is enforced. Pursuant thereto, the point in time that a lawyer must be appointed must be shifted forward when the accused person is brought be-fore a judge. Furthermore, DIR 2016/800/EU has likely resolved the argument about whether section 68, no. 5 JGG is applicable only to the proceedings in which re-mand detention is executed, or whether it applies to other proceedings as well. Be-cause Article 6 para. 6, (2)(b) refers only to "detention," in the future other cases in which remand detention is not enforced will lead to compulsory defence counsel as well.

Recital 28 states that certain situations involving short deprivations of liberty do not require compulsory assistance by a lawyer pursuant to paragraph 3, second sentence, letter c and paragraph 6 (2). However, section 230 para. 2 StPO might pre-sent problems of categorisation in this regard. Like Recital 15 of DIR 2016/1919/EU, Recital 28 expressly names "bringing (...) to appear before a competent authority" as an exception. Although the term "bringing (é) to appear" does not mean to imply the relevant terminology of section 230 para. 2 StPO, and detention pending appearance must not necessarily be excluded, a comparison with the other situations named in Recital 28 might logically lead to the assumption that deprivation of liberty due to detention (pending appearance) ï which might be of longer duration ï will not result in the denial of assistance by a lawyer. On the other hand, failure to com-ply with the obligation to be present (Anwesenheitspflicht) ï which is stricter in juvenile criminal law ï must not lead to the fact that enforcement of detention pursuant to section 230 para. 2 StPO would justify a case of compulsory defence throughout the entire proceedings. A solution which does justice to all interests might be oriented to section 408b StPO. Defence counsel would then expressly need to be appointed only for the length of the deprivation of liberty enforced pursuant to section 230 para. 2 StPO (cf. also Article 6 para. 6 (2), letter b). Appointment would end along with the termination of the respective measure involving deprivation of liberty; a decision terminating representation would not be necessary. As the proceedings continue, the assessment of necessity of defence counsel would be made pursuant to the general provisions ï as is the case in section 408b StPO.

2. Assistance by a Lawyer in the Case of Deprivation of Liberty as a Criminal Sentence

Pursuant to Article 6 para. 6 (3), deprivation of liberty must not imposed as a criminal sentence, "unless the child has been assisted by a lawyer in such a way as to allow the child to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court." "Deprivation of liberty as a criminal sentence" includes youth penalties within the meaning of section 27 et seq. JGG. Assuming no additional restrictions, it will likely be irrelevant in this regard whether the youth pen-lty is suspended on probation pursuant to section 20 et seq. JGG, or whether decision has been deferred as to whether the youth penalty will be suspended on probation pursuant to section 61 et seq. JGG. German juvenile criminal procedure law needs to be adjusted in this regard, because a highly heterogeneous blend of opinions exist with regard to section 68, no. 1 JGG in conjunction with section 140 para. 2, first sentence StPO and the circumstances under which, when youth penalty is threatened, a case of necessary defence is to be assumed. However, the provision on suspending the imposition of a youth penalty pursuant to section 27 et seq. JGG will likely require clarification, because viewed strictly, the imposition of deprivation of liberty as a criminal sentence does not occur until any subsequent proceedings under sections 30 para. 1, 62 et seqq. JGG. In terms of its impact, however, a "section 27 decision" will not be much different from a youth penalty. The circumstance that assistance by legal counsel must be guaranteed "in every case during the main proceedings" means that the main proceedings might need to be repeated if indications that a youth penalty is to be expected do not arise until the main proceedings.

Cases in which the relevant expectation arises before the main proceedings have started, but no defence counsel has been appointed nonetheless, may be remedied by repeating investigative measures following appointment of defence counsel or, if this is not possible, will lead to excluding consideration of the relevant evidence.

3. The Relevant Point in Time for Assistance by a Lawyer

Currently, in cases covered by section 140 para. 1, nos. 1-3, 5-9 and para. 2 StPO, defence counsel is appointed as soon as an indicted accused without defence counsel has been requested according to section 201 to reply to the bill of indictment (cf. section 141 para. 1 StPO). Defence counsel may also be appointed during the preliminary proceedings pursuant to section 141 para. 3, first sentence StPO. Because the JGG does not contain any other provision with respect to section 141 StPO, it applies in juvenile criminal law as well. With regard to the applicable point in time when the appointment must take place, DIR 2016/800/EU deviates considerably. The relevant provision is the above-mentioned Article 6 para. 3. If a case of compulsory defence is given, in the future defence counsel must be appointed at the point in time when children "are made aware that they are suspects or accused persons," to the extent that no earlier point in time is mandated by Article 6 para. 3, second sentence. As a result, compulsory defence in juvenile criminal procedure law will be expanded to become a right to counsel from Day One ï with far-reaching consequences which include questions of detail. Issues requiring clarification will include who is to be responsible for the appointment of counsel from Day One, how that counsel is to be chosen and/or exchanged, as well as how long the parties must wait in advance of an examination if counsel is not immediately available (on this point, cf. only Article 6 para. 7 and Recital 27, third and fourth sentences).

II. Article 7 (Right to an Individual Assessment)

The "right to an individual assessment" laid down in Article 7 has a misleading heading. It does not have anything to do with a forensic evaluation. In order to be able to take into account ï as required by Article 7 para. 1 ï the special needs of children with regard to protection, education and training, as well as social integration, Article 7 para. 2 requires that children be individually assessed; this individual assessment must specifically take into account the child's personality and maturity, his/her economic, social and family background, and any specific vulnerabilities that the child may have.

The key is to ascertain the circumstances which are characterised as the "supervisory, social and care-related aspects" in section 38 para. 2, first sentence JGG and which, according to section 43 para. 1, first sentence JGG, are "apt to assist in assessing his psychological, emotional and character make-up."

To the extent that no general exception exists pursuant to Article 7 paras. 3 and 7, Article 7 para. 5 provides that "the individual assessment shall be carried out at the earliest appropriate stage of the proceedings and, subject to paragraph 6, before indictment." This principle requires implementation, because neither section 38 nor section 43 JGG have as a precondition that the youth court assistance service report be completed before indictment at the latest. However, Article 7 para. 6 provides that "in the absence of an individual assessment, an indictment may nevertheless be presented provided that this is in the child's best interests and that the individual assessment is in any event available at the beginning of the trial hearings before a court." This means that the results of the individual assessment need not necessarily have been submitted in order to conclude an otherwise completed investigation proceeding. Recital 39, third sentence states that "this could be the case, for exam-ple, where a child is in pre-trial detention and waiting for the individual assessment to become available would risk unnecessarily prolonging such detention." But this notion does not apply only to cases of pre-trial detention, because it could also be in the best interests of the child to have certainty as soon as possible about how the matter will proceed. Details as to the conditions under which an indictment is possible before the individual assessment has taken place will need to be formulated within the framework of implementation.

The circumstance that the individual assessment is to take place before the indictment as a general rule and in any case before trial will likely need implementing legislation as well. An evaluation will be necessary as to whether the law as it currently stands adequately ensures that the youth court assistance services are always made aware of investigation proceedings at an early enough stage that an individual assessment ï at least as a general rule ï may be completed before the indictment. In order to create certainty here, we should consider establishing a rule, for example pursuant to section 52 para. 2 of the Social Code, Book VIII, which is already valid law in that context and which has thus far been lacking here, which requires (early) notification of the youth court assistance service. Likewise, we will need to evaluate whether the circumstance that the individual assessment report must be available at the beginning of trial implies the (express) rule of compulsory attendance on the part of the youth court assistance service. This will be necessary in particular because written minutes are not always taken, or are not taken adequately, and

(additional) questions pertaining to Article 7 paras. 1 and 2 might arise during trial.

III. Article 9 (Audiovisual Recording of Questioning)

The audiovisual recording of the questioning pursuant to Article 9 stands in direct relation to the assistance by a lawyer according to Article 6.

Article 9 para. 1 provides that "Member States shall ensure that questioning of children by police or other law enforcement authorities during the criminal proceedings is audio-visually recorded where this is proportionate in the circumstances of the case, taking into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not, provided that the child's best interests are al-ways a primary consideration." Within the scope of the evaluation of proportionality which Member States are allowed to carry out in the implementation process, they may expressly consider the circumstance of whether the questioning was carried out in the presence of counsel.

The result of this is that there is likely little need for action to implement the Directive. Although this is not expressly mentioned in Article 9 para. 1 (also in conjunction with Recital 42, second sentence), the formulation "inter alia" means that the question of the proportionality of an audiovisual recording may be answered by examining the circumstances relevant for a finding of proportionality pursuant to Article 6 para. 6 (1) ("seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence"). As such, cases in which the audiovisual recording of questioning would be proportionate are, as a general rule, consistent with those in which the assistance of a lawyer is proportionate. When assistance by a lawyer is proportionate, Article 6 para. 3, second sentence, letter a mandates that this be ensured before questioning by the police or by another law enforcement or judicial authority; therefore, in the case of examinations in which audiovisual recording of questioning is proportionate, as a general rule a lawyer will be in attendance. His or her tasks will include ensuring adequate protection within the meaning of Recital 42, first sentence (understanding the content of questioning).

Thus, at the most there would be an area of application for Article 9 para. 1 for those cases, pursuant to Article 6 para. 7) and Recital 27, third and fourth sentences, where questioning is to take place without a lawyer being present; but these are rather rare in practical terms. Another justified question is whether the ex-amination should not then at least be recorded on an audio device (cf. Article 9 para. 2) in order to properly supplement the written minutes, which are susceptible to error.

C. Outlook

DIR 2016/800/EU took effect on 11 June 2006, and is to be implemented within three years, i.e. by 11 June 2019. The overview has attempted to show that among the many subjects that are regulated by the Directive, several require considerable action for their implementation. Although implementation will affect certain existing rights and will therefore not enjoy unfettered popularity, Directive 2016/800/EU does indeed harbour the potential of bringing important changes ï some past due ï for juvenile criminal procedure law and its stakeholders. The ambitious legislative pro-cess in this regard ought to be very interesting!

Dr Michael Sommerfeld* is a former senior public prosecutor who now works for the Federal Ministry of Justice and Consumer Protection. He is a specialist for the field of juvenile jus-tice and the juvenile justice system and a former board member of the Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V.

Bibliography

Ostendorf, H. (2016). Jugendgerichtsgesetz. 10th ed., Baden-Baden.

Sommerfeld, M. (2011). note on Oldenburg Regional Court - 6 Qs 21/11 - order of 24 May 2011. ZJJ 22, 461-464.

Sommerfeld, M. (2015). Von Eigentoren und Spielgestaltern ï eine Anmerkung zu Überlegungen für ein ĂDrittes Gesetz zur Änderung des Jugendgerichtsgesetzes ï 3. JGGÄndG (Verbesserung der Zusammenarbeit zwischen Jugendhilfe und Ju-gendgericht im Jugendstrafverfahren)ñ in: T. Rotsch, J. Brüning & J. Schady (Eds.), Festschrift für Heribert Ostendorf, 855-871. Baden-Baden.

Sommerfeld, M. (2017a). Was kommt auf den deutschen Gesetzgeber, die Landes-justizverwaltungen und die Justizpraxis zu? ï EU-Richtlinie über Verfahrensgaran-tien in Strafverfahren für Kinder, die Verdächtigte oder beschuldigte Personen in Strafverfahren sind, in: Federal Ministry of Justice and Consumer Protection (Ed.), Berliner Symposium zum Jugendkriminalrecht und seiner Praxis. Eine Dokumenta-tion des Bundesministeriums der Justiz und für Verbraucherschutz. 63-88. Mön-chengladbach.

Sommerfeld, M. (2017b), Was kommt auf den deutschen Gesetzgeber, die Landes-justizverwaltungen und die Justizpraxis zu? EU-Richtlinie über Verfahrensgaran-tien in Strafverfahren für Kinder, die Verdächtigte oder beschuldigte Personen in Strafverfahren sind. ZJJ 28. 165-175.

Right-wing extremism & Islamist extremism in adolescence: similarities, particularities and conclusions for pedagogical practice

Michaela Glaser

From a Germany-based, pedagogical perspective, a comparison of the phenomena of ñright-wing extremismò and ñIslamist extremismò in adolescence seems worthwhile in two respects: Firstly, interphenomenal approaches in countering right wing and Islamist extremism are currently being discussed in the expert debate. Secondly, the professional traditions of approaching these two phenomena have developed very differently. Whereas pedagogical work approaches countering right-wing extremism can build upon several decades of experience, preventive and re-integrative approaches dealing with Islamist extremism have only been realised during the past few years. In this respect, it is of interest whether and to what extent approaches from one field can be transferred to the other.

Against this background, in a comprehensive analysis of the available research findings[1], we pursued the following questions: first, what similarities can be ascertained between the two phenomena, that might justify such a transfer? Second, what particularities requiring specific approaches are to be found?

The analysis focused upon those aspects that are particularly relevant for pedagogical interventions:

- findings on biographical backgrounds,
- experiences and motives of young people who respond to right wing or Islamist extremist ideologies and groups as well as
- aspects of these ideologies that are particularly attractive to young people.

Aspects relating to historical backgrounds or to organizational aspects of the phenomena, however, have not been taken into account.

The results are presented in summary in the following. In connection with that some conclusions regarding pedagogical practice are then formulated.

Relevance of the growing-up phase

First of all, it is evident that adolescence has a specific significance. Young people are particularly responsive to extremist standpoints and ways of belonging: according to experts familiar with the field, approaches to right-wing extremist scenes take place above all between the ages of 13 and 15. On average, the adoption of Islamist extremism occurs somewhat later, especially in late adolescence and early adulthood. This special significance of the growing-up phase is also reflected in the central moments of attraction identified by research. For example, there is the overarching finding that ideological content is frequently only slightly relevant in the phase of approaching and entry. At this point in time, ideological positions are usually only substantiated and consolidated to a slight degree, in keeping with the young age of the protagonists (comp. also Borum 2011).

By contrast, a dominant role is played by motives such as the search for meaning and orientation, (provocative) differentiation, borderline experiences and ï as a very important motive ï the search for recognition and belonging. The motives that are relevant here are thus ones that are relevant for all adolescents: This period of life is a period of (sometimes provocative, demonstrative) detachment from the family and differentiation from the older generation, social repositioning, and the finding of oneôs own identity, including a political identity. It is also a phase often characterised by great insecurities. Extremist standpoints and ways of belonging ñrespondò to this by supplying clear and simple answers, a ñhigher purposeòfor oneôs own actions and a greater sense of worth through membership of an exclusive community.

[1] This article is a summary of a presentation, given at the 30. Jugendgerichtstag of the Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen (DVJJ), in September 2017 in Berlin/Germany. It mainly draws upon a systematic analysis of available international research findings on motives, biographical backgrounds and experiences of young people attracted by or involved with violent extremism, conducted by Joachim Langner, Nils Schuhmacher and the author (comp. Glaser/Langner /Schuhmacher 2017a and 2017b). Many thanks to my colleagues for sharing their profound knowledge on right wing extremism (Nils Schuhmacher) and Islamist extremism (Joachim Langner) with me and for our fruitful discussions on these topics.

Biographical experiences

Adolescent processes of detachment and individuation are, however, not sufficient in themselves to explain why some young people turn to extremism (while the majority, after all, does not do this). Therefore the specific experiences in the biographies of these young people and the life circumstances from which approaches to extremist scenes occur, are also of interest.

It should first of all be stated that vulnerabilities towards extremism never result from single factors, but that instead they are always the result of an *interaction of various aspects*.

In addition, studies enquiring more deeply into this (which have to date primarily focused on right-wing extremism) indicate that it is not an mere accumulation of problematic living conditions and critical life events, that causes young peopleøs vulnerability towards extremist offers. Of decisive importance are also the modes of interpretation and coping skills, acquired in socialisation, that young people can draw upon in coping with and processing these experiences.

The overall view, however, shows that *experiences of deficient belonging* and *a lack of recognition* are present in many cases as biographical background experiences.

These experiences might result from interpersonal relations or also from structural conditions (i.e. marginalisation, relative deprivation). They also differ to some extent between right-wing extremism and Islamist extremism: Whereas in the former, individual experiences of emotional neglect in the family (Hopf et al 1995; Rieker 1997; Gabriel 2005) social exclusion and socio-economic failure (e.g. Marneros/Steil/Galvao 2003; Eckert/Reis/Wetzstein 2000) are dominant, in the latter the research also particularly emphasises experiences of discrimination more personally and structurally experienced, and also vicariously perceived (for members of oneøs own group) discrimination (comp. Roy 2006). They are similar, however, in that they can cause particular susceptibility to the promises of community and social gratifications of extremist groups. These social dimensions can, accordingly, also be identified as central motives for turning to these movements and as moments of attraction.

The major *importance of social aspects* is also evident in another respect: research on processes of distancing shows that disappointment of this idealised promise of community, experienced in the everyday life of the group, represents a major motive for distancing oneself from extremism. Particularly if ñcommunityò was a central reason for joining, alternative social relationships can weaken group bonding and promote distancing. Conversely, a lack of alternative social relationships represents a decisive obstacle against departure.

Last but not least, group dynamics and loyalties play an important role in ideological and violent radicalisation processes of group members ï even among those members, whose involvement with extremism originally occurred from non-ideological motives.

We have now mentioned some central similarities between processes of involvement with right-wing and Islamist extremism, which are relevant to pedagogical work. In the following, some particularities of the phenomena are named which are of importance for the adequate conception of pedagogical approaches as well.

Particularities of right wing and Islamist extremism

An essential difference is that right-wing extremism (despite its sense of marginalisation) relates to a narrative of the established, long-time inhabitants and the prerogatives to which they ñhave a rightò For Islamist extremism, on the other hand, a narrative of discrimination is central, namely the narrative of the ñglobal oppression of Muslimsò

Secondly (and directly related), the two ideologies differ in their exclusivity - or inclusivity - as ways of belonging. Whereas right-wing extremism defines belonging by ethnic origin, Islamist extremism is ethnically ñcolour-blindò in this respect: Because conversion requires only a confession of faith, it is potentially open to everyone. It is thus e.g. also attractive to migrants from non-Muslim countries (who account for a substantial proportion of the converts in Germany).

A further difference results from the religious moment in Islamist extremism and the transcendence that this involves: unlike right-wing extremism, the ideology of which is regarded as possessing ñmedium-range transcendenceò, Islamist extremism, as an ideology legitimated by a religious system, possesses long-range transcendence ï and can thus function as a stronger source of meaning.

A characteristic of Islamist extremism, connected to this, is that it is oriented towards an afterlife. Even more, it is very strongly rule-governed because of its literal interpretation of the Quran. It is thus able to function as an aid to coping with everyday life, but is also more ñausthereò Right-wing extremism, in comparison, is more strongly grounded in the lifeworld, youth culture and hedonism. In this respect, the two ideologies offer different options of belonging and of conduct, and different ways of endowing life with meaning. They therefore also differ in their attractiveness to and ability to connect with different social groups.

In addition to this, an essential difference can be ascertained: The phenomena are both located in the processes and constellations of society and can both be promoted by these ï these interactions with social reactions are, however, very different, if not contrasting.

For example, research into right-wing extremism indicates that right wing extremist movements and activities can be *positively reinforced* by (supposed or actual) agreement in the population, which might be communicated by a general social climate of hostility towards migrants and ñforeignersò as well as by overlooking and tolerating xenophobic, racist and extreme right-wing phenomena within society (comp. Bibouche 2010) In connection with Islamist extremism, by contrast, findings to date indicate that such movements are especially fuelled by *polarising* social reactions, e.g. repressive state responses or anti-Muslim tendencies in the population (comp. Larsson/Lindekilde 2009, Abbas/Siddique 2012).

In this also the empirical reference point of the above mentioned central narratives - the collective of the ñestablishedò vs. the collective of ñdiscriminated against Muslimsò - is to be found (speaking about a Western society context): historical inhabitants of the western world, regardless of their individual social status, belong to the ethno-cultural collective of the established. In contrast, immigrants from Muslim countries are a minority facing different forms of discrimination as a ñcollectiveò in every-day life ï regardless of the citizenship they hold.

In the final part, some conclusions will be outlined regarding the conceptualization and conduction of pedagogical, re-integrative work, intended to counter such extremist patterns of interpretation and group offers.

Common elements and starting points of re-integrative work

A first overarching conclusion to be drawn from empiricial findings on right wing and Islamist extremism is: Backgrounds and motives of young peoplesô turns towards extremism are always multiple and diverse. Therefore standardised catalogues of criteria and checklists are of little use in this context; instead, it is always necessary for professionals to look closely at and assess the individual case.

In doing so, professional work with these young people should find out the specific attraction and function of an extremist movement in the concrete individual case. It should make them the starting point for pedagogic interventions, because otherwise interventions might miss their mark. (For example, was Islamism a way for a juvenile delinquent to live out their affinity for violence, or was it the opposite intention - to ñget a gripò on their life through orientation towards a strict fundamentalist set of rules? It is obvious that very different approaches are required here.)

Based on such an analysis, pedagogical work should try to find alternative solutions (ñfunctional equivalentsò) to what was provided by the group or the ideology; alternatives that serve to meet the young persons´ needs in a less harmful way ï less harmful to the young person him/herself and to others. These might be alternative experiences of community integration, support in labour market integration but also alternative possibilities for engagement and exploring self-esteem.

In addition, it may be advisable to make the young person aware of the biographical experiences behind a turn towards extremism, and to then review them together; in some cases, it may also be necessary to incorporate therapeutic aids for this.

Last but not least, it is necessary to examine the problematic patterns of interpretation and ñproblem solvingò these young people expose. This can be assisted by the conveying of knowledge - by presenting facts and figures and alternative interpretations - in that this may sow seeds of doubt concerning the ñunquestionable truthsò of extremist ideologies. Above all, however, it is a matter of concentrating on these patterns themselves - by fostering alternative ways of interpreting social processes as well as individual, problematic experiences, and by conveying alternative strategies of dealing with these experiences.

All these elements of work have been practised for many years and with good success in distance-promoting and re-integrative work with young people attracted by or even involved with right wing extremism (comp. Rieker 2009; Möller/Schuhmacher 2015; Glaser, Greuel, Hohnstein 2017).

Therefore, this professional field might very well function as a learning resource for the comparatively young pedagogical task of dealing with Islamist extremism.

Specific requirements in the field of Islamist extremism

A range of requirements specific to dealing with Islamist extremism is also evident, however. Some of these specifics, which have proved to be relevant in practical work, (comp. Glaser/Figlestahler 2016), are, in conclusion, set out below.

For getting access to adolescents and their social milieu, but also for conducting discussions on a substantiated basis, co-operations with religious protagonists have to be built and explored. The possible character of these co-operations and of religiously grounded work in this field is currently being discussed and negotiated.

Subjects of this debate are e.g. the criteria to be applied in the selection of religious partners (particularly the question of co-operating with non-violent Islamists is controversially discussed in this context.) Discussions also arise on the subject of state neutrality in religious matters and on what results from this principle for publicly funded work by religious protagonists in this field.

A specific challenge also results from Islamist ideologyôs orientation towards an afterlife: Promises and threats relating to a life after death are much more difficult to counter, as they cannot be invalidated by experience.

Another specificï currently declining in importance, but highly relevant in this work during recent years ï is the territorial distance of the (former) ISIS held territories. Firstly, the geographic distance, combined with the strong isolation and control of those who travel there, makes it more difficult to question and rebut IS propaganda. Secondly, this geographic distance also presents practitioners with the question of how they can continue to reach the departed adolescents in order to support possible distancing impulses.

New requirements also result from the decline of ISIS in Syria and the growing number of returnees to western countries: Young people who return from these battle zones will in many cases have a need for support, in order to process acts of violence they have either perpetrated or experienced and to support their social re-integration. At the same time, in view of the frequently unclear motives of these returnees, state authorities as well as the public regard them as potential security risks and security officials show a high interest in them. Therefore, the always difficult question of co-operation between pedagogical and security professions arises here in an intensified form. A specific challenge in this context is related to the fact, that ISIS promoted the travelling of whole families to its territories as well as the founding of families by its fighters to build up and strengthen the ñcaliphateò. Consequently, there is a relevant number of children among those returnees. These children have been strongly exposed to ISIS-indoctrination and are likely to be highly traumatized, as they have witnessed violence and death and might even have been misused for committing acts of violence themselves (comp. NCTV/AIVD 2017). Special efforts will be needed to help them to process their experiences and to (re)integrate them into society.

Not least, one crucial particularity results from the social framing of these phenomena: The social discourse on Islamist extremism in Germany, as in other western countries, is closely intertwined with fundamental debates about the ñcompatibilityò of Islam and of Muslim life with mainstream society, and with widespread suspicion of Muslims in general. In addition, a substantially greater social perception of risk is evident here compared to the perception of right-wing extremism - both in absolute terms and in relation to their actual potential for violence.

These social conditions also have an influence upon pedagogical options in this context. For example, fear of (further) stigmatisation may be one of the reasons why families with Muslim backgrounds have, to date, been substantially more difficult to reach with counselling and assistance services relating to this subject than relatives without Muslim backgrounds (Glaser/Figlestahler, ibid.).

Furthermore, against the background of these discourses, problematising of adolescent ñdeviantò behaviour involves a particular risk of possible stigmatizing effects. Pedagogical professionals working in this context therefore bear a particular responsibility to differentiate carefully and to act with appropriate sensitivity.

Michaela Glaser holds a university degree (M.A.) in social sciences and political sciences. She is a senior researcher at the German Youth Institute and project head of the institutesôñResearch Unit for the Prevention of Right Wing Extremism and Radicalisationñ. Main research fields: right wing extremism and Islamist extremism, with special focus on biographical and youthï related subjects; pedagogical approaches in countering violent extremism, with special focus on youth and social work, disengagement and ñderadicalisationñ approaches and gender perspectives. Various publications on related topics, membership in several working groups and advisory boards, e.g. the European Commissionôs expert group ñThe contribution of youth work to preventing marginalization and violent radicalizationñ.

References

Abbas, Tahir/Siddique, Assma (2012) Perceptions of the Processes of Radicalisation and De-Radicalisation among British South Asian Muslims in a Post-Industrial City, Social Identities, 18:1, pp. 119-134

Bibouche, Seddik (2010): Rechtsextremismus und sein Umfeld: Eine Regionalstudie, in: Zeitschrift für Jugendkriminalrecht und Jugendhilfe - ZJJ - Zeitschrift für Jugendkriminalrecht und Jugendhilfe. 2/10, S. 151-159

Bohnsack, Ralf/Loos, Peter/Schäffer, Burkhard/Städtler, Klaus/Wild, Bodo (1995): Die Suche nach Gemeinsamkeit und die Gewalt der Gruppe. Hooligans, Musikgruppen und andere Jugendcliquen. Opladen: Leske + Budrich.

Borum, Randy (2011): Radicalization into Violent Extremism I: A Review of Social Science Theories. In: Journal of Strategic Security 4, Nr. 4, S. 7ï 36.

Eckert, Roland/Reis, Christa/Wetzstein, Thomas A. (2000): ÄIch will halt anders sein wie die anderenñ Abgrenzung, Gewalt und Kreativität bei Gruppen Jugendlicher. Opladen.

Gabriel, Thomas (2005): Familienerziehung und Rechtsextremismus. Analyse der biografischen Genese rassistischer Deutungs- und Handlungsmuster junger Menschen. Zürich.

Glaser, Michaela, Langner, Joachim, Schuhmacher, Nils (2017a), Right-wing and Islamist extremism among young people. A comparison of attraction and involvement processes, Paper presented at the conference ñInternational Dissidence: Rule and Resistance in a Globalized Worldñ, Goethe-University Frankfurt/Main, 2-4 March 2017. Conference-Paper www.dji.de/fileadmin/user_upload//bibs2017/Glaser_Langner_Schuhmacher_Dissidence_2017.pdf

Glaser, Michaela, Langner, Joachim, Schuhmacher, Nils (2017b), Rechtsextremismus und gewaltorientierter Islamismus im Jugendalter. Eine vergleichende Diskussion der Forschungsstände zu Motiven, biografischen Hintergründen und Sozialisationserfahrungen. in: Möller, Kurt/Neuscheler, Florian (Hrsg.): Wer will die hier schon haben? Ablehnungshaltungen und Diskriminierung in Deutschland, S. 223-241

Glaser, Greuel /Hohnstein 2017 in, Glaser, Michaela/Greuel, Frank/Herding, Maruta/Hohnstein, Sally/Langner, Joachim (2017): Young and radical. Political Violence during Adolescence. https://www.dji.de/fileadmin/user_upload/bibs2017/young_and_radical.pdf

Michaela Glaser/Figlestahler Carmen (2016): Distanzierung vom gewaltorientierten Islamismus - Ansätze und Erfahrungen etablierter pädagogischer Praxis. In: ZJJ, Zeitschrift für Jugendkriminalrecht und Jugendhilfe, H.3/2016

Hopf, Christel/Rieker, Peter/Sanden-Marcus, Martina (1995): Familie und Rechtsextremismus. Familiale Sozialisation und rechtsextreme Orientierungen junger Männer. Weinheim ï München.

Marneros, Andreas/Steil, Bettina/Galvao, Anja (2003): Der soziobiographische Hintergrund rechtsextremistischer Gewalttäter. In: Monatsschrift für Kriminologie und Strafrechtsreform 5, 364-372

Möller, Kurt/Schuhmacher, Nils (2014), Soziale und pädagogische Arbeit mit rechtsextrem affinen Jugendlichen. Akteure, Projekte, Ansätze und Handlungsfelder. https://www.migration-online.de/data/bik_netz_pdagogische_arbeit_mit_rechten_jugendlichen_1.pdf

National Commitee for Security and Counterterrorism (NCTV)/General Intelligence and Security Service (AIVD) (2017), The Children of ISIS. The indoctrination of minors in ISIS-held territory

Özsöz, Figen (2008): Hasskriminalität. Auswirkungen von Hafterfahrungen auf fremdenfeindliche jugendliche Gewalttäter. Freiburg.

Larsson, G./Lindekilde, L. (2009): Muslim claims-making in context Comparing the Danish and the Swedish Muhammad cartoons controversies. In: Ethnicities 9, S. 361ï 382.

Rieker, Peter (1997): Ethnozentrismus bei jungen Männern. Fremdenfeindlichkeit und Nationalismus und die Bedingungen ihrer Sozialisation. Weinheim/München: Juventa.

Rieker, Peter (2009): Rechtsextremismus: Prävention und Intervention. Ein Überblick über Ansätze, Befunde und Entwicklungsbedarf. Weinheim ï München: Juventa.

Roy, Oliver (2006): Der islamische Weg nach Westen. München: Pantheon.

Youth Justice in Australia – locking down the problem

James McDougall

Abstract

This article discusses the strengths, challenges and opportunities for systematic reforms currently facing youth justice across Australia in light of recent critical inquiries, including the Royal Commission into the Protection and Dentation of Children in the Northern Territory.

The context of Youth Justice in Australia

The youth justice system is an important reflection of how a society treats young people. Its effectiveness is often measured by how limited the contact a young person has with the formal criminal justice system. In Australia around 96 per cent of children and young people have little or no contact with the formal criminal justice system. As a federation, Australia comprises eight states and territories (New South Wales, South Australia, Western Australia, Victoria, Tasmania, Queensland, the Northern Territory and the Australian Capital territory). Each state and territory jurisdiction and legislature operates its own criminal justice and youth justice systems.

Most criminal offending behaviour by children and young people is transient and relatively minor in its seriousness. So, it is considered critical to limit the stigmatising impact of the criminal justice process on a child or young person.

For those young people whose offending behaviour is characterised as serious (in frequency or impact or both) the criminal justice objective of providing appropriate punishment after due determination of guilt still operates. But the broader framework of the youth justice system calls for a clear focus (in process and outcome) on rehabilitation. This focus should involve careful consideration of the background and opportunities for the individual offender. There should also be an appropriate focus on community engagement and re-engagement where necessary.

Detention is to be a measure of last resort. Those who end up in detention should reflect a very small proportion of those children and young people in contact with the criminal justice system. Nevertheless, rehabilitation remains the key focus for this group. We should still be aiming to ensure that the young people who serve sentences in detention do not make the transition to become recidivist and/or adult offenders.

The principles that underpin an effective youth justice system are well established. In broad terms the Australian youth justice system is based on these internationally recognised and respected principles. Most children and young people are dealt with appropriately by the system. And as a broad measure of the effectiveness of the system, the number of young people who are offending is falling and the number of young people in detention in Australia is also stable (and falling in some areas of youth justice).

Critical Challenges

However, Australiaôs youth justice system is facing critical challenges. The most serious issue facing the system is the over-representation of Aboriginal and Torres Strait Islander children and young people in detention. On an average night in 2014ï 15 there were 480 Aboriginal and Torres Strait Islander children and young people in detention in Australia. Despite making up only 5.5 per cent of children between 10 and 17 years of age, they make up over half of all children in youth justice detention on any night.

As a related issue, about half of all children and young people in detention nationwide at any time are yet to be sentenced. This overall rate has remained relatively steady over recent years although there are marked differences between jurisdictions.

The conditions imposed by the courts for release on bail, the lack of suitable bail accommodation and a failure to recognise the principle of detention as a measure of last resort (by legislatures and sometimes also by courts) combine to create these unacceptably large populations of children and young people held on remand.

And finally, it has become apparent that insufficient attention is being given to appropriate standards of care and management in Australian detention centres. There has been a failure to meet international human rights standards in the treatment of children and young people in detention.

Responses across Australia

Each of these issues is receiving some degree of attention ï either through media, coordinated public campaigns or through government-initiated inquiries.

A tipping point for attention at a national level occurred in July 2016 with the broadcast of an episode of the ABC-TVôs Four Corners current affairs show which documented abuse of children held in the Northern Territoryôs Don Dale youth detention centre. The episode included CCTV footage of boys held in solitary confinement being tear gassed; and video of a boy being hooded and shackled in a chair. In response to the outcry, within days the Australian Government established a Royal Commission into the Protection and Detention of Children in the Northern Territory.

In November 2017 the Royal Commission handed down its final report. The Commission made extensive and detailed findings of the unsatisfactory nature of the state of the accommodation, the conditions and treatment of the children and young people held in detention and the management of youth detention facilities in the Northern Territory. These included inappropriate use of isolation, physical and psychological abuse, excessive use of force and restraints, denial of access to schooling and educational material. The Commission identified significant breaches of a range of international youth justice and human rights standards. It found that the youth detention centres in the Territory ñwere not fit for accommodating, let alone rehabilitating children and young peopleò

The situation in the Northern Territory is not unique. There have been recent reviews of youth detention practice in most states and territories in Australia.

Following media allegations of mistreatment of young people in detention in Queensland, the State Government announced an independent review in August 2016. The review examined the practices, operation and oversight of the state's two youth detention centres in Townsville and Brisbane and the effectiveness of programs and services delivered in the centres. In April 2017 the Queensland Government agreed to implement all 83 recommendations of the review report to improve practices and services to better address the safety, wellbeing and rehabilitation of young people in youth detention.

In New South Wales, the most populous state in Australia, the Inspector General of Custodial Services began an inquiry into the use of force in youth detention centres in May 2016. In October 2016, after the State Ombudsman raised concern at complaints relating to the use of extended periods of isolation as behaviour management in youth detention centres, the terms of reference for the Inspector Generalôs inquiry were extended to include confinement and segregation.

In addition, the Government announced an internal review of all behaviour management practices in youth detention. Reports from these investigations have not yet been made public.

In South Australia, in December 2016 the Guardian for Children and Young People was appointed as the Official Visitor for South Australiaôs youth detention facility, the Adelaide Youth Training Centre. This role will enable increased and more thorough monitoring of the quality of care, treatment and control of the young people in the Centre. The Guardian had already identified the use of isolation as a key concern.

The Inspector General of Custodial Services in Western Australia reported in 2012 and again in July 2017 on the need for reform of practices in youth detention in this the largest state in geographic area in Australia. In his most recent report, he noted unacceptably high incidence of self-harm by young people in the only youth justice facility in the state. He found significant deficiencies in management in the facility including over-use of isolation and restraints and denial of basic rights to exercise and care. He recommended that the single facility should be replaced with a number of smaller facilities better able to meet the needs of the young people in detention.

For many years the youth justice system in Victoria (the second most populous state in Australia) had been the most effective on a range of indicators by Australian standards. Victoria has the lowest rate of children aged between 10 and 17 in detention, the lowest rate of recidivism for children in Australia and the second lowest youth crime rate in Australia (apart from the ACT).

However, it is now clear that the proper management of Victoriaôs youth detention facilities has been badly neglected in recent years. During 2016 and into 2017, there were a series of disturbances by young people in detention, including incidents Parkville Youth Justice Centre that resulted in damage to the physical fabric of the centre and the intervention of critical incident response police. As a result, a number of teenage boys were moved into a special section of a regional high security adult prison.

In February 2017 the Victorian Ombudsman delivered the third of a series of reports detailing concerns in the management of youth justice detention facilities. Soon after the Victorian Commissioner for Children and Young People handed down her report detailing unacceptable levels of isolation and routine ólockdownsô of children and young people in Victoriaôs youth justice centres.

International Context

It is noted that there have been concern at similar practices internationally. Youth justice facilities in England and Wales have been a focus of concern about the use of force and evidence that many children in these facilities feel unsafe. Systemic abuse has been reported in American youth justice facilities since the late 1970s. Evidence of systemic or recurring maltreatment has been found in all but five American statesô youth prisons between 1970 and 2015.

National Responses

Notwithstanding the extensive evidence across the nation, youth justice is not yet consistently treated as a national policy concern by the Australian Government.

The Australian Law Reform Commission is currently conducting an inquiry into the unacceptably high incarceration rates of Aboriginal and Torres Strait Islander peoples. Its discussion paper has already highlighted the critical importance of the treatment of Aboriginal and Torres Strait Islander children and young people. Contributing factors include not only the failures in youth justice but also in child protection, cultural safety and responses to family violence and issues of access to justice in rural and remote communities. Significant attention will be given to the operation and impact of bail laws and over-representation on remand.

The Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory focuses most attention in its recommendations on detailed improvements required to the youth justice system in the Territory. However, it makes extensive reference to the lack of effective monitoring and compliance with existing national standards and in measurement against international human rights and youth justice instruments. Its most substantive recommendations to the Australian Government relate to the establishment of a coordinated funding and policy frameworks for government programs and services to families and children in the Northern Territory; consistent national youth justice data and monitoring.

The NGO Coalition ó*Change the Record*ô has called on the Australian Government to address the challenges facing youth justice systems across the nation . It believes that what is required is a National Youth Justice Action Plan that involves all state and territory governments and is coordinated through the Council of Australian Governments. Clearly such a plan would require more effective monitoring and enforcement of compliance than has occurred to date.

.

Applying the International Principles

Australia is already a signatory to the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, which contain provisions relevant to the treatment of children and young people deprived of their liberty. Article 10 of the ICCPR states that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person é

Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The Convention on the Rights of the Child acknowledges the need to afford children special protection in the criminal justice system due to their vulnerability to abuse and exploitation as well as their relative immaturity. There is a comprehensive suite of other international instruments that set out minimum standards for the treatment of children involved in the criminal justice system as well as affirming their human rights in such situations. The most important among these are the Standard Minimum Rules for the Administration of Juvenile Justice 1986 (ó*Beijing Rules*ô), the Guidelines for the Prevention of Juvenile Delinquency 1990 (ó*Riyadh Guidelines*ô), the Rules for the Protection of Juveniles Deprived of their Liberty 1990 (ó*Havana Rules*ô) and applicable principles contained in the Standard Minimum Rules for the Treatment of Prisoners 1955.

Nationally, minimum standards for youth justice facilities have been set by the Australasian Juvenile Justice Administrators (ó*AJJA Standards*ô). These standards are based on the international instruments as a foundation for minimum requirements for youth justice facilities.

In 2012, in its regular review of Australiaôs implementation of the United Nations Convention on the Rights of the Child, the UN Committee on the Rights of the Child (the UN Committee) expressed regret that despite its recommendations in previous reviews

> *the juvenile justice system of Australia still requires substantial reforms for it to conform to international standards".*

In April 2016, the Australian Childrenôs Commissioners and Guardians released a report on practices within youth justice detention that raise human rights concerns: the use of disciplinary regimes, restraint, force, searches, seclusion and segregation. The report sought to improve understanding of the use of such practices, examine the human rights standards applicable and recommend improvements. The recommendations addressed issues of staffing (including training and recruitment) and suggested more effective systemic review, including monitoring and independent oversight.

Effective Monitoring and Compliance

With such a complex federated political system, the issue of monitoring and compliance in Australia is critical. Awareness of the international human rights standards is evident. Compliance with the standards is almost accidental. This lack of enforceability threads itself throughout the operations of youth justice in Australia.

For example, there is generally a lack of effective accountability mechanisms to monitor and regulate the discretion granted to custodial officers for dealing with disciplinary infractions committed by children in detention. Some Australian jurisdictions do not grant children in detention access to legal representation in a formal disciplinary hearing and as a rule there is very little formal regulation of disciplinary proceedings in youth justice facilities67.

In most jurisdictions, if a child commits what could amount to a criminal offence inside a detention facility, they can be dealt with formally or informally within the centre or be charged with a criminal offence. Clearly the decision to treat an infraction as a disciplinary or criminal matter can have serious consequences for a child.

The use of restraints, isolation practices and the use of force without legal authority or with excessive or unnecessary force may constitute an assault or an act of false imprisonment. Searches, particularly strip searches with their impact on privacy and bodily integrity might be actionable if beyond authority, particularly as damaging assaults.

Without proper record keeping, effective complaints mechanisms and rigorous and consistent review, these areas of often routine practice in detention facilities remain effectively unregulated.

To ensure the observance of relevant laws and regulations and the meeting of human rights standards, places of detention should be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority independent of those in charge of the administration of the place of detention.

The independent authority should be able to focus on institutional and systemic issues within places of detention. The authority should have comprehensive powers to obtain and use information to review and report on detention conditions. The work of the authority may be complemented by independent community-based visitors who can receive and act on individual requests and complaints.

As identified in the Australian Childrenôs Commissioners and Guardiansô report, currently inspections are generally carried out by Official Visitors, the Ombudsmanôs office or another body independent of the centre or government department. However, jurisdictions vary with respect to the qualifications visitors should hold. Generally, all those involved in oversight and review should have expertise in youth justice and understanding of the needs and rights of children within the youth justice system.

There should be separate provisions for children in detention to make and pursue individual complaints. Every child should have the right to make a request or complaint, without censorship as to substance, both to the central administration and to an independent authority, and to be informed of the response without unreasonable delay.

Access to support to make complaints (and legal advice where necessary) is important for children in detention. This should include clear guidance as to their rights in detention and be available to children in remand as well as those on sentence.

Opportunities at a National Level

The Australian Government has decided to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This will include providing for inspections of places of detention by the UN Subcommittee on the Prevention of Torture; and establishing an independent National Preventive Mechanism to conduct inspections of all places of detention.

Hopefully the development of such a National Preventive Mechanism will provide an opportunity for the coordinated development of appropriate measures for monitoring and mechanisms to ensure compliance in every youth justice system and every youth justice detention facility across Australia.

The Northern Territory Royal Commission has drawn attention to the Australasian Juvenile Justice Administrators Standards. These Standards should be reviewed, strengthened and extended to build youth justice systems that consistently support rehabilitation, diversion from the formal justice system and the use of detention as a measure of last resort. The Standards should more comprehensively reflect and enforce the relevant principles of child and human rights and international youth justice principles.

Each state and territory must ensure and adequately resource independent authorities to monitor and ensure compliance with the Standards. These authorities must be qualified and experienced in the relevant youth justice principles and understanding of child development and the experiences of children.

The Standards and their implementation should be regularly reviewed at a national level by a body such as the Australian Human Rights Commission with the guidance of the Australian Children's Commissioner. The Commission should be adequately resourced and supported to do so.

Conclusion

Consistent with international standards, Australian youth justice should be firmly based on diversion away from detention, with detention considered as a last resort for children. Practices such as warnings, cautions and community sanctions and conferences should be given priority for all children over appearing before courts and particularly being placed in detention.

For those children who are in detention, special protection should be provided. These children often have complex needs. These children deserve a youth justice system that does not add or perpetuate their experiences of trauma and abuse. Planning for behaviour management and safety in Australian youth justice facilities should demonstrate a clear regard for the vulnerability of these children.

Youth justice systems serve a dual purpose. They give the community confidence that children and young people are learning the value of a system of law and order. They also support and rehabilitate young people to ensure they are reintegrated within the community in a positive and productive manner.

Systems of punishment must be built on evidence of what is effective in achieving both purposes. Any period of detention must serve to support, educate and rehabilitate child offenders and seek to mitigate any factors that could exacerbate pre-existing vulnerabilities

All detention centre practices that involve invasive or restrictive procedures must be carried out to the least extent necessary and with respect for the dignity of the child. There should be confidential recourse for a child to complain about treatment and practices to an independent authority. There should also be robust internal and external oversight mechanisms that ensure all complaints and concerns are thoroughly investigated.

In Australia, youth justice is now a national policy concern. It requires a national system of effective monitoring and compliance that draws on and enforces international standards.

James McDougall is a leading child rights advocate, policy worker and consultant in Australia and has previously managed several national and state-wide services, including the National Children's and Youth Law Centre, National Association of Community Legal Centres, and was Director of Advocacy at Save the Children Australia. Most recently, James worked with the Commission for Children and Young People, Victoria. James is a Steering Committee member of the Australian Child Rights Taskforce, providing strategic and technical advice in the development of the NGO report to the Committee on the Rights of the Child.

To abolish the death penalty and life imprisonment for children

Bernard Boëton*

According to reliable sources, some 13 countries still have provision in their law (and sometimes enforce) the death penalty for adults who were under 18 years old at the time of the offence. Some 65 countries use the life sentence for the same category of offenders. These countries are clearly violating the Articles 6 and 37 of the Convention on the right of the child (1989), which they signed and ratified, and which state that the rights to life and development for children are not negotiable, while the death penalty and life imprisonment are forbidden.

In some countries, there are serious shortcomings in many of the legal cases which lead to the death penalty, due to such as: absence of documents or use of false identities, the substitution of identity, incomplete, fabricated or lost files, absence or inadequacy of a social report, confessions obtained under duress or violence, preventive detention when awaiting trial for several months or years, external pressure exerted on the court, reference to customary or religious law, non-recognition of physical or mental handicap, sentence exclusively based on the notion of "deserving of deathò etc. In every case where proper procedure has broken down, the vulnerability and lack of capacity of a minor to defend him/herself is aggravating and clearly demonstrates the failure of the legal system.

in addition, some countries implement new « Anti-terrorism Act », or « Crime against the State », pieces of legislation whose unclear definitions allow inclusion of a wide range of offences, where death penalty or life imprisonment may be enforced on offenders whose age is uncertain or whose minority is ignored - or even legally applicable from the age of 16. The death penalty for blasphemy is completely inappropriate for a child who is not judicially considered as having the full capacity of understanding, expressing or defending him/herself. A death sentence on children, manipulated by adults for drug trafficking has never reduced the death rate of drug addicts. No specific law allows the death penalty or a life sentence for children in conflict or war situations, where the international norms on juvenile justice are still applicable in terms of juvenile restorative justice.

Some countries have put up « Reservations » when ratifying the Convention on the rights of the child by saying that, as a general principle « it will be interpreted in the light of principles resulting from religious laws and values. ». Even if the principle of Reservation cannot be legally questioned, it is illegitimate to impose a reservation, based on religious grounds and extended to the whole content of a Convention: how can a State ratify an international Convention forbidding the death penalty and, almost simultaneously, circumvent its obligation, by applying this « State-sponsored homicide » under the cover of a « general reservation » based on religious or customary procedure or practice?

The support of public opinion, as well as the so-called deterrence effect are clearly covers for the show of an « ever-increasing repression », which doesnô solve anything. As Gandhi used to say : ñ An eye for an eye ends up making the whole world blind. » Capital punishment when carried out on minors not only contravenes the right to life itself, but is also clearly unacceptable, as it states with absolute certainty that a human being, not yet adult, will never be able to reform.

The underlying motivation of a juvenile offender cannot be judged in terms of rationality, but with mixed motives, and considering the social, economic and psychological context. If, in civil law, a child cannot give his/her valid consent before the age of 18, because he/she is still developing, how can the same child be judged as having given his/her consent for an act and as being fully aware of the consequences of this same act, when a crime of the utmost seriousness has been committed?

In conclusion, Vivere asks for a moratorium on capital executions and life imprisonment on juveniles based on at the time of offence, in order to save the lives of those presently on death row and in view of abolishing these two sentences in their legislation. The history of the gradual abolition of the death penalty in the world reveals that resistance to it is more of a political rather than philosophical or religious nature, and that ultimately, it is always fundamental values, such as the respect for life, which prevail. The countries concerned by this issue should start - now - by banning the death penalty and life sentence in their legislation on juveniles. This would be in line with the course of history.

Bernard Boëton* - Vivere - www.vivere.ch - Email : bernard.boeton@vivere.ch.

News on the Italian Juvenile Justice Reform

Joseph Moyersoen*

I have the pleasure to inform you that the Italian Minister of Justice Andrea Orlando at the end agreed to cut off the part of the civil process proposed in the draft Law No 2284 that provides for the abolition in Italy of Youth Courts and of the Youth Public Prosecutors and the transfer of their functions into specialized sections established at the Adult Courts.

The Minister of Justice Andrea Orlando therefore has ceased to carry on this misplaced reform that, I remind, has been criticized by all the specialized professional categories that work within the Italian juvenile justice system (ordinary and juvenile judges, professional and honorary judges, public prosecutors, lawyers, social workers, psychologists, educators, and I apologize if I forgot someone). Only a couple of lawyers' associations - mainly focused on civil family matters rather than on criminal, civil and administrative juvenile matters - with the subsequent endorsement of the Judicial National Council, pushed to the very end to allow for this reform.

I think it is a great example of advocacy and lobbying teamwork, which saw many subjects in the front line, including I remember the Italian Association on Youth and Family Magistrates (AIMMF), first of all its President, Francesco Micela. I share what he wrote in his message addressed to AIMMF members: ñthe goodness of the arguments, the ability to networking and the tenacity have wonò We could see in Italy a large number of reactions appreciating this last Minister of Justice decision to not insist on this reform. It was also an opportunity to realize that the Italian juvenile justice system can and must be reformed, but by enhancing its strengths and improving its weaknesses without the abolition of the Youth Courts and of the Youth Public Prosecutors. For this reason, it would be appropriate, for example, to setting up a working group that really involves ñall the specialized professionals by gathering the contribution of thought and experience of those who, in different roles, work in the field of Juvenile Justice", as stated by the latest press release of the Lawyerôs Association named National Union of Children Chambers.

Against the reform a petition has exceeded 26,200 subscriptions in just over a year, and an Appeal saw the signature in just a few days of over 300 personalities of culture, justice and the economy not only in Italy (i.e. Avril Calder and Jean Zermatten).

I would like to thank all those who, at national and international level, have actively contributed to persuading the Minister of Justice to change their orientation and stop before serious damage was done by this kind of reform.

Joseph Moyersoen* is the immediate past President of IAYFJM and sits in the Juvenile Court of Milan.

Judicial perspectives on child-centred decision-making in England and Wales: Challenges and Opportunities

David Lane

Introduction

This article is based on one-to-one research interviews with 30 judges in England and Wales who work in the public child law system, dealing mainly with care and adoption applications in England and Wales. The background, aim and objectives of the study as well as the methodological approach used in the research were outlined in a brief article in the previous edition of the Chronicle.

This article will first outline a very brief summary of the historical background of the concept of child-centredness before moving on to consider the context within which decisions are made in relation to international conventions and guidance and in relation to current public child law legislation in England and Wales. It will then discuss the perspectives of judges on child-centred decision-making and the challenges and opportunities inherent in the process. Such perspectives will be highlighted through the use of direct quotes from the interviews with judges. It is acknowledged that this article, due to the limitation of space, just gives a very limited flavour of judgesô perspectives on child-centred decision-making.

Brief historical background of the concept of child-centredness

The term ócild-centredôhas its roots in the field of early yearsô education. It was first used by Froebel in 1826 in relation to early-years education in the United States which placed the child at the centre of everything in her or his life, with the child viewing everything only in relation to herself or himself.

Chung and Walsh in tracing the history of the term child-centred in relation to early yearsô education in the United States, found that there was much debate about what constituted the nature of child-centredness. They highlight a number of perceptions of the concept by various groups involved in early yearsô education down through the years, including, learning based on childrenôs interests, childrenôs participation in decisions regarding their learning, an emphasis on childrenôs developmental stages and the development of individual potential. Generally, however, despite different perceptions, the childôs own experience of their world was placed at the centre of the system and seen as a core element of child-centredness. However, Chung and Walsh in tracing the history of the concept of child-centredness, posed the question, ó*Of what is the child the centre?*ôIn the context of this research, this will be explored and analysed through the responses of the judges, current legislation, policy and formal guidance, as well as relevant literature and research, all of which reflect the reality of the childôs position within the public child law system. Although this core element of child-centredness emerged in the early 1800ôs, current legislation, literature and research continue to highlight this as one of the core elements that should form the basis on which child-centred decisions are made in both the child protection system and in public child law proceedings.

Placing a childôs own experience of their world at the centre of decision-making processes and having such an approach accepted as a core element of child-centred decision-making, has become an integral part of the language of childrenôs rights and child-friendly justice today.

Context of Child-centred decision-making

In public child law in England and Wales, the principle of paramountcy, as contained in s.1(1) of the Children Act 1989, is accepted by judges and lawyers and by child care professionals in the field including, social workers and childrenôs Guardians, as the over-arching principle that should guide and inform all decisions made by the court in relation to the welfare of a child. The Act states:

When a court determines any question with respect toð

(a) the upbringing of a child; or

(b) the administration of a childôs property or the application of any income arising from it, the childôs welfare shall be the courtôs paramount consideration.

The purpose of the paramountcy principle is to place the child at the centre of proceedings and is the basis of child-centredness within our current public child law system. In addition to the principle of paramountcy, there is the ówelfare checklistô which lists a number of areas that need to be taken into account when considering the welfare and best interests of children including, obtaining the childôs own wishes and feelings.

Article 12 of the CRC states:

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

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

In relation to Article 12 the UN Committee on the Rights of the Child assert:

ő*States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity'*.

The Committee places great importance on children being able to participate in decision-making processes, the outcome of which will affect their lives. The Committee asserts that such participation must not be momentary, but needs to be meaningful, intense and ongoing throughout the entire process.

In relation to vulnerable children who need protection in relation to the status of their rights, the UN Committee makes clear that a childôs right to be protected from abuse and neglect does not relegate the standing of their other rights to a subordinate position. The right to be heard and participate in decision-making processes in the meaningful and intense way, as outlined by the UN Committee, and the right to express their wishes and feelings throughout such processes should not be given any less importance than their need for and right to protection from harm. According to the UN Committee, parties need to presume a child has the capacity to form a view and that a child should not have to first prove their capacity. There is no age limit attached to Article 12 and the UN Committee discourages States parties from introducing age limits in legislation.

For the UN Committee, children should always be at the centre of processes and systems that make decisions about their lives. However, just listening to the views of children is not enough to characterise an approach as being child-centred. Their views must also be given serious consideration. Of relevance to this research, the Council of Europeôs guidelines on óchild-friendlyô justice, which reflect the approach adopted in General Comment Number 12, cautions against a tokenistic approach in the application of Article 12 of the CRC. In relation to processes for hearing children, the Council of Europe outline the essential elements that should characterise child-friendly processes; transparent (to the child) and informative, voluntary, respectful, relevant, child-friendly, inclusive, carried out by trained staff, safe and sensitive to risk, and, finally, accountable (to the child). Both the UN Committee on the Rights of the Child and the Council of Europe stress the importance of childrenôs rights being accessible, thus enabling children to use their rights. The decision whether a child wishes to exercise their rights is solely the childôs and is under no obligation to do so.

Guidelines adopted and ratified by the International Association of Youth and Family Judges and Magistrates (IAYFJM) present a global approach in relation to children who are involved in justice systems. The guidelines are based on childrenôs rights, as contained in the CRC and the Council of Europe Guidelines on Child-friendly Justice. Within these guidelines, children are acknowledged as having rights in their own right and are not seen as objects where their rights take second place to those of adults. One of the fundamental principles of the guidelines is, óThe right to be treated according to the rule of law, which must recognise children as subjects of substantive and procedural rightsô In relation to ensuring that children are aware of what is going on in proceedings, principle 8 of the guidelines state that judges should show sensitivity and communicate with the child and indeed with all parties, in a manner ódapted to their level of understandingô The IAYFJM sees this principle applying to all justice officials and professionals involved in proceedings. The guidelines stress the need for a child-centred focus, both throughout proceedings and in the processes and procedures that have led up to the proceedings. These guidelines complement the Council for Europe guidelines in offering clarification to judges and magistrates about how to give effect to these childrenôs rights principles in practice.

In relation to England and Wales, the guidance on judges meeting children was put forward by the Family Justice Council as representing good practice in the area of public child law. The Council in their guidelines for judges meeting children, outline why such meetings are important for children, the main purpose being to help children feel more involved in their proceedings and to be reassured that the judge has understood their wishes and feelings. The guidance makes clear that the purpose of a meeting between child and judge is not to gather evidence, as this is role of the childôs Guardian and the childôs Local Authority social worker. It emphasises that the responsibility for making the final decision in a case is the Judgeôs and not the childôs

However, it is acknowledged that there is a real tension that exists between Article 12 (Childrenôs right to express their views) and Article 3 (childrenôs best interests) of the CRC. In essence, it is a tension between the childôs welfare and their right to participate in decisions being made about their welfare. The balance that needs to be struck between protecting the child and respecting their right to express a view, is an area addressed by the UN Committee on the Rights of the Child. The Committee in General Comment 12 states: ôArticle 12 manifests that the child holds rights, which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision)ô The family court system as presently constituted in England and Wales, sees such tension being resolved in favour of the childôs welfare and by the indirect participation of children in proceedings through their Guardian.

Judges' Perspectives on child-centred decision-making

Carol Smart makes the point that having a voice is considered in developed societies as being a basic human right and she questions whether participation is possible without having a voice and an environment where that voice can be expressed. The findings of the Family Justice Review found that courts were scary and daunting places for children. The views of the participating judges in the research reflect a general consensus that courts were not designed for or welcoming of children. It is therefore difficult to see a space within the system where children can express their true voice. Nevertheless, there was a level of openness among judges regarding a willingness to make the courts more open and child-friendly.

Dixon and Nussbaum, lays great emphasis on opportunities for childrenôs level functioning and choice in whatever arena children find themselves and state that, ó.. all human beings possess equal and inalienable human dignity, whatever their attainments, talents, or potentialô

Dixon and Nussbaumôs perspective is encapsulated powerfully in the following abstract from one of the judicial interviews from this research. It captures the true essence and spirit of child-centred participation in practice:

> *" …. even really severely disabled children who maybe can't communicate other than, just with a flicker of their eye or just touching you, but they have a view and even if that is simply wanting to be there, just to see what you look like, to make sure you have not got two heads, that is really important". (County Court Judge)*

The issue of court processes and procedures getting in the way of being child-centred was acknowledged by judges in this research.

ñThe only thing that concerns me about it overall, it has become too legalistic in some ways. ... I wonder if we have actually made it much more legalistic than child-centred in that wide sense, that we now become very concerned with procedural rules and procedural steps and the child fades into the background. We do I think become so involved in the actual process itself that we can forget the child. We are all doing the best for the child, but the child must feel quite marginalised very often because they just are told what has happenedò (County Court Judge)

The following quote is a relevant and insightful response of one county court judge, which encapsulates the reality of the current public law system:

ñIn public law proceedings we donôt focus on the child. We think we know what is right for the child so we focus on what is wrong with the adults. My perception of our professional thinking is that by and large we keep children as far away as possible, in their own interests, we think. The idea of inclusion of accountability, transparency, it is all mediated through the childôs Guardian in other indirect ways, it is not the Courtôs structure itselfò (County Court Judge)

The above judicial views see the concept of child-centredness as something remote from the court and is an area that lies within the domain of the childrenôs Guardian and Local Authority social worker rather than being an integral part of the legal process and system itself. Yet, for Stalford and Hollingsworth ensuring that the childôs voice is heard ôe conveys to the child that her views are worth listening to, an aspect of the recognitional function of rights and reinforces the childôs dignity, autonomy and status as rights-holderé ô while Willow feels the childôs voice should be at the heart of the system, as they are key sources of information in relation to their situation within their family and the impact it is having on their lives. Listening to children within the context of child-centred timeframes was very much seen by the participating judges as a core element of child-centredness:

ñTime for a child is very different from time for an adult. öHow many sleeps before I know where I am ögoing toôbeô? I say to people in court, how would you like not to know where you are going to be next Christmas? What do you think it feels like not to know whether you are going to be friends with the girl who is sitting next to you? What school you are going to? Where are you going to live next year? Whether you should put pictures up on the wall because you donôt know whether you are going to stay. Whatôs the point of me investing anything in this house, these friends, these people? I say in court, wouldnôt it do your head in if you were living in that kind of limbo? that is the key word, limbo. How do you think that feels?ò Children get lost in the decision, they get so desperately lost. (County Court Judge)

Judges in this research identified the need for the legal system to be transparent for and accountable to children, but very much view this area as the domain of Guardiansô and Local Authority Social Workers, yet they also acknowledge that neither childrenôs Guardians or social workers have adequate time to fulfil their role adequately in relation to these areas. Paramountcy of the childôs welfare and best interests were viewed by judges as the core principle underpinning the public child law system. However, they view their role in applying this principle in practice as one which is somewhat remote, relying on Guardians and social workers to keep children informed and up to date about their proceedings and to be the eyes and ears of both the child and the court, ensuring the court is aware of the childôs wishes and feelings, albeit at a distance. It is acknowledged by the judges that the system itself, with its complex rules and procedures and adult-centred timetables, take priority over the reality of a childôs situation and their need to feel part of a system that is making such important decisions about their lives.

For one county court judge, the following quote gave an insight into how he keeps children at the centre of his decision-making:

ñI very often say to parents, ñWhat must it be like when we say, 6 weeks for this 3 months for that. You are a child; you have to go to sleep every night with all of this in your mindò I think if they were more intimately involved with the process, assured by the process, it would be a healthier thing for them. From the point of view of their own welfare and their rights, I think they should be involved.

… when I am having to make a decision in what seems like a finely balanced case and you see the merits of both sides, how do I make a decision? I physically imagine, mentally imagine, that the children are here with me, and when I look to them, I think it focuses my mind and it makes the decision making easy, because whatever we say and however often we may say the children's interests / welfare are the paramount consideration, it is easy for that to just become something that we trip off and lose sight of it in the adversarial nature of the proceedings".

For another county court judge, the historical roots of proceedings have contributed significantly to keeping children at a distance including its adult-centric nature and professional attitudes:

In terms of trying to involve them, I think the whole process is very adult-centric. The way professionals work, it is this old thing that Dame Butler-Sloss said about children - the object of concern rather than the subject of the proceedings and whereas if they really were the subject you would be saying "right how are we going to involve the child in this?" We don't, it is all very much adults in rooms talking and deciding about the child. There is this historical and perhaps natural tendency not to think about involving the children and just say this is going on for you, you don't need to come. It is a lazier way of working and it is adults just dealing with adults. Part of the structure is to intimidate people, isn't it? That is a natural barrier as well". (County Court Judge)

Laura Lundy has argued that article 12 CRC will only be implemented successfully when the factors of space, voice, audience and influence are given serious consideration. For Lundy, children need to feel they are in a safe environment, which is welcoming of their presence and of their right to express views freely and have their views listened to and acted on appropriately. She stresses the importance of providing children with a range of ways to express their views and of being given adequate, age appropriate and accurate information with which to make choices including the choice not to express a view. Children need to be assured that their views are reaching and influencing those who have the power to effect change in their lives. Influence according to Lundy, needs to be seen as an integral part of the application of Article 12, which reflects the value of respecting the dignity of the child.

In their discussion on the importance of the judiciary advancing children's rights, particularly in highly charged sensitive and emotional situations, Stalford and Hollingsworth state: "It is thus children's invisibility and vulnerability within the law and their lack of political voice that gives even greater legitimacy to the explicit judicial adoption of a children's rights perspective" While it is essential to embed children's rights into the fabric of law and relevant policies, this of itself, this will not achieve a children's rights or a child-centred perspective in terms of the application of law and policy. The law, policies and procedures are what makes children invisible in the reality of proceedings. Children need to take centre stage in the decision-making process, rather than waiting in the wings of ongoing proceedings.

Conclusion

The perspectives of the judges in this research in relation to child-centredness are informed by the sensitive and complex factors involved in balancing a child's welfare and safety with their rights. In reality, it is a system that seems unwilling or able to engage with children who are subject to proceedings, in a way that makes children feel confident and comfortable in using the available legal protections, processes and rights enshrined in legislation, to ensure their true voice is heard and understood, throughout the entire period of State intervention. Children remain the possession of a system that maintains a distance from the reality of their lives. Such a distance silences the feelings of children about the true realities of their abuse and neglect.

David Lane is a Postgraduate Research Student with the University of Liverpool. He has been a professional social worker for twenty years involved in child protection, adoption and fostering. He has also been a children's Guardian representing children in court in care and adoption proceedings. David is a fellow of the Higher Education Academy and held senior lecturer posts in childhood studies

Foster care in Malta – recommendations and findings by the Office of the Commissioner for Children

Pauline Miceli

"All human beings are born free and equal in dignity and rights."
Universal declaration of Human Rights

Children are recognised to be in need of special protection and support, not because they have special rights but because they are unable to fully access their rights owing to their age and vulnerability.

This is particularly true of children who have been removed from their family setting. There is evidence to show that the particular challenges associated with being taken from a familiar environment, often for the very best reasons, can continue to have an impact on young people throughout the course of their lives.

In 2016 the Office of the Commissioner for Children in Malta carried out and published a local research study on foster care entitled ôLet Me Thriveõ which focused on the voice of children and young persons who are experiencing or have experienced foster care in Malta.

While referring to the central findings of this study[1], this article will highlight and discuss the Officeôs main recommendations.

A. Permanency Planning

The Preamble to the UNCRC recognises that the ôfull and harmoniousõ developmental rights of children are best met within a family environment. Furthermore, Article 20 stipulates the requirements regarding the alternative care that the State is obliged to provide for children deprived of their family environment. Among these, Article 20 (3) includes that ôwhen considering solutions, due regard shall be paid to the desirability of continuity in a childôs upbringing.ô

Childrenôs need for permanence and for a sense of belonging to a caring family should be addressed in a timely manner when children cannot live with their birth parents (temporarily or permanently). It is expected that the State addresses this fundamental need for permanence and stability. The manner in which individual childrenôs needs for permanency should be addressed will vary according to many factors. These different factors and circumstances include, inter alia, the childrenôs age, the age at which they have been taken into care, the length of time they have been in a foster family and the emotional ties that they have built both with their birth family and/or their foster family.

Furthermore, statutory strength needs to be given to concurrent policies that address family reintegration and permanent alternative care.

- **Family reintegration**
  - A social worker needs to be assigned to the birth family as soon as a child is placed in care (whether under care order or on a voluntary basis).
  - Treatment orders need to be given statutory strength.
  - In line with the UN Guidelines for the Alternative Care of Children (Par 48), to ñsupport the child and the family for his/her possible return to the family, his/her situation should be assessed by a duly designated individual or tem with access to multidisciplinary advice, in consultation with the different actors involved (the child, the family, the alternative caregiver), so as to decide whether the reintegration of the child in the family is possible and in the best interests of the child, which steps this would involve and under whose supervision.ò
- **Permanent alternative care**
  - Adoption
  - Open adoption
  - Permanent foster care.

[1] The full study may be found online at https://tfal.org.mt/en/publications/PublishingImages/Pages/Research-Studies/Let%20Me%20Thrive%20-%20A%20Research%20Study%20on%20Foster%20Care.pdf

B. Adequate budget allocations

The UNCRC stipulates that ôWith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resourcesô (Article 4). The obligation of the State to meet the fundamental right of the child to family life and to good alternative care involves supporting all those who are responsible for the life and development of the child. This includes, inter alia, their birth families, their foster carers, their social workers and the relevant agencies. To perform this duty sufficient resources and budget allocations should be made to meet the following:

- monitoring and supporting the birth family. This includes the support given by welfare services to the birth family to address problems related to the care and development of their children:
  - Before the child is taken into care.
  - While the child is in care.
  - If and when the child returns to the birth family.
- human and material resources required by the welfare services in order to provide good alternative care. These include:
  - a well-trained and well-supported LAC staff with a realistic workload. This should allow the childôs social worker to keep up meaningful contact with the child and with persons who play a significant role in the care of the child.
  - well-trained and well-supported social workers within the foster care teams with a realistic workload. This should allow them to:
    - monitor and support foster carers competently and efficiently;
    - intensify support during potential periods of increased demands made on foster carers when the children are going through the transitional development between childhood and adolescence; and
    - intensify support if needed during periods of emotional upheavals such as those that may arise regarding contact with the birth family.
  - a sufficient number of foster carers to meet the different needs and circumstances of children in need of alternative care. These foster carers should be provided with accredited training both initial and ongoing. They should also be provided with the human and financial resources required to care for and support the children.
  - a fully professionalised Supervised Access Visits (SAV) service. This includes:
    - a sufficient number of professional supervisors who have the relevant qualifications
    - a Childrenôs House that mirrors a home environment where the children and their birth family members can benefit from the experience of quality family time
    - the allocation of drivers to carry out the duties related to the childrenôs commuting requirement
    - professional services to help and support the child, the birth parent and the foster carer to adequately address issues related to contact visits.
    - the setting up of an efficient crisis intervention centre and pre-assessment centre
    - the provision of well-resourced after-care services to children who have been fostered and to foster carers who provide after-care.

C. The voice of the child

The participation rights of the child as outlined in Article 12 form one of the cornerstones of the UNCRC. The State is obliged to have the proper mechanisms in place to facilitate the participation of children in the decision making process regarding matters that are of major importance to their lives. However, the children who were interviewed expressed the view that they did not consider that the current mechanism was giving them a voice or was meeting their needs to live as normal a life as possible. In particular the following need to be addressed:

- The decision-making process involving administrative structures such as the Children and Young Persons Advisory Board needs to be revised. In line with prevalent international case-law, children have a right to have a system that allows for judicial review of important decisions affecting their lives. They should have automatic access to representation in the decision making process and to a fully effective, child-friendly, decision-making system.
- The decision-making process should be more child-friendly and easier for the child to navigate. This includes that:
  - the child is empowered and supported
  - the child feels that decisions are taken by persons who are well informed about the childôs day-to-day life
  - the logistics respect the childôs expressed needs such as the need not to miss school attendance
  - the persons providing the day-to-day care are delegated certain decision-making powers that can help ônormaliseôfamily life in cases of long term care.
- In line with what has been stated above, the workload of the childôs social worker should allow for sufficient and timely meaningful communication with the child. No child should

feel that contact with the childôs social worker only occurs prior to the Children and Young Persons Advisory Board meetings.

D. The best interests of the child

The best interest principle (Article 3) is another of the fundamental overarching rights cutting across the whole of the UNCRC. Therefore there needs to be a clearer statutory articulation of what is required in order to consistently meet the best interests of the child in alternative care. This needs to be in conformity to the CRCôs 2013 concluding observations to Maltaôs 2nd Periodic Report. In the report, the CRC urges Malta to undertake certain specific measures. The following recommendations are extracted from the 2013 CRC report and specify that Malta is urged to:

- strengthen its efforts to ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied
  - in all legislative, administrative and judicial proceedings
  - in all policies, programmes and projects relevant to and with an impact on children, particularly
    - those deprived of a family environment
    - those who are asylum seeking, refugee and/or in immigration detention;
- develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to public and private social welfare institutions, courts of law, administrative authorities and legislative bodies; and
- base the legal reasoning of all judicial and administrative judgments and decisions on the best interests principle. (CRC/C/MLT/CO/2, 2013, Par 31)

These recommendations have a very broad application that includes all the relevant areas of policy and practice related to the FSWS, the DSWS. the Family Court, The Children and Young Persons Advisory Board and the Fostering Board.

E. Non-discrimination

Article 2 (1) of the UNCRC stipulates that ó States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kindé ôIn the light of the anecdotal evidence of informal fostering of non-Maltese nationals, the situation pertaining to migrant and asylum-seeking children needs to be fully investigated and addressed. In particular:

- There should be no discrimination regarding the availability of welfare agency services to address childrenôs needs.
- The same repertoire of services needs to be made available to non-Maltese nationals as those provided for Maltese nationals.

Some children suffer as a result of stigma in schools that is displayed by some of their peers or the families of some of their peers. In order to reduce the incidence of stigma, the social care services and the education system could:

- Ensure that policies and procedures are sensitive to the reality of children being singled out as in need of social care services.
- Provide sensitive support to children in care who feel that they are being discriminated against by their peers or who are suffering as a result of social stigma.

F. Meaningful behaviour

In order to provide the appropriate conditions for all children to reach their potential as stipulated by the UNCRC, a more positive and holistic approach to ómeaningful behaviourô is required. The system can benefit from a more adequate investment into specific resources dedicated to addressing the complex needs of adolescents during periods of potential emotional upheavals and ómeaningfulôbehaviour. One such period may arise as a result of stress experienced during early adolescence or during the transitional period of development from childhood to adolescence. The following recommendations include some of the measures that are required in this respect:

- Foster carers are to receive further and accredited training regarding behaviour that is often labelled as óchallengingôbehaviour.
- Foster carers are to receive sufficient timely support that includes the 24/7 availability of a social worker when needed in order to further avoid placement breakdown.
- Clearer guidelines need to be established, supported and followed regarding behaviour management. These guidelines should follow the stipulations of Par 95 of the 2009 UN Guidelines for the Alternative Care of Children.
- Foster carers are supported on an ongoing basis to follow the above-mentioned guidelines that, inter alia, cover the various forms of physical or psychological violence.
- A well-resourced 24/7 crises intervention centre is required to provide timely support.
- A three-tier therapeutic intervention service needs to be set up. This service should provide a range of services that should include residential, semi-residential and non-residential services in order to meet the different and changing needs of children and young persons.

G. Boards and Authorities

The role of appointed boards is key in the provision of appropriate foster care for children. This role needs greater appreciation and awareness among the various stakeholders. Therefore, the following is being suggested:

- the availability and promotion of both user-friendly and child-friendly electronic and hard-

format material outlining the functions and procedures of these bodies;
- the availability and promotion of this material in all languages used and in a variety of appropriate formats; and
- the material should be professionally designed to attract and retain the attention of those who require the information.

Furthermore, the transparency and accountability of appointed bodies and authorities need to be ensured. In this respect it is recommended that:
- clear guidelines be established for the procedures and substantive decisions of bodies and authorities in order to ensure consistency;
- entities carrying out the functions that are currently the responsibility of the above-mentioned bodies should not be accountable to the same Ministry so as to further ensure transparency and accountability.

- The Office of the Commissioner for Children is entrusted by law to foster the development of alternative care to children who need such care with special reference to fostering and adoption[1]. For this reason, the need was felt to delve into what makes children thrive or suffer in foster care. In so doing, the study throws light on the intrinsic complexities of foster care and the formidable challenges that need to be overcome for fostering to work in the best interest of the child. It is certainly not an easy field to research; as expected from a field that deals with the care and development of children, it is highly charged. In conclusion, it is felt that the rights of fostered children in Malta will be further protected with the introduction of the National Childrenôs Policy which will be launched before the end of the year 2017 as well as with the coming into force of the Child Protection (Alternative Care) Act in the near future. It may be said that childrenôs rights are a top priority on the Maltese agenda.

Pauline Miceli is the Commissioner for Children in Malta. http://tfal.org.mt/en/Pages/default.aspx

[1] Article 9 (e), Commissioner for Children Act (Cap. 462 Laws of Malta)

The dual imperative of *childbirth under secrecy* in France

Flora Bolter
Judge Elsa Keravela
Milan Momića
Professor Dr Gilles Séraphin

Flora Bolter

Judge Elsa Keravela

Milan MomiĹ a

Professor Dr Gilles Séraphin

Protecting the children, protecting the gravidae

Concern over the welfare of abandoned babies and infants has spurred a number of technical and legal arrangements throughout history in European societies. In France, tours dôabandon (baby hatches) have existed since 1638 and publicly-operated bureau ouverts (open offices) have been created on the same principle in 1904. They have long provided the main technical arrangement of the sort. But a legal and administrative arrangement has since superseded this technical response: accouchement sous le secret (childbirth under secrecy). This procedure has its origins in the French revolution, with a decree voted on June 28, 1793 stating that ñThe Nation shall provide for all the expenses related to the motherôs stay and to her needs for the duration thereof, namely until she has perfectly recovered from childbirth. The most absolute secrecy will be kept on all matters that concern her.ò

Accouchement sous X (childbirth under X), as the procedure has been nicknamed, was formalized into law in 1941, and reaffirmed by various laws in 1993, 1996, 2002 and 2009. This procedure creates the possibility for a pregnant woman to give birth with all due medical attention and then relinquish the baby to child welfare services. The baby is cared for from the start, and the womanôs ties to him/her is not acknowledged. . This procedure is traditionally seen as a way to prevent ñoff the gridò childbirth/ abandonment and infanticide through a compromise between the childôs right (to know his/her origins) and the womanôs right (to not have an unwanted child).

But there currently is little consensus on the compromise as it stands. Many are calling for changes in the way childbirth under secrecy is organized, and this is a topic that has been raised in all four workgroups organized by the State Secretary for families in 2014 concerning the reform of family and childhood-related law and policies. This practice represents a significant institution both in terms of legislation and in terms of how many children and women are concerned. The changes that are proposed would all have a profound impact on childbirth under secrecy, but they differ notably. How will this affect child welfare and child protection in France?

Childbirth under secrecy: an institution consolidated by law and practice

The legal framework

The 1793 version of what was to become childbirth under secrecy did not, at the time, exonerate the woman from potential, albeit improbable, consequences. For two centuries, i.e. from its creation to 1993, this form of childbirth was chiefly thought of as a necessity in the interests of society, mainly to reduce infanticide and facilitate abandonment in decent conditions. It was therefore exclusively recognized through various provisions regarding social action and the funding of the proceedings. In other terms, although access to the procedure was publicly provided for, there was no substantive or formal right for women to resort to it. This changed in 1993, when a law passed on 8 January (Law No 93-22) modified article 341 of the Civil code to specify that childbirth under secrecy creates a legal obstacle to any civil action against the woman who gave birth. Until that time, it was possible for a child to file suit against the birth mother: by dismantling this possibility, the 1993 law made the procedure entirely rightful.

Childbirth under secrecy can therefore be identified from that point on as a right for women in the framework of French legislation. The 1 July 2006 reform of affiliation legislation has validated this principle and extended it to articles 325 and 326 of the Civil code (ñUpon her arrival at a hospital institution, the mother may ask for her admission and identity to be kept secretò).However, the 16 January 2009 Law (No 2009-61) rewrote article 325 to lift the 1993

exception that protected women who had given birth under secrecy from affiliation proceedings ï an exception that had already been weakened in 1996 by a law granting children born under secrecy access to some, non-identifying information. Current doctrine is impacted by this inconsistency: in effect, the birth mother's identity is kept secret, but in the (unlikely) occurrence that the child somehow found out the biological mother's identity, he/she could bring a civil action against her (provided he or she had no legally-recognized parents).

This inconsistency bears witness to the lawmaker's conflicted vision of childbirth under secrecy. Early regulations did not frame childbirth under secrecy as a rights issue, but the legislation changes in the 1990s and 2000s were informed by this approach. In such a framework, the discrepancy between a women's rights perspective and a children's rights perspective can explain the seemingly erratic shifts between protecting absolute confidentiality and granting children more leeway to identify their genitors.

From a women's rights perspective, childbirth under secrecy can be understood as an extension of reproductive rights, allowing women to bring to term an unwanted pregnancy without legally having any ties to the child. The 1993 reform that inserts the procedure in article 326 of the Civil code and prevents possible maternity claims (inside article 325) was voted in January 1993, a few days before the Neiertz law (No 93-121, 27 January 1993) made obstruction to abortion illegal, which is one of the milestones of abortion being recognized as a full right in France.

But there was also a children's rights perspective in the 8 January 1993 reform, and not exclusively as a translation of the right to life expressed in article 6 of the UNCRC. The idea was also that it was in the child's best interest to have no established affiliation in this case, as this would allow him or her to be more fully recognized as a child of his/her adoptive parents (Lianos, 2012). Far from being seen as an infringement of the child's right to an identity, as recognized by article 8 of the UNCRC, this was therefore, paradoxically, seen as a way to enhance it.

However, this constructivist view of identity and affiliation subsequently evolved, and the right to know one's origins, which was recognized in French law by the Mattei law (No 96-604) in 1996, was eventually seen as precluding absolute and irrevocable secrecy: this rationale is behind the 2009 legislation change.

This unstable balance between very conflicting interests is also manifest, on a broader scale, in human rights legislation and case law concerning this type of practice. Over the past century, anonymous birth systems and abandonment at birth schemes (through baby hatches) have been instituted in an increasing number of countries: over a third of European states now have procedures to this effect (Fenton-Glynn, 2013), but only a few countries have instituted them in this way, mainly France and Italy. And there have been multiple instances of persons filing suit against authorities for having instituted them, on the basis of the rights recognized by Article 8 of the UNCRC. In such a case, Odièvre v. France, in 2003, the European court of human rights ruled France's system respectful of articles 8 and 14 of the European Convention on Human rights. However, this was a controversial decision, with 7 of the 17 judges dissenting. In 2012, the same Court ruled against an anonymous childbirth system in Godelli v. Italy. In both cases, the facts of the matter were very similar, with one key difference: ñThe Court notes that, unlike the French system examined in Odièvre, Italian law does not attempt to strike any balance between the competing rights and interests at stake. In the absence of any machinery enabling the applicant's right to find out her origins to be balanced against the mother's interests in remaining anonymous, blind preference is inevitably given to the latterò (Godelli v. Italy, § 57).

The ñmachineryò mentioned by Odièvre is the institution by France of a council in charge of monitoring access to origins, CNAOP (Conseil national d'accès aux origines), since 2002. Its mission is to ensure the effective access of adopted children and wards of state to the information that concerns them, which it does by collecting the information that birth mothers leave in a sealed envelope (information that may or may not include their names), by centralizing and mediating when possible the requests made by the children or their legal representatives, as well as by receiving and treating the messages from the birth parents or their heirs (when they want to lift secrecy or ask about possible requests made by the children). CNAOP comprises 17 members: 2 magistrates, 6 Ministry representatives, 1 representative of the départements, 6 NGO representatives, and 2 experts. Because gravidae are encouraged to leave non-identifying information in a sealed envelope to CNAOP, and because CNAOP can lift secrecy in specific circumstances, a semblance of balance is created between the conflicting rights at stake.

The institution of CNAOP is a kind of legal ñotfixò that creates the possibility for some mediation on a case-by-case basis. But the fundamental unbalance at the core of of the system is not structurally altered by it: the right for the child to access his or her origins is in effect a relative right that is contingent on the birth mother's decisions.

It should be noted that the Italian constitutional court had rejected the introduction of similar systems, considering that it was in both parties'

best interest to not entertain the notion that the relinquishment of affiliation could ever be reversed (decision No 425, 2005, quoted by Cerase, 2012). The Italian lawmaker, in this case, follows the same rationale as the 1993 French lawmaker, which is that erasing the biological affiliation would promote stronger ties with the legal parents, which would ultimately be in the childôs best interest. In both cases, the childôs interest is taken into account including the right to identity, but in a way that stresses the first paragraph of article 8 (ñright to preserve his or her identity (...) and family relationsò) to the detriment of article 2 (ñ(...) deprived of some or all elements of his or her identity (...)ò).

Additionally, in recent years, French jurisprudence has more and more taken into account the rights of the childôs other relatives. Biological fathers (Cass. Civ, 7 April 2006), or even maternal grandparents (Angers, 26 January 2011), can successfully initiate civil proceedings on the basis of affiliation even when a child was born under secrecy. The secrecy involved in the procedure is, in other words, becoming more and more relative. Although this evolution does not particularly strengthen the childrenôs rights approach, since the rights that are recognized in this case are the rights of the adult family members, it does affect the overall ecology of the case, and it does weaken the womanôs claim to secrecy. As a result of recent evolutions, there is a general consensus that the existing practice needs to be overhauled.

The institution in practice

But childbirth under secrecy is not just a legal concern: the practical realities of it are also particularly important to understand as well. The practical conditions in which childbirth under secrecy is organized are defined in article L 222-6 of the Code for social action and families (CASF, Code de lôaction sociale et des familles). When a pregnant woman asks to give birth under secrecy, she is informed of the judicial consequences and of the importance to know oneôs origins and encouraged to leave information about her health and the biological fatherôs, the circumstances of birth, the familyôs originsé If she accepts, she may also write her name down in a separate, sealed envelope. She is also informed that she can put an end to the secrecy, and/or send more information and/or communicate her identity in a sealed envelope, at any time and that her identity can otherwise only be communicated in the framework of article L147-6 CASF (through CNAOP).

These questions of information and secrecy must be taken care of from the start since no ID is required for a woman to give birth under secrecy, and no investigation can be conducted. The birth motherôs name is not registered, and neither is the biological fatherôs unless he acknowledges paternity: for this reason, the procedure is frequently called ñaccouchement sous Xò or anonymous childbirth, which is not necessarily always the case.

All expenses for the birth are covered by the local child welfare agency (Aide sociale à lôenfance, ASE), and the hospital staff is in charge of registering the birth, though the birth mother may choose the childôs given names. The woman who gave birth is offered psychological assistance.

The baby is cared for by ASE or an adoption organism, and a legal report is drafted (L 224-5 CASF). Once the report is filed, the baby temporarily becomes a ward of the state (pupille de lôEtat ï L 224-6 CASF). However, for the first two months after that, the child can be claimed by either birth parent, with no questions asked (L 224-6 CASF).

After the 2-month mark, the childôs status as ward of state becomes definitive (L224-4 CASF), and he/she may be placed for adoption (unless a claim by one of the birth parents is still pending). If either birth parent claims the child past this two-month period, the childôs guardian gets to decide with the Family council what solution would be in the childôs best interest (L 224-6 CASF).

Later on in life, what information has been left concerning the child and the conditions of his or her birth is collected by CNAOP, who receives and manages all requests sent by children and parents. Any child born in these circumstances is entitled to access the information that has been left, provided he or she makes a formal request as an adult (or as a child, in conjunction with his or her parents/guardians). When it comes to identifying information (all the elements that have been left in a separate, sealed envelope), this can only be given if the birth parent has agreed; CNAOP therefore acts as a go-between when no prior agreement has been given (which the birth parents are entitled to give, although this agreement does not automatically transmit the information to the children: there has to be agreement on both parts for the information to be given).

Quantifying the realities of childbirth under secrecy in 2015

Numbers and their evolution

Childbirth under secrecy has a long history, and as such is a fairly well-known option, despite most people not being aware of the precise procedure or its legal implications. It has been tied to morally conservative periods of history in which unwed mothers faced considerable social stigma. At the end of the 1960s, there were approximately 2 000 children born under secrecy per year. This number has dramatically decreased since the 1970s as a result of two main phenomena: legal contraception (since 1969) and abortion (since 1975) on the one hand, and the evolution of representations concerning unwed marriages on

the other (in 2014, 57.4% of all births in France were out of wedlock as opposed to 6.8% in 1969). Since the beginning of the 21st century, this number has broadly remained stable between 600 and 700 (table 1)."

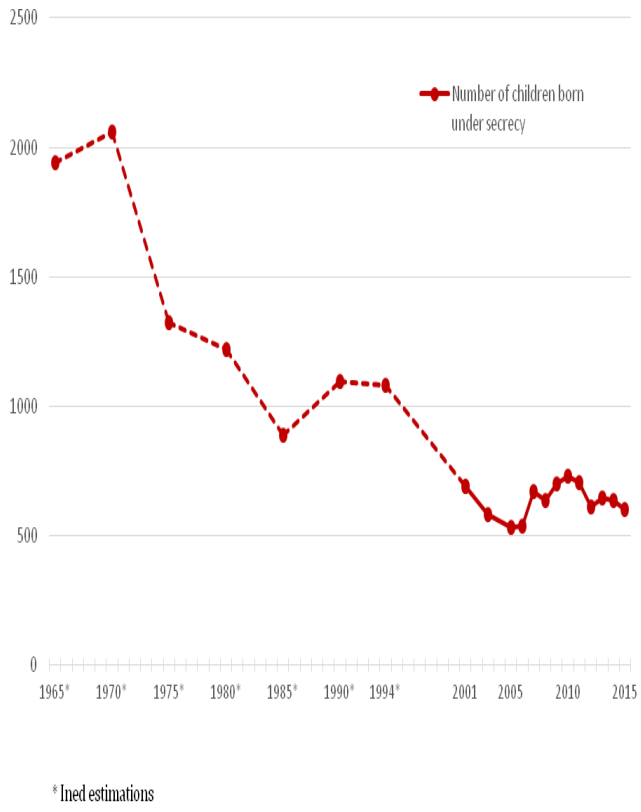

Table 1

Table 1. Children born with no known parentage, 1965-2015.

Field: All of France. Children born with no known parentage1965-2015.

Source: « Les enfants nés sans filiation en France, 1965-1994 », Ined, 2000 ; « Enquête sur la situation des pupilles de lØEtat » 2007-2015 », Oned/ONPE, May 2017

Despite the broad numbers remaining fairly stable in a comparative historical perspective, there are clear variations from year to year that become even more apparent when compared to the overall number of births: the proportion oscillates between 74 to 88 children born under secrecy per 100 000 births.

Typical early life trajectories of children born under secrecy

Children born under secrecy do not immediately become adoptable: the law creates a two-month period after birth where either birth parent can change his or her mind and claim the child. For two months, their status as wards of the state is not final, and they can therefore not be put up for adoption until this status is confirmed.

Very few of them, however, remain wards of state for long (they are usually placed for adoptions in less than 3 months, unless there are special circumstances). As of 31 December 2015, 96,5% of children born under secrecy from 2007 to 2012 had ceased being wards of state: 80% had been adopted, 15% had been claimed by a parent (before or after the 2-month mark). Table 2 shows, for each birth year on this period, what had become of children born under secrecy.

Table 2

	Number of children born (cohort)	Reasons to no longer be a ward of state						Total of all children no longer wards	Cumulated exit rate 31/12/2013
		Adoption	Restitution before 2 months	Restitution after 2 months	Family guardianship	Death	Different ASE status		
2007	669	546	103	2	0	4	3	658	98,4%
2008	633	509	94	4	0	3	7	617	97,5%
2009	701	573	99	6	1	4	6	689	98,3%
2010	731	557	104	1	0	5	4	671	91,8%
2011	704	579	84	1	1	9	5	679	96,4%
2012	611	483	98	3	0	5	4	593	97,1%
2013	646	472	107	5	0	5	2	591	91,5%
2014	633	268	78	3	0	5	2	356	56,2%
2015	600	2	88	3	0	5	2	100	16,7%
Total (all cohorts)	5928	3989	855	28	2	45	35	4954	

Table 2. Reasons children (with no known parentage) cease being wards of state 31/12/2015

Field : All of France. Children born under secrecy who have become wards of state, 2007-2015

Source : « Enquête sur la situation des pupilles de lØEtat, 2007-2015 », ONPE, December 2015

Those children born under secrecy who are put up for adoption are usually adopted by local families (95.7%). Those who are adopted by families hailing from other areas usually have particular circumstances such as disabilities, and tend to be adopted later.

The relatively important proportion (15 to 16%) of children who are given back to one or both birth parents is cause for some concern among professionals and academics working on child protection. Regardless of the personal motives and profiles of these parents ï issues we have very few elements of knowledge about ï the very fact that they chose to give birth under secrecy raises questions on their parental project. Psychological counselling and various types of help (reinforced social services, reinforced infant health services, child protection measuresé) are proposed to these families: in 2015, 77 % of them received this help. The yearly reports done by ONPE regarding wards of state have started to include this aspect, but as of 2016 there is still very little data to go on.

An institution at the crossroads

An unstable compromise between clashing imperatives

As an institution, childbirth under secrecy has been perfected over its long history. Its legal and administrative intricacies are broadly under control and there is no shortage of information that would prevent pregnant women from knowing about it.

However, even though fixes have been found in practice, it is difficult to mask the growing chasm between legal perspectives that make the current status quo very precarious indeed.

The rationale behind the birth under secrecy procedure is that "childbirth under secrecy aims to avoid pregnancies and childbirth in conditions that may be harmful for the mother or the child; as well as to prevent infanticide and child abandonment" (Cass. Civ, 16 May 2012).

Childbirth under secrecy is therefore thought of as a public health issue (as one way to ensure all births can take place in decent surroundings and conditions) and as a child protection/CAN prevention issue (as a way to prevent neonaticide and "off-the-grid" abandonment). As a public policy, its efficiency is not debated.

However, when framed in a rights-based approach, there are different points of view involved that clash very strongly, as we have seen. Birth under secrecy can be seen as part of reproductive rights, giving the possibility for a woman to refuse motherhood even if she is unwilling to terminate an unwanted pregnancy. As such, the current procedure is defended by some women's rights movements.

But from the child's point of view, it can be argued that despite the existence of CNAOP, access to one's origins is still not recognized as an absolute right consistent with Article 8 of the UNCRC. Furthermore, persons born under secrecy can also legitimately be concerned that they cannot have access to some of their medical and administrative files from the time of their birth, information that social workers, hospital staff and registry officers are in possession of. As such, the current procedure is strongly debated by some children's rights specialists and some groups of persons born under secrecy.

Finally, the procedure as it is revolves overwhelmingly around the gravida's decision. However, fathers, grand-parents and other members of the family have ties to the child that they have a right not to see severed: jurisprudence has already recognized this (when it is in the child's best interest). This adds additional sides to take into account, and opens a new dimension of potential conflict.

All in all, reforming the childbirth under secrecy system is gaining momentum on the political agenda. As early as 2011, a parliamentary report drafted by MP Brigitte Barèges recommended that childbirth under secrecy be replaced by "confidential childbirth" ("accouchement dans la discrétion"), the main change being that the women's identity would systematically be recorded. The demand for a reform has continued growing since then and has been particularly important since the preliminary work on a reform of family law has been started in 2014.

Diverging pathways to the future

In the framework of this proposed new legislation, three public reports have been published in 2014 on various aspects of family law:

1. Gouttenoire, A., & Corpart, I. (2014). 40 propositions pour adapter la protection de l'enfance et l'adoption aux réalités d'aujourd'hui concerning adoption and child protection
2. Rosenczveig, J.-P., Youf, D., & Capelier, F. (2014) De nouveaux droits pour les enfants ? Oui ! dans l'intérêt même des adultes et de la démocratie concerning children's rights in general

- Théry, I., & Leroyer, A.-M. (2014). Filiation, origines, parentalité: le droit face aux nouvelles valeurs de responsabilité générationnelle concerning filiation and family law

Access to one's origins is one of the themes in which the reports are most at odds with one another.

For Rosenczveig et al., the state-organised secret around the birth mother's identity is seen as a major problem for any child's well-being. In this framework, the search for one's origins cannot be separated from the identification of the biological father and mother. The report therefore creates an obligation for the birth parents to recognize the child, with a double biological filiation. In this report, the identity of the mother would de facto always be revealed to the adult child upon request.

In the Théry & Leroyer report, state-organised secret is also seen as the major problem in the existing situation. The search for one's origins is however quite separate from the identification of the biological father and mother: the report makes a distinction between knowing one's history and knowing the identity of one's parent(s); it also stresses the importance of counselling at every stage. The report advocates for CNAOP to be reinforced, so that it could systematically record the birth mother's identity, as well as the biological father's whenever possible, collect more information, and follow up requests with counselling for the adult children asking for their parents' identity. Secrecy should also, in this framework, be lifted automatically when the child turns 18, but this should not be enforced retroactively and there can be no systematic right to meet the birth parent(s).

Finally, for Gouttenoire & Corpart, the state-maintained secret issue is not seen as the main problem, and the proposed solution does not lift it. It does, however, systematically record the birth mother's identity, so as to enable CNAOP to transmit the adult child's request to lift secrecy to the birth mother.

However, this report does not create a full right of the child to know his/her origins: the report is concerned that doing away with secrecy altogether would push women to give birth off the grid. The right to know oneôs origins is balanced by a more general consideration of the childôs well-being: an absolute right to know oneôs origins would also jeopardize the childôs actual possibility to access any information at all (i.e. children would be abandoned in more informal circumstances). The Gouttenoire & Corpart report also emphasizes the importance of counselling for the women involved, especially when they claim the child back.

This last element is the only element of all these recommendations that has so far entered the French legislation. Article 33 of Law No 2016-297 (14 March 2016) makes it compulsory for départements to offer their help to any birth parent whose child/ren is/are given back after being a ward of state. The French birth under secrecy procedure seems destined to be radically altered in the near future,

but the direction is unknown, aside from the reinforcement of CNAOP and the introduction of a recording mechanism for the birth motherôs identity, which all reports agree on.

Funding: This study has received no particular funding.

Ethical approval: This article does not contain any studies with human participants or animals performed by any of the authors.

Flora Bolter is a political scientist. She currently works as a research officer for the French observatory of child protection, Observatoire national de la protection de lôenfance (ONPE).

Judge Elsa Keravel is a magistrate, a former youth judge, and currently works as a programme officer for ONPE.

Milan Momić is a demographer. He currently works as a research officer for ONPE.

Professor Dr Gilles Séraphin is a sociologist and University professor at Paris-Nanterre University(CREF, Education and training research centre). He was director of ONPE from 2012 to 2017.

Reference list:

Barèges, B. (2011) Rapport de la mission parlementaire sur lôaccouchement dans le secret. Paris, France: La documentation française. Retrieved from http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000057.pdf . Accessed 21 June 2016.

Cerase, M. (2012). Il parto in anonimo al vaglio della Corte europea dei diritti: una condanna davvero convincente? Rivista telematica giuridica dellôAssociazione italiana dei Costituzionalisti, 2012 (4), 1-5. Retrieved from http://www.rivistaaic.it/download/UUTZVYtXuFFIAouOxbeZO6Efw079anh3jQu9_b0gbwg/cerase.pdf

Fenton-Glynn, C.(2013). An unbalanced scale: anonymous birth and the European Court of Human Rights. Cambridge Law Journal, 72(2), 263-266

Godelli, A. v. Italy (33783/09), ECHR, 25 September 2012. Retrieved from http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-113460&filename=001-113460.pdf . Accessed 21 June 2016.

Gouttenoire, A., & Corpart, I. (2014). 40 propositions pour adapter la protection de lôenfance et lôadoption aux réalités dôaujourdôhui. Retrieved from http://social-sante.gouv.fr/IMG/pdf/2014_rapport_3-1-2.pdf . Accessed 1 March 2016.

Juston, M., & Gargoullaud, S. (2014). Médiation familiale et contrat de coparentalité. Paris: Ministère des affaires sociales et de la santé, Ministère délégué chargé de la famille. Retrieved from http://www.oned.gouv.fr/ressources/mediation-familiale-et-contrats-co-parentalité . Accessed 1 March 2016.

Lianos, F. (2012). Lôavenir de lôaccouchement dans le secret en France. Droit et société, 82 (3), 643-658. Retrieved from http://www.cairn.info/revue-droit-et-societe-2012-3-page-643.htm.

Munoz-Pérez, F. (2000) Les enfants nés sans filiation en France, 1965-1994. Population, 55 (4-5), 663-690.

Observatoire national de lôenfance en danger (ONED). (2016) La situation des pupilles de lôEtat: enquête au 31 décembre 2014. Paris, France: La documentation française. Retrieved from http://www.oned.gouv.fr/system/files/publication/20160209_pupilles2014_web.pdf . Accessed 21 June 2016.

Odièvre, P. v France (4236/98), ECHR, 16 October 2001. Retrieved from http://hudoc.echr.coe.int/eng#{"appno":["42326/98"],"itemid":["001-43150"]} . Accessed 21 June 2016.

Rosenczveig, J.-P., Youf, D., & Capelier, F. (2014) De nouveaux droits pour les enfants ? Ouié dans lôintérêt même des adultes et de la démocratie. Retrieved from http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/144000326.pdf . Accessed 1 March 2016.

Séraphin, G. (2009). Lôaccès aux origines : les enjeux du débat. Esprit, 360, 82-102.

Séraphin, G. (2014). Pour une autre politique de lôenfance et de la famille. Lecture de quatre rapports récents. Esprit, 410, 91-106.

Théry, I., & Leroyer, A.-M. (2014). Filiation, origines, parentalité: le droit face aux nouvelles valeurs de responsabilité générationnelle. Paris: Ministère des affaires socials et de la santé, Ministère délégué chargé de la famille. Retrieved from http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf . Accessed 1 March 2016.

Villeneuve-Gokalp, C. (2011). Les femmes qui accouchent sous le secret en France, 2007-2009. Population, 66 (1), 135-169.

Human Rights Education for Legal Professionals: The HELP Programme of the Council of Europe

Eva Pastrana

October 2017 in the HELP Programme

On 3 October 2017, in the Spanish Judiciary School in Barcelona, judges and lawyers attended the launch of the Council of Europeôs HELP course on Fight against racism and xenophobia. A timely move in a sensitive political context, with Catalonia paralysed by a general strike in protest of police force to pre-empt an unconstitutional referendum two daysô earlier. After a brilliant speech against xenophobia, the session was cut short to ensure early departure for fear of picketing.

During the same month, the course on Hate crime and speech was launched for a group of Macedonian lawyers, and two new HELP courses saw the light of day: one on International Cooperation in Criminal Matters and one to combat Trafficking in Human Beings.

Preparations for the HELP course on human rights in sports also started, in anticipation of next yearôs World Football Cup. With EU financing, a new project is signed to Prevent Radicalisation and HELP is also presented in the Moroccan Ministry of Foreign Affairs.

Although it may look busy, October was an ordinary month in the dynamic agenda of the highly motivated HELP team.

HELP is the acronym of the Council of Europeôs Programme on Human Rights Education for Legal Professionals. HELP is making progress spreading knowledge on European standards and values in areas such as combating discrimination, respecting privacy, guaranteeing decent work or defending vulnerable groups.

The goal of HELP is to provide high quality education on human rights issues to judges, prosecutors and lawyers from the 47 countries of the Council of Europe, an organisation protecting the 830 million people who live on its soil.

HELPôs success rests on two main elements. First, the HELP Network of Judiciary schools and Bar associations across the continent, from Russia to Portugal from Ireland to Turkey. Second, the Training Courses for legal professionals which help them to identify and resolve human rights issues in their daily work.

The 2017 report by Thorbjørn Jagland, the Secretary General of the Council of Europe, noted that the checks and balances of European countries are not strong enough to prevent populist, anti-democratic and nationalistic forces gaining power, and called on states to rebuild trust in democratic institutions and uphold their obligations under the European Convention on Human Rights (ECHR). He highlighted the challenges posed by xenophobic attitudes, migration, the financial crisis, social inequalities and terrorism.

With such pressing challenges growing in Europe, training courses like those offered by HELP are becoming more and more necessary. Apart from the ECHR, HELP courses now also cover the European Social Charter and key Council of Europe Conventions, as well as the ever-evolving jurisprudence of the European Court of Human Rights based in Strasbourg. Since 2015, relevant EU laws (e.g. data protection and anti-discrimination), as well as the case law of the EU Court of Justice based in Luxembourg have been included where relevant.

The complete catalogue of HELP courses covers the following topics, with new ones being developed:

1. Introduction to the ECHR and the ECtHR
2. Admissibility criteria (ECtHR)
3. Asylum
4. Child-friendly justice and childrenôs rights
5. Anti-discrimination
6. Fight against racism, xenophobia and homophobia*
7. Data protection and privacy rights*
8. Labour rights*
9. Right to the integrity of the person (bioethics)*
10. Hate crime/hate speech
11. Community sanctions and alternative measures to detention
12. International co-operation in criminal matters
13. Business and human rights
14. Counterfeiting of medical products and crimes against public health
15. Transitional justice
16. Property rights
17. Trafficking of human beings
18. Prohibition of ill-treatment
19. Pre-trial investigation in the light of ECHR
20. Reasoning of judgments in criminal cases

The courses are available free online on the HELP e-learning portal

http://help.elearning.ext.coe.int/

ensuring access for all interested legal professionals. Law enforcement authorities, academics or law students can also benefit and enrol in the online HELP courses.

Courses are designed to take into consideration practitionersô busy schedules and the difficulties of balancing learning and working. They cover the topic in question in a concise and interactive way with a wide range of visuals, exercises and references to landmark cases. HELP aims to make sure that users will gain a practical understanding of when and how to apply the European system of protection. The objective is not to make every single judge, prosecutor and lawyer an expert in human rights; it is rather to create a ñreflexò among them so that they can recognise and react to human rights issues in any case they have to deal with. On average, a HELP course requires an investment of 2 to 3 online learning hours every 2 weeks over a period of 2 to 3 months. Furthermore, courses can easily be browsed or consulted at any time by legal practitioners faced with a particular case.

The Council of Europe is in a unique and privileged position to develop practical training courses because, taking CoE standards as the basis, it can also factor in relevant case law and the results of its monitoring bodies. The courses are designed by experts from the CoE, such as lawyers or judges of the Strasbourg Court or thematic experts from relevant CoE entities (Human Rights Commissionerôs Office, Execution Department, Committee for the Prevention of Torture, Units of Data Protection or Bioethics, etc.). This is a guarantee of the high-quality and practical approach of HELP courses. Examples of videos produced jointly by HELP and the ECtHR include topics as varied as counterterrorism or asylum.

In fact, one of the courses most in demand to date has been on Asylum and the ECHR, developed jointly with the UNHCR. This course has been launched in 10 countries mostly affected by the high influx of migrants . In 2017, the Greek Government set up its first legal aid service, recruiting 90% of graduates from that course. It is planned in 2018 that some 300 Turkish officers from the Migration Directorate will be trained to improve their processing of asylum applications.

HELP is working together with the CoE Children Division and the team of the Secretary General Special Representative on Refugees to develop specific modules on different aspects concerning migrant and refugee children, namely proceedings upon arrival, family reunification, unaccompanied minors and alternatives to detention centres for child refugees.

Two important courses will be completed by the end of 2017. The first is on Child-Friendly Justice. Children come into contact with the justice system in many different ways. This can be for family matters such as divorce or adoption, in administrative justice for nationality or immigration issues or in criminal justice as victims, witnesses or perpetrators of crimes. When faced with the justice system, children are thrown into an intimidating adult world which they find hard to understand. It is therefore necessary to ensure that both access to and the processes within justice systems are always friendly towards children.

Along with the CoEôs Childrenôs Rights Division, the course has been developed with acknowledged experts, including the President of the International Association of Youth and Family Judges and Magistrates (IAYFJM), Avril Calder. As with all HELP courses, they are developed ñby legal professionals for legal professionalsò

The second HELP course this year will combat Violence against Women and Domestic Violence. It covers the key concepts, the international and European legal framework and case law, focusing in particular on the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). The bulk of the course contains the steps of the criminal and civil justice response to cases of VAW and DV and the risks of alternative dispute resolution.

Finally, in the first semester of 2018, the existing curriculum on Family law will be made more interactive. With EU funding, a new course will be developed with two modules, one on procedural safeguards in criminal cases and another one on victimsô rights.

In recent years, the interest in the HELP Programme across the European continent has grown exponentially. Its online platform went from some 6.000 users in 2014 to more than 22.000 by the end of 2017. This has been facilitated thanks to regional projects like ñHELP in the Western Balkans and Turkeyò, ñHELP in Russiaò and the first phase in the largest ever training programme on human rights for legal professionals in the European Union. Soon, to be followed, with EU financing, by training in the prevention of radicalisationï one of the priorities for the CoEôs work. Cooperation with national training institutions and Bar associations as well as with key international partners has been crucial, notably the European Judicial Training Network, the Council of Bars and Law Societies of Europe or the EU Agency for Fundamental Rights.

While the courses are available in English, HELP strives to gradually translate them into national languages and adapt them to national legal systems, a colossal task considering the 47 member States of the Council of Europe. As well as the self-learning courses available online, courses can be launched and tutored with face-to-face sessions. These can be organised in collaboration with the Judiciary Schools and Bar associations upon request.

Education on Human Rights should be a continuous journey that starts from childhood and should never end. As adults in general and legal professionals in particular, there is a need to keep up with the constant developments and challenges of modern times.

HELP has done so much to spread expertise, with free online courses that can be used not only by professionals but also by universities and professors in their programmes of human rights education.

National courts are at the forefront of human rightsô protection, and adequate legal training of judges and other practitioners is necessary to ensure that all fundamental rights are effectively protected at national level. As HELPôs moto goes, ñgood training for good judgementsò, the Council of Europe will strive to support the actors of the judicial chain in upholding human rights throughout the European space.

Eva Pastrana
Head of HELP Unit
Directorate General of Human Rights and Rule of Law, Council of Europe

Court Watch Poland Foundation engages ordinary citizens in improving standards

Bartosz Pilitowski, Stanislaw Burdziej, Martyna Hoffman

Court Watch is a civil society movement of social monitoring over the way courts and the system of justice fulfill their duties. The goal of the movement is to improve the quality of service provided in democratic countries by the courts. Despite almost 30 years since democratic transformation in Poland, the judiciary in Poland still struggles with a lack of trust among the citizens. For over seven years, a small NGO from ToruŒ, Poland has been trying to change that through the biggest Court Watch monitoring programme in the world.

The Court Watch Poland Foundation was founded and started its first monitoring program in 2010. Since the very beginning, its purpose has been to promote and organize civic monitoring of the Polish system of justice. The Citizen Court Monitoring programme involves volunteers participating in court hearings as members of the public. They do not represent either party but observe the way hearings proceed, with special attention to how parties and witnesses are treated by judges and court personnel. Observers are equipped with simple observation forms, which help them systematize observations and direct their attention to crucial elements of procedural justice. By sending to courts hundreds of observers who sit on random hearings, the Foundation aims at reconstructing the quotidian reality of Polish courts. Based on these observations, a national report is prepared each year. Later itôs distributed among Polish judges and other stakeholders.

The Foundation also reaches judges by publishing articles based on the results of monitoring. These appear in the professional press, giving lectures in the National School of Judiciary and Prosecution, as well as by meetings and training sessions with the judges in individual courts. To secure independence the Foundation finances court monitoring mostly from private sources, intentionally excluding the Ministry of Justice from the list of possible donors.

Until now the Foundation has gathered over thirty four thousand (34,000) trial hearing observations from all over the country and published seven annual reports. The methodology applied by the Court Watch Poland Foundation, has been acknowledged by the Office for Democratic Institutions and Human Rights of Organization for Security and Cooperation in Europe (ODIHR/OSCE) which helped to publish English handbook of the method used by Court Watch Poland: ñCourt Monitoring Methodologyò ed. by Stnislaw Burdziej and Bartosz Pilitowski, avalible at Foundation web page: www.courtwatch.pl/in-english.

Bartosz Pilitowski, Stanislaw Burdziej, Martyna Hoffman

Contact with the authors: b.pilitowski@courtwatch.pl

Book review by Justice Clarence Nelson*

Introduction to South Pacific Law, 4th edition (2017)

The book represents the first part of a larger research project financed by the European

This is the latest edition of a work intended to provide an introduction to the legal systems of the South Pacific. It does not purport to cover laws applying in US territories in the Pacific such as Guam and American Samoa or those of the French Overseas Territories such as New Caledonia and French Polynesia. Neither does it extend except where expressly considered relevant to Papua New Guinea, Australia or New Zealand.

Its focus is on the smaller island states and as such it is a valuable scource under one cover of information concerning the laws, including applicable case-law of the Cook Islands, Fiji, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

It is deliberately titled ñIntroduction to South Pacific Lawò It is not an exhaustive examination of the minutiae of any particular concept or legal issue but it does provide a valuable overview and understanding of the origins, foundation principles and jurisprudence of the various jurisdictions.

For those interested in Pacific law, it is a readily accessible digest of how each country has approached and developed their law. For the practitioner, it is a valuable Pacific-specific source of information and material. For the student commencing a course of study in Pacific law, it is an essential weapon in the arsenal of understanding the different approaches and methodologies applied to common problems and themes.

The Chapters

The first chapter helpfully reviews the history and origins of the various South Pacific legal systems. It sets the context of Pacific Law. And discusses the issue of national jurisprudence and whether there is room for a regional or sub-regional jurisprudence or even a common jurisprudential approach.

Chapter 2 deals with the sources of domestic law viz State Constitutions and the different forms of legislation. In particular the impact thereon of English common-law and equity given the historical evolution of Pacific nations. It reinforces the primacy of post-independence legislation but highlights the common regional problem of slow legislative reform.

Chapter 3 discusses the important issue of Customary Law. It notes that in the Melanesian countries of Fiji, Vanuatu, Solomon Islands and Papua New Guinea, there is great variation in custom whereas in Micronesian and Polynesian societies, the differences are not as marked. Common to all jurisdictions however is legislative recognition of customary law and the relevant provisions are usefully outlined in tabulated form.

Various issues and difficulties arising out of the application of custom and customary law are also addressed. These include reference to the conflict between custom and tradition and modern notions of gender equality and childrens rights.

Chapter 4 on Constitutional Law examines briefly the evolution of the various Pacific Constitutions, their general structure and format. Constitutional interpretation is given brief treatment as is the application of fundamental rights and freedoms provisions. However, the authors correctly note that given the wealth of legal materials and case-law available, such matters cannot be fully traversed in a work of this nature. But they signpost relevant authorities and discuss some key principles of interpretation.

More in-depth consideration is given to the constitutional organs of a State: the Executive, the Legislature, Judiciary, the Public Service and the over-arching office of Head of State, in the various jurisdictions. Particular attention is paid to specific issues such as abrogation, suspension and repeal of a Constitution and the presence in some constitutions of non-justiciability provisions.

Under this head is also discussed the special situation of Fiji (where the Constitution was purportedly abrogated during certain politically turbulent periods) and Tokelau, Cook Islands and Niue who remain subject to the laws of New Zealand. The extent to which the common law of England and the authority of the Queen together with the issue of Constitutional Conventions also receives attention.

Chapter 5 begins the nuts-and-bolts sections of the Book where particular areas of law are canvassed in more detail. Beginning with Administrative Law concepts such as judicial review, natural justice and bias, and how these have been applied and developed in the various

jurisdictions. It is a creditable review of a vast and changing subject and as noted in the review of a previous edition, ñprovides flavour rather than full verseòrequiring to be digested by those interested in the area (Susan Bothmann, Journal of South Pacific Law, 4/2000).

Chapter 6 on Criminal Law delves into the criminal legislation of the various countries and basic principles of criminal responsibility. As well there is a discussion of particular kinds of criminal offences.

Chapter 7 deals with all the traditional aspects and principles of Family Law including a lengthy section on divorce and an interesting discussion on the legal position in some jurisdictions of same sex relationships and trans-sexuals.

Chapter 8 on Contract Law addresses the main aspects of the law relating to contracts. An ambitious undertaking given the expanse of the topic. It does however provide the reader with a good basic understanding of the relevant principles and their application by various courts. And provides the reader with valuable tools and starting points for further research and analysis.

The same can be said for Chapter 9 on the Law of Torts but not so for Chapter 10 on Land Law. The latter contains an understandably extensive narrative concerning land tenure in the various jurisdictions especially in relation to customary land, which in most if not all South Pacific countries comprise the bulk of the land. Non-customary interests in land are also usefully touched upon by the authors.

The Book ends with Chapter 11 on the Hierarchy and Constitution of the Courts of the South Pacific, both civil and criminal. A valuable guide to the myriad of courts and their jurisdictional limits in the various countries.

Conclusion

As stated at the outset, this does not purport to be a comprehensive analysis of South Pacific Law. It is meant to be an Introduction only and in that regard, it is a highly readable scholarly work that fully serves its purpose. A valuable addition to the library of every practitioner and student of South Pacific Law.

The Writers

Mr Don Paterson is an Emeritus Professor of Law at the University of the South Pacific. He is a graduate of Victoria University in Wellington, New Zealand and Yale Law School, United States of America. He is highly respected in the region and taught at the University of the South Pacific Law School for over 10 years. He has also published other legal texts on selected aspects of South Pacific Law.

Ms Jennifer Corin is also a veteran of the University of the South Pacific and is currently Professor of Law at the University of Queensland. She has published extensively on many areas of Pacific Law drawing on her extensive experience at the Solomon Islands Bar and elsewhere. She is a graduate of Griffith University, Australia and the University of Nottingham in the United Kingdom.

Both are recognized experts on South Pacific Law.

Justice Vui Clarence Nelson* is a senior judge of the Samoa Supreme Court with over 30 yearsô experience in South Pacific Law including at the Bars of various jurisdictions.ô He is also a Vice-Chair of the United Nations Committee on the Rights of the Child.

Comparative Law and IAYFJM's website

Andrea Conti*

In this article I set out a few words about comparative law, its relationship to the IAYFJM's aims and a related proposal for the website. I also take the opportunity to explain development of the Events webpage, which should also help comparisons to be made.

IAYFJM and Comparative Law

At an international level the objectives of IAYFJM include:

- studying problems raised by the functioning of judicial authorities and organizations involved in the protection of children and the family;
- ensuring the application of national and international principles governing those authorities and making them more widely known; and
- examining legislation and systems designed for the protection of children and the family with a view to improving such systems both nationally and internationally.

In studying legal issues and also child development and protection (which are universal issues not confined within national borders) our statutes clearly relate well to the underlying purposes of comparative law which:

- creates an international perspective on legal problems and involves an understanding of similarities and differences;.
- promotes knowledge of other models of justice and encourages interpreters of national laws to import best practice into the decisions they make;.
- facilitates understanding of the different social and cultural institutions of our world, lessening prejudice and improving international good will;
- stimulates analysis of one's own system of law, contributing to its better drafting and development; and
- supports development of international guidelines and standards and the work of international courts.

Problems related to childhood and the evolution of the concepts of childhood and family are common across the world. Deeply-rooted problems are not purely national. Domestic violence, child abuse, relationship break-up and breakdown of families are issues that face every State and every civilized community. However, the cultural and environmental contexts in different States have considerable influence on local perception of issues and responses to them. They also influence the way in which problems emerge within communities.

These cultural and environmental characteristics should not obscure an understanding of universal issues. Given the international nature of family problems, a comparative law approach allows those working in child and family justice systems to be aware of solutions adopted by other countries and can offer a broader view of the issues under consideration. Of course, no solution offered by a foreign law can be applied directly in national law without proper adjustment and a prior feasibility study. However, knowledge of alternative solutions can open the mind of the jurist and offer a variety of solutions upon which to draw.

A comparative law perspective produces an outlook and a communication system that can help to give effect to the rights of children and promote their healthy mental and physical development in a constantly changing world.

Initiatives and the website

In the light of the above, IAYFJM is aiming

- to give concrete expression to the objectives of comparative law; and
- to put into practice the vision expressed by our President in her Inaugural speech:

> "One of our advantages as an international organisation is that, within our membership, we encompass knowledge and experience of a wide range of different judicial systems and approaches. Each approach has its strengths and weaknesses. [é] And having such a broad view can help us see what is really fundamental in our quest to make the lives of children, young people and their families better"

Jurisprudence

A special section of the website has been created to offer an online platform where members can share significant judgements and case law on children and the family. We are planning sections dedicated to each State in which the Association has members.

So, we are calling for help from all members to submit material. We ask you to send it accompanied by a short abstract in one of the three languages of our Association (English, French or Spanish) to help members understand the context and content of the main text.

Once I have received the material, I will add it to the website as soon as possible. A topic sentence for the material will appear in the first Jurisprudence screen and material will then be organised according to country of origin.

Please note that I would also welcome material relevant to the principles of family or child law or an outline describing the judicial systems for children in your country.

Events

The Events section of our website was created in order to make initiatives relating to family and child law known to all members.

Events include those initiatives promoted and organized by our Association, the National Associations affiliated to IAYFJM, IAYFJM regional sections and by any other bodies that cover our interests.

This page will also include reports of events organised or attended by IAYFJM, particularly when they might usefully stimulate a debate on the topic within our Association.

The Events webpage aims to raise awareness of initiatives and topics being discussed around the world and to encourage our membersô participation in those events. This will help build knowledge, direct or indirect, about how other countries are discussing and dealing with issues relevant to our Association.

Anyone wishing to publicise an event in their own country is invited to send us relevant information. I will upload the material as soon as possible and will also add it to the home page if the event is significant.

Anyone who would like to participate in these initiatives should send their material, in at least one of the three languages of the Association, to the email address: jurisprudence@aimjf.org .

Andrea Conti* is a Lawyer with Ph.D in Criminal Law and Criminal Procedure, Editor-in-chief of IAYFJMôs website and one of IAYFJMôs Young Representatives at the United Nationôs Department of Public Information

Treasurer's column — Anne-Catherine Hatt

Subscriptions 2018

I will soon send out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 50 for the year 2018 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

May I take this opportunity to remind you of the ways in which you may pay:

1. by going to the website of the IAYFJMð click on membership then subscribe to pay online, using PayPal. This is both the simplest and cheapest way to pay; any currency is acceptable. PayPal will do the conversion to GBP;
2. directly to the following bank accounts:

   GBP: to Barclays Bank, Sortcode 204673, SWIFTBIC BRCGB22, IBAN GB15 BARC 2046 7313 8397 45, Account Nr. 13839745

   CHF: to St.Galler Kantonalbank, SWIFTBIC KBSGCH22, BC 781, IBAN CH75 0078 1619 4639 4200 0, Account Nr. 6194.6394.2000

   Euro: to St. Galler Kantonalbank, SWIFTBIC KBSGCH22, BC 781, IBAN CH48 0078 1619 4639 4200 1, Account Nr. 6194.6394.2001

If you need further guidance, please do not hesitate to email me.

It is, of course, always possible to pay in cash if you should meet any member of the Executive Committee.

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

Thank you very much in advance!

Anne-Catherine Hatt

Contact Corner — Andrea Conti*

We receive many interesting e-mails with links to sites that you may like to visit and so we are including them in the Chronicle for you to follow through as you choose. **Take note that on our website there is a complete list of links related to juvenile justice**. Please feel free to let us have similar links for future editions.

From	Topic	Link
IAYFJM	Website	Find it here
Child Rights Connect	A global child rights network connecting the daily lives of children to the UN. Press release: Children can now seek justice through the UN	Find it here
CRIN	Website	Find it here
The Child Rights Information Network	Email https://www.crin.org/en/home/what-we-do/	info@crin.org Find it here
Defence for Children International	Website	Find it here
European Schoolnet	Transforming education in Europe Skype e.milovidov Contact elizabeth.milovidov@eun.org ENABLE project information	Find it here
IDE	Website	Find it here
International Institute for the Rights of the Child	http://www.childsrights.org/en/news/editorials/916-parents-children-and-the-proof-of-the-swiss-prison http://www.childsrights.org/en/news/editorials/906-parental-abduction-a-breach-of-the-child-s-integrity Contact	 Find it here
IJJO	Website	Find it here
International Juvenile Justice Observatory	Newsletter http://www.oijj.org/en/european-research-on-restorative-jj	Find it here
OHCHR Office of the High Commissioner for Human Rights	Website	Find it here
PRI Penal Reform International	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
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
Washington College of Law,- Academy on Human Rights and Humanitarian Law	http://www.wcl.american.edu/	

Council and European Section meeting Raad voor de Rechtspraak and Leiden University, Netherlands October 28-29th 2017

The picture on the left shows our Treasurer entering the old bank vault in the building of RVDR

Bureau/Executive/Consejo Ejecutivo 2014-2018

President	Avril Calder, JP	England	president@aimjf.org
Vice President	Judge Marta Pascual	Argentina	vicepresident@aimjf.org
Secretary General	Andréa Santos Souza, D.A.	Brazil	secretarygeneral@aimjf.org
Vice Secretary General	Judge Viviane Primeau	Canada	vicesecretarygeneral@aimjf.org
Treasurer	Anne-Catherine Hatt, Magistrate	Switzerland	treasurer@aimjf.org

Council—2014-2018

Presidentð Avril Calder (England)	Marie Pratte (Canada)
Vice-presidentð Marta Pascual (Argentina)	Gabriela Ureta (Chile)
Secretary Generalð Andrea S. Souza (Brazil)	Hervé Hamon (France)
Vice Sec Genð Viviane Primeau (Canada)	Theresia Höynck (Germany)
Treasurer—Anne-Catherine Hatt (Switzerland)	Laura Laera (Italy)
Patricia Klentak (Argentina)	Aleksandra Deanoska (Macedonia)
Imman Ali (Bangladesh)	Sonja de Pauw Gerlings Döhrn (Netherlands)
Godfrey Allen (England)	Andrew Becroft (New-Zealand)
Eduardo Rezende Melo (Brazil)	Carina du Toit (South Africa)
Françoise Mainil (Belgium)	David Stucki (USA)

The immediate Past President, Hon. Judge Joseph Moyersoen, is an ex-officio member and acts in an advisory capacity.

Chronicle Chronique Crónica Voice of the Association

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Associationð 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 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 languagesð it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. Items of Interestô 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,

chronicle@aimjf.org

Editorial Board

Leiden Law School	**Application for Master of Laws 2018-2019**

Open for Applications: Master of Laws (LL.M) – Advanced Studies in International Children's Rights – Leiden University

The Department of Child Law is now welcoming applications for the upcoming academic year 2018-2019 of the LL.M. programme Advanced Studies in International Children's Rights at Leiden Law School (Leiden University) (the Netherlands), starting in September 2018.

The programme is a small-scale international programme that provides in-depth specialization and teaches students on how to respond to the increasing international, regional and national legal developments in relation to children.

The programme is fit for legal professionals and graduates from all over the world, with a full law degree (offering access to legal practice) or with a degree at an equivalent level in another discipline with a sufficient background in or understanding of law.

The deadline for applications is 1 April 2018 for non-EU students and 15 June 2018 for EU students. Read our latest newsletter here and visit our Facebook-page.