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Contents

Special Issue on the Convention on the Rights of the Child

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Twenty-one years of the CRC: a coming of age?

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1 Twenty-one years of the CRC

In 2010, the Convention on the Rights of the Child (CRC)[2] reached the age of 21 and, arguably, "came of age". The CRC was not, however, the first international instrument that attempted to protect the rights of the child: 1924 saw the enactment of one of the first legal instruments to explicitly recognise that children, as human persons, ought to enjoy certain inalienable rights. It was recognised that children are often the first and most severely affected in times of conflict or economic hardship. The 1924 Geneva Declaration of the Rights of the Child outlined the duty of all nations, and indeed individuals within states, to protect weak, marginalised, or impoverished children.[3] The Universal Declaration of Human Rights further highlighted the need to protect the rights of the child to receive "special care and assistance".[4] In 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child which contained 10 principles, recognising inter alia the duty of non-discrimination in the enjoyment of such rights, the concept of best interests of the child as a "guiding principle" (in respect of education and child development), the right to play, the right to social security, protection from trafficking, and the need to adopt special measures to ensure that disabled children would also enjoy such

1 Lecturers in law, University of Ulster, and organisers of the University of Ulster (Magee) and International Society of Family Law (ISFL) conference, "The Children's Convention at 21: The rights of the child come of age?", which took place in Derry/Londonderry on 19 and 20 June 2010. The authors would like to express their appreciation to all those who presented at the conference and submitted manuscripts for consideration. The authors also wish to express their appreciation to the editorial board of the *Northern Ireland Legal Quarterly* for its patience and assistance in bringing this project to fruition.

2 Convention on the Rights of the Child, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990. See also, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000, UN, Treaty Series, vol. 2173, p. 222 and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000, UN, Treaty Series, vol. 2171, p. 27.

3 In 1924 the League of Nations adopted the Geneva Declaration of the Rights of the Child which inter alia protected the right to food, the right to health care, protection from exploitation and the right to 'receive relief in times of distress'.

4 Article 25, Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 at 71 (1948).

protections.[5] Some 30 years after this declaration, and a decade after the International Year of the Child, the UN General Assembly approved the text of the CRC and opened it for signature and ratification by states.[6]

By 2010, the CRC had been ratified by every state in the world, with the exception of Somalia and the United States.[7] The CRC ostensibly represented a fundamental commitment to the recognition of the civil, political, economic, social and cultural rights of children. The "best interests of the child" principle is now deemed to be the primary, if not paramount, consideration in all public and private legal actions which relate to children.[8] From the right of children to be heard (i.e. when decisions are made which will affect them)[9] to protections for asylum-seeking and refugee children,[10] the right to life,[11] freedom from torture,[12] and a right to a decent standard of living,[13] the CRC seeks to provide a comprehensive declaration of the basic rights of all children.

2 Select issues on the rights of the child

The papers selected for inclusion in this special edition of the *NILQ* have been drawn from the works of the keynote speakers, established academics and emergent scholars, who participated in the University of Ulster conference – "The Children's Convention at 21: The rights of the child come of age?" – which took place in Derry/Londonderry on 19 and 20 June 2010. These contributions touch upon a wide range of issues relevant to the notion of children's rights; cultural and religious relativism; the Convention's ability (or otherwise) to persuade domestic and international jurists of the need to meaningfully embed the concept of child rights; children's need for familial contact; juvenile justice and the treatment of vulnerable young offenders; the extent of domestic compliance with the principles of the Convention.

Dr Ursula Kilkelly's article analyses the impact of the Children's Convention and discusses the scope of this impact upon children's rights. Kilkelly emphasises the legal qualities of the CRC and rejects arguments that it is somehow legally unenforceable noting the "holistic review" that takes place through state reporting to the Committee on the Rights of the Child.[14] While countries may not *explicitly* incorporate the CRC into their domestic legal systems, evidence suggests a heightening of protection for children's rights in ratifying countries.[15] The CRC, rather than contributing to the disaggregation of international human rights law,[16] has led to a cross-fertilisation of children's rights within and between differing domestic, supra-national and international legal systems.[17] The CRC's

5 Declaration of the Rights of the Child, GA Res. 1386 (XIV), 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959). See also, ILO Convention No. 138, Minimum Age Convention (1973), which came into force on 19 June 1976.

6 See n. 2 above. For further comment on the CRC drafting process, see in this edition U Kilkelly, "The CRC at 21: assessing the legal impact" (2011) 62(2) *NILQ* 143–52.

7 For a list of ratifying states, dates of signature and ratification, and declarations and reservations to the CRC, see http://treaties.un.org.

8 Article 3 CRC.

9 Article 12 CRC.

10 Article 22 CRC.

11 Article 6 CRC.

12 Article 37 CRC.

13 Article 27 CRC.

14 Kilkelly, "CRC at 21", n. 6 above, pp. 145.

15 Ibid. p. 146–7.

16 See further below, p. 141.

17 Kilkelly, "CRC at 21", n. 6 above, pp. 146–52.

ability to sway courts in jurisdictions not bound by its provisions is highlighted as a significant, if controversial, endorsement of the Convention's potential.[18]

From an assessment of the impact of the CRC after 21 years, to highlighting recurring issues relating to religious relativism within children's rights, Professor Javaid Rehman argues that rigid interpretations of Sharia negate the rights of children under the CRC (and other international human rights instruments).[19] Placing the context of his arguments within wider debates on religion, culture and law,[20] Rehman examines the application of *kafalah*,[21] child marriages and the "option of puberty"[22] in relation to the rights of the child under international law. Issues relating to child marriage within Sharia are regarded as "archaic" and not reflecting progressive moves within Islam to evolve beliefs and practices to respect the rights of children. Rehman discusses the notion of guardianship as an alternative to formal adoption models (*kafalah*) and examines the role of the guardian (*wali*) in protecting the best interests of the child.[23] Ultimately, he notes the inherent flexibility of Sharia principles, and expresses confidence in their ability to embrace "the evolving norm of child rights and gender-based equality".[24]

Lorenzo Wakefield, an emerging children's rights scholar working in South Africa, examines the theme of juvenile justice in light of South Africa's recent legislative reforms. Wakefield examines South Africa's obligations under Article 40 of the CRC[25] in light of the recently enacted Child Justice Act 2008. After an outline of the 2008 Act's key provisions,[26] Wakefield examines four core issues relating to children's rights and the criminal justice system: criminal capacity,[27] pretrial release and detention,[28] diversion[29] and sentencing.[30] Wakefield argues that while the 2008 Act may not create a pattern of full compliance with the CRC, measures such as core principles relating to the minimum age of criminal responsibility, shorter pretrial detention periods, legislative recognition and support for diversion programmes, and the specific inclusion of five objectives to be considered when a judge is deciding on punishment, mean that the Act goes quite some distance towards such compliance.

Catherine Kenny examines the protection of family reunification within the CRC[31] and how the Republic of Ireland conforms (or otherwise) to this core protection. Noting the

18 Kilkelly, "CRC at 21", n. 6 above, pp. 146–52, where the decision of the majority within the United States Supreme Court's decision in *Roper* v *Simons* is highlighted as one example of cross-judicial reliance on the CRC.

19 In this edition, J Rehman, "Religion, human rights law and the rights of the child: complexities in applying the Sharia in modern state practices" (2011) 62(2) *NILQ* 152–66.

20 Ibid. p. 160.

21 Ibid.

22 Ibid. pp. 160–5.

23 Ibid. pp. 162–5.

24 Ibid. p. 166.

25 Article 40 CRC requires signatory states to take "appropriate measures" to ensure that children accused of committing offences are treated in a manner that would ensure their best interests are upheld.

26 L Wakefield, "The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's right instruments?" (2011) 62(2) *NILQ* 167–82.

27 Ibid. pp. 169–71.

28 Ibid. pp. 171–3.

29 Ibid. pp. 173–6.

30 Ibid. pp. 178–81.

31 Article 10(1) CRC requires states parties to ensure that applications for family reunification involving children should be dealt with in a "positive, humane and expeditious way".

increased anti-refugee measures in place in Europe,[32] Kenny argues that the right to family unity for those unable to return to their countries of origin is protected under international human rights law.[33] The key protections under the CRC and the pronouncements of the Committee on the Rights of the Child tend to suggest widespread state disregard for this important right.[34] Kenny then documents the procedural delays[35] and the failure to consider the views of the child[36] that suggest a disregard by Ireland of its international obligations under the CRC with regard to family reunification.

Dr Anne Egan examines the rights of children to remain in meaningful contact with their parents following the breakdown of a relationship. While Articles 9(3) and 7(1) ostensibly support child–parent contact; Irish law has yet to incorporate such provisions into its domestic legislative framework. Egan examines how the Irish courts have dealt with difficult issues relating to parental access to children.[37] Drawing upon her research (involving practitioners, separated and divorced parents, and unmarried parents),[38] she questions whether incorporation of the Convention would strengthen the rights of children affected by familial breakdown and further the best interests of the child. Incorporation of the CRC could lead to a situation where the rights of the child are vindicated through sustained and ongoing contact with both parents (subject to the best-interests principle and the right of the child to be heard).[39] The proposed wording of an Irish constitutional amendment on the rights of the child[40] will be beneficial to children, she argues, in terms of equality, the right to be heard, and child welfare being the paramount concerns within all issues relating to children.[41] However, as Egan concludes, the CRC retains its lowly level of guidance, rather than law, within child custody disputes (and other child-related proceedings).[42]

Dr Linda Moore examines the issue of Convention compliance in Northern Ireland, in respect of children in custody and juvenile justice. Moore outlines the key international legal instruments and principles that broadly set down legal standards and best practice in issues relating to children in custody.[43] The unique circumstances of Northern Ireland are highlighted, given the difficult "social, economic and political context"[44] that continues to impact upon the lives of children. Recent legislative reforms to the juvenile justice system are also examined, with a view to gauging whether meaningful compliance with the Children's Convention is being achieved.[45] Moore draws upon her recent (and ongoing) qualitative research into the treatment of incarcerated young people in Northern Ireland,

32 C Kenny, "Positive, humane and expeditious? An analysis of Ireland's implementation of its obligations in relation to family reunification under the CRC" (2011) 62(2) *NILQ* 183–98.

33 Ibid. p. 184.

34 Ibid. pp. 193–4.

35 Ibid. pp. 196–7

36 Ibid. p. 197.

37 A Egan, "Access and the non-custodial parent in the Republic of Ireland" (2011) 62(2) *NILQ* 199–215.

38 Ibid. pp. 208–10.

39 Ibid. pp. 211–13.

40 Ibid. p. 213.

41 Ibid.

42 Ibid. pp. 214–15.

43 L Moore, "The CRC comes of age: assessing progress in meeting the rights of children in custody in Northern Ireland" (2011) 62(2) *NILQ* 217–34.

44 Ibid. p. 217.

45 Ibid. p. 224–6.

and questions the extent to which international rights and standards are being adhered to, not least in respect of those most at risk of harm.[46]

3 Conclusion

Initially, it was suggested that the Convention might bring about significant progress in respect of protections for the rights of the child.[47] While, as evidenced by the work of the UN Committee on the Rights of the Child, factors such as a lack of government or societal support seem to have prevented full realisation of the rights of the child for now, 21 years on, the CRC continues to have profound impact on national and international legal systems. As Hammarberg argued, the CRC as a whole was at least instrumental in ensuring increased awareness of and respect for the "three Ps": *provision* for basic needs to ensure all children can enjoy all the rights set down in the Convention; *protection* from harmful act and practices and, not least, *participation.*[48] Despite lingering concern that the conceptualisation of distinct rights for persons under 18 might serve to separate "children's rights" from other, more general "human rights",[49] the language of "children's rights" has nevertheless become ingrained within human rights discourses. Rather than undermining the rights of the child, such a development can arguably be viewed as emphasising the special regard which international human rights law ought to hold for all children.

One core overarching theme which can be drawn from these contributions as a whole is that the task of protecting the best interests of the child cannot be carried out in isolation from citizens, legislators, policymakers, jurists, scholars or, indeed, parents or guardians. Kilkelly clearly outlines the impact of the CRC on wider international and domestic legal systems, evidenced by Wakefield and Moore's conclusions that in *certain parts* of the respective state juvenile justice regimes, there have been improvements, in large part based on maintaining key legal standards as set down in the CRC. As Egan notes, current political and societal concerns in the Republic of Ireland on the issues of children's rights have seen reliance on elements of the CRC in arguing for more child-centred approaches to difficult issues. However, challenges still remain. As evidenced by Rehman's and Kenny's articles, religion, culture and immigration can have profound impacts on the rights of the child, yet the CRC has not fully pierced the sovereign veil on issues often seen as private and thus exceptionally sensitive.

Clearly, a multi-faceted approach is needed to achieve a greater degree of child protection across the wide range of difficulties and dangers that childhood can present. The Children's Convention appears to have survived its infancy relatively unscathed: the same cannot be said of many of the children who feature in the case law and empirical research referred to by the contributing authors.

46 Moore, "The CRC comes of age", n. 43 above, pp. 226–32.

47 See, D A Balton, "The Convention on the Rights of the Child: prospects for enforcement" (1990) 12(1) *Human Rights Quarterly* 121, p. 121; M Jupp, "The UN Convention on the Rights of the Child" (1990) 12(1) *Human Rights Quarterly* 130, pp. 135–6.

48 T Hammarberg, "The UN Convention on the Rights of the Child – and how to make it work" (1990) 12(1) *Human Rights Quarterly* 97, pp. 99–100.

49 A Quennerstedt, "Children, but not really humans: critical reflections on the hampering effect of the '3Ps'" (2010) 18 *International Journal of Children's Rights* 619, pp. 621–3 and 629 *et seq*.

NILQ 62(2): 143–52

The CRC at 21: assessing the legal impact

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Introduction

The Convention on the Rights of the Child (CRC) is an international treaty which sets out the rights of children across all areas of their lives. The CRC is celebrated for its comprehensive scope and detail and the terms of the Convention have become the common interdisciplinary language of those who work with and for children in a variety of settings.[1] The Convention's relevance to the study and implementation of children's rights in theory and in practice ranges from healthcare to education, from adoption and alternative care to children in conflict with the law. Researchers seeking to evaluate respect for children's rights in practice use the Convention's legal standards as a benchmark and those who campaign and advocate for better protection of children's rights use the Convention's legal status to underpin their work.[2] In many contexts, those working to improve children's rights invoke the Convention's legally binding force to support their calls for further implementation, and training for professionals working with children uses the Convention as a means of enhancing awareness and understanding about children's rights. Being able to have recourse to a legal instrument greatly strengthens the work of researchers and advocates in all areas of children's rights.

The aim of this article, therefore, is to explore the legal impact of the Convention and to consider the extent of its influence in the national and international legal systems. The article begins by examining the Convention's status as a legal instrument. Then, in two sections, it considers what contribution the CRC has made to national and international law on children's issues. The first section addresses the extent to which the Convention has become part of national law and in some cases constitutional law in states which have ratified the Convention. It also considers some examples of where recourse to the Convention has had positive effect in the national courts. The second section considers the international contribution of the CRC, notably its impact on other legal instruments dealing with children's issues, and its influence on caselaw in regional courts like the European Court of Human Rights. The article concludes with a review of the Convention's legal status.

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1 L Lundy and U Kilkelly, "Using the Convention on the Rights of the Child as an auditing tool" (2006) 18(3) *CFLQ* 331–50.

2 U Kilkelly, "Operationalising children's rights: lessons from research" (2006) 4(1) *Journal of Children's Services* 35–45.

The legal status of the Convention

The drafting process

The CRC was drafted following a Polish initiative to mark the UN-sponsored International Year of the Child in 1979.[3] Apart from the desire to draft a children's rights instrument that was widely relevant and applicable – and could be ratified by as many states as possible – the intention was to adopt an instrument that would have binding legal effect.[4] This was especially important given that there already existed two non-binding declarations in this area – one limited instrument was adopted by the League of Nations in 1924 while the United Nations adopted a more detailed declaration in 1959.[5] The case for a legal instrument codifying children's rights was also supported by the fact that in 1966 the UN had adopted two instruments, namely the International Covenant on Civil and Political Rights[6] and the Covenant on International, Economic and Social Rights[7] – reflecting its commitment to promote respect for human rights through the adoption of binding human rights standards. With the decision to draft the CRC, the UN showed its support for an international instrument on children's rights that would be legally binding on states that ratified it as well as being widely applicable across political, economic and social divides. Although the drafting process was not entirely smooth, the strength of the commitment to the objectives of drafting a legally binding treaty to which all states could sign up meant that any stumbling blocks had to be overcome through political compromise, instead of being allowed to derail the process altogether.[8]

The drafters were largely successful in achieving their objectives. The Convention was adopted unanimously by the General Assembly on 20 November 1989[9] and 30 days after the requisite 20 instruments of ratification had been received the Convention came into force just over nine months later, on 2 September 1990. It has now been ratified by 193 states parties, two short of universal ratification; as is well known, it has been signed but not ratified by the United States of America and Somalia.[10]

The obligation to implement the CRC

The status of the Convention as a legally binding instrument of international law is thus unequivocal. The core obligation to implement the Convention is set out in Article 4, which provides as follows:

3 J Fortin, *Children's Rights and the Developing Law* 3rd edn (Cambridge: CUP 2009), pp. 38–9.

4 G van Bueren, *International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff 1995), pp. 13–16.

5 Declaration of the Rights of the Child (1959) GA Res. 1386 (XIV), 14 UN GAOR Supp. (No 16) at 19, UN Doc. A/4354. See, generally, S Detrick (ed.), *The UN Convention on the Rights of the Child. A guide to the travaux preparatoires* (Dordrecht: Martinus Nijhoff 1992).

6 Adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966.

7 Adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966.

8 See T Hammarberg, "The Convention on the Rights of the Child and how to make it work" (1990) 12 *HRQ* 97–105. See also LJ LeBlanc, "The Convention on the Rights of the Child" (1991) 4(2) *Leiden Journal of International Law* 281–91.

9 Adopted and opened for signature, ratification and accession by GA Res. 44/25 of 20 November 1989. The Convention entered into force on 2 September 1990, in accordance with Article 49.

10 The US signed the Convention on 15 February 1994 and Somalia signed on 9 May 2002. For full details of ratification, reservations and declarations see www.ohchr.org. See S Kilbourne, "The wayward Americans – why the USA has not ratified the UN Convention on the Rights of the Child" (1998) 10 *CFLQ* 243 and also R Lawrence-Karski, "Legal rights of the child: the United States and the UN Convention on the Rights of the Child" (1996) 4 *International Journal of Children's Rights* 19–44.

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.

Although the second sentence of this Article provides, with regard to economic, social and cultural rights, that states must undertake such measures to the maximum extent of their available resources, it is important that Article 4 imposes a clear duty on states to take all appropriate measures, including the passing of legislation, to implement the Convention. This further illustrates the Convention's legal authority. Indeed, mindful of this, states have entered reservations seeking to limit the application of the Convention in specific areas, although under Article 51(2) a reservation incompatible with the object and purpose of the Convention shall not be permitted.[11] States have also sought to limit the influence of the Convention by entering interpretive declarations, which allow them to assert their views inter alia on the meaning of particular provisions.[12]

Monitoring implementation

Although appearances might deceive, the Convention's legally binding status is not affected by its lack of an enforcement mechanism. Like other international human rights instruments, implementation of the CRC is monitored by a committee of independent experts – the Committee on the Rights of the Child – established under Article 43. Currently, there is no system for the determination of individual complaints, although discussions on an optional protocol to allow individuals to petition the Committee on the Rights of the Child are at an advanced stage.[13] Although it is important to have a system of individual petition under the CRC, it is equally important to note the particular merits of the reporting mechanism. As a system designed to evaluate the extent to which states have implemented the Convention's provisions, it offers the opportunity for an holistic review – both by states themselves and by national non-governmental organisations – of measures taken to realise children's rights under the Convention.[14] Where states engage constructively with the Committee in its review process, it can and does lead to reform of law and policy as well as improvements in practice.[15]

The legal obligation on states to implement the CRC – set out in Article 4 – also informs the Committee's approach to the reporting process. For instance, from the outset, the Committee's reporting guidelines on initial reports requested states to provide it with information on the measures taken to harmonise national law and policy with the Convention.[16] In addition to seeking information from states that enables it to assess the implementation of the Convention in practice, information as to the "legislative, judicial,

11 The extent to which the CRC has been subjected to reservation, entered by states parties on ratification, impinges on the status of the Convention. This issue is, regrettably, beyond the scope of this paper, but see, further, W Schabas, "Reservations to the Convention on the Rights of the Child" (1996) 18(2) *HRQ* 472–91.

12 A significant proportion of the declarations entered concern the application of the Convention to the unborn child, by virtue of the open-ended definition in Article 1. See, further, R Joseph, *Human Rights and the Unborn Child* (Dordrecht: Martinus Nijhoff 2009).

13 See comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the chairperson-rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, A/HRC/WG.7/2/3 13 October 2010, available at www.ohchr.org.

14 See, further, U Kilkelly, "The UN Committee on the Rights of the Child: an evaluation in the light of recent UK experience" (1996) 8 *CFLQ* 105.

15 Ibid.

16 Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44 para. 1(a) of the Convention, UN Doc. CRC/C/5 1991, para. 9(a).

administrative and other measures" taken to further implementation of the Convention at national level is seen as key to the success of the monitoring function.[17]

As is explained further below, in some cases, the Convention enjoys the status of national law particularly in states with a monist system where incorporation into the domestic legal system is automatic on ratification.[18] Where this is the case, the CRC can be litigated in the domestic courts and authorities can be challenged about the failure to secure Convention rights to children. Where the Convention is not part of the national legal order, however, those who seek to have children's CRC rights vindicated may struggle to find an effective avenue of redress. This enforcement deficit may give rise to the impression that the Convention is not a binding treaty.[19] Of course, the inability to rely on the CRC in the domestic courts is not an indicator of the Convention's legal status or its importance in a legal sense. What it does mean, however, is that innovative ways must be found to give the Convention more practical effect, especially at national level. This is explained further below.

Impact of the CRC at national level

Article 4 of the CRC requires states to take all appropriate measures to implement the Convention. According to the Committee on the Rights of the Child, this requires states to ensure that law reform takes place in line with the Convention.[20] As to how progress can be measured in this area, the CRC reporting process, notably the concluding observations issued by the Committee on the Rights of the Child after the review of each state party report, offers an objective assessment of the extent to which the Convention has been implemented in each state party. In its concluding observations, the Committee usefully documents the state's efforts to reform law and policy in line with the CRC and offers an assessment of what further measures need to be taken to achieve greater compliance. Analysis of this data is an important way to track the progress made by states over time in the achievement of greater implementation.[21]

Studies have also undertaken assessments of progress at a more global level. In one important study undertaken by the UNICEF Innocenti project in 2007, the steps taken by 52 states parties to the CRC to implement the Convention were examined.[22] The study found that the number of countries which has engaged in a process of law reform following their ratification of the CRC is very high. According to UNICEF, its results are "impressive" in that "the Convention has been incorporated directly into the law of two thirds of the countries studied".[23] Furthermore, "provisions on the rights of children have

17 For example, this information is requested at paras 15 (in respect of civil rights), 16 (in respect of family support and alternative care), 19 (in respect of basic health and welfare), 21 (in respect of education, welfare and leisure activities), and 23 (in respect of special protection measures): General Guidelines, n. 16 above. See this emphasis on measures to harmonise national law and policy with the Convention in other treaty reporting guidelines. See CRC Treaty Specific Reporting Guidelines, Harmonised According to the Common Core Document, CRC/C/58/Rev. 2, para. 19, available at www.ohchr.org.

18 See further A Aust, *Handbook of International Law* (Cambridge: CUP 2010), pp. 74–80.

19 See C M Lyon, "Interrogating the concentration on the UNCRC instead of the ECHR in the development of children's rights in England?" (2007) 21(2) *Children and Society* 147–53.

20 Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation UN Doc. CRC/GC/5 (2003) available at www.ohchr.org.

21 On the experience of Ireland, see U Kilkelly, *Children's Rights in Ireland: Law, policy and practice* (Dublin: Tottel 2008), pp. 4–8.

22 UNICEF Innocenti Research Centre, *Law Reform and Implementation of the CRC* (Florence: UNICEF 2007). The study included 9 states from Asia and the Pacific, 8 from Central and Eastern Europe, 11 Islamic states, 6 from sub-Saharan Africa, 14 from the Americas and 4 from Western Europe: p. 1.

23 Ibid. p. viii.

been incorporated into the constitutions of one third of the countries studied".[24] Although the research found great diversity among the measures states had taken to give the Convention legal effect in their national systems, it concluded that no single model could or should be advocated as a "blueprint" for incorporation.[25]

Just as it is arguable that there is little connection between ratification of a human rights treaty and better human rights protection,[26] it cannot be concluded simply that giving the Convention the force of domestic or even constitutional law is the most effective route to greater protection for children's rights at national level. Although its effect may be difficult to measure, it is significant, nonetheless, that Article 4 requires legislative measures to implement the Convention. More in-depth study is needed, however, to determine whether a particular model of incorporation would reap greater rewards.

What is impressive about the results of the UNICEF study is the extent not only of incorporation of the CRC – including those states for whom incorporation requires an Act of parliament – but also the number of states which have shown the ultimate legal commitment to the CRC by giving it, or some of its provisions, constitutional status. Africa arguably leads the way here with provisions of new constitutional instruments in Burkina Faso, Ethiopia, Rwanda and South Africa (which has the most extensive provision) all containing express protection for children's rights.[27] In Europe, the constitutions of Poland, Romania, Slovenia and Ukraine contain articles dedicated exclusively to the rights of children, and in Asia and the Pacific, new constitutions were adopted by Nepal in 1990, by Vietnam in 1992 and by Fiji in 1997, which contain some (limited) protection for children's rights.[28] In Europe, by contrast, the UNICEF study found that only two countries – Iceland and Belgium – had given express constitutional protection to children's rights. Moreover, recent proposals to give express constitutional protection to children's rights in Ireland have floundered,[29] and efforts to ensure that children's rights are incorporated into the Bill of Rights for Northern Ireland have met with little success to date.[30] Although constitutional protection of children's rights is often seen as the high-water mark in the protection of children's rights at national level, as Tobin reminds us, it is both an important indicator of the political and social status of children, while also saying something but not everything about the status of children in a particular society.[31]

It is important then to look beyond constitutional protection and, indeed, beyond incorporation, when measuring the Convention's impact at a national level. Here, too, the UNICEF study comments favourably on the extent to which states parties have brought their national law into line with the Convention. According to UNICEF:

24 Innocenti Research Centre, *Law Reform*, n. 22 above,

25 Ibid.

26 This is a vast area of legal scholarship. See, for example, O A Hathaway, "Do human rights treaties make a difference?" (2002) 111 *Yale Law Journal* 1870 and R Goodman and D Jinks, "Measuring the effects of human rights treaties" (2003) 14(1) *Eur J Int Law* 171–83.

27 See Innocenti Research Centre, *Law Reform*, n. 22 above, pp. 13–14.

28 Ibid. p 15.

29 See Kilkelly, *Children's Rights*, n. 21 above, pp. 71–83.

30 See U Kilkelly, "Children's rights in the Bill of Rights: meeting or exceeding international standards" (2001) 52 (3&4) *NILQ* 286–95. However, the latest proposals contain no provision for children's rights. See Northern Ireland Office, *Consultation Paper: A Bill of Rights for Northern Ireland – next steps* (Belfast: NIO November 2009).

31 J Tobin, "Increasingly seen and heard: the constitutional recognition of children's rights" (2005) 21(1) *South African Journal on Human Rights* 86–126, p. 88.

> Nearly all of the countries studied have made serious efforts to bring their legislation into greater conformity with the Convention, either by adopting children's codes, or the gradual, systematic reform of existing law or both.[32]

Examples of best practice in this context include Romania which adopted comprehensive codifying legislation concerning the rights of the child – the Law on the Protection and Promotion of the Rights of the Child – in 2004.[33] And even those states – like the United Kingdom – that resisted widespread reforms following ratification of the CRC, have been seen to take legislative action gradually to ensure greater compliance between the CRC and national law since that time.[34] Incorporation should thus not be seen as the only way in which implementation of the Convention can be achieved, especially given the diversity of approaches taken by states.[35] Indeed, gradual reform of domestic law, in line with the Convention, may achieve better results over time.[36]

Impact of the CRC at international level

In addition to the impact of the CRC at national level, it is important to consider the horizontal impact that the Convention has had at an international level. As noted above, the CRC is a highly ratified treaty which enjoys the force of binding international law. Although the Convention only binds states parties that have undertaken to implement it through ratification, it is apparent that the Convention has resulted in a proliferation of children's rights instruments at international level. Although there is no scientific study identifying with precision the cause and effect between the adoption of the Convention and the proliferation of international children's rights instruments, it is at least arguable that the unparalleled legal and political status enjoyed by the CRC has had a positive knock-on effect on international standard-setting activities.

The most direct manner in which the Convention has contributed to international law is in the adoption of two Optional Protocols – on the Sale of Children, Child Prostitution and Pornography[37] and on the Involvement of Children in Armed Conflict.[38] In addition, and more generally, the Committee on the Rights of the Child has itself contributed to international law on children's rights through the adoption of general comments under Article 45 of the Convention.[39] Although not binding on states, these documents represent the Committee's authoritative view of the application of the Convention to specific areas and they also reflect the priorities of the Committee as it attempts to guide states and others on how to interpret and apply particular provisions of the Convention in specific contexts. To date, the Committee has published 13 general comments, including on: the Aims of

32 Innocenti Research Centre, *Law Reform*, n. 22 above, p. viii.

33 Ibid. p. 20. On the position of Serbia, see O Cvejic, "Rights of the child under Serbian law: harmonisation with European and international conventions" (2008) 42(1) *Zbornic Radova* 145–66.

34 The same point can be made with respect to Sweden, Innocenti Research Centre, *Law Reform*, pp. 21–2.

35 On the role of policy, see J Williams, "Incorporating children's rights: the divergence in law and policy" (2007) 27(2) *Legal Studies* 261–87.

36 Analysis of the role of the judiciary is unfortunately outside the scope of this paper. However, for some discussion, see J Harrington, "The democratic challenge of incorporation: international human rights treaties and national constitutions" (2007) 38 *Victoria University of Wellington Law Review* 217.

37 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted and opened for signature, ratification and accession by GA Res. A/RES/54/263 of 25 May 2000. It entered into force on 18 January 2002.

38 Adopted and opened for signature, ratification and accession by GA Res. A/RES/54/263 of 25 May 2000. It entered into force 12 February 2002.

39 Article 45 provides that in order to foster implementation of the Convention, the committee may inter alia make suggestions and general recommendations based on information received pursuant to Articles 44 and 45 of the present Convention.

Education (No. 1); Adolescent Health (No. 4); General Measures of Implementation (No. 5); Child Rights in Early Childhood (No. 6); Children with Disabilities (No. 9); Juvenile Justice (No. 10); and on Implementation of Article 12 (No. 12).[40] Although the legal status of the comments is not clear, they are worthy of attention to the extent that they clarify states' obligations to implement and respect the provisions of the CRC in a wide range of areas. They may be a useful supplement in litigation where they illuminate the obligations on the state in the area of children's services.

The CRC and, indeed, the guidance of the Committee on the Rights of the Child have also had an influence on human rights law-making in other areas of the UN. In particular, the Convention on the Rights of Persons with Disabilities[41] not only contains a provision dedicated to the rights of children with disabilities – under Article 7 – but, in addition, the terms of that provision reflect the guidance of the Committee on the Rights of the Child which identified as general principles the values of non-discrimination (Article 2 of the CRC), best interests of the child (Article 3) and the right of the child to be heard (Article 12).[42]

In Europe, the Convention has arguably had a much greater impact on standard-setting in both the Council of Europe and the European Union (EU). Developments in the EU have been more recent but they may, ultimately, result in deeper implementation of children's rights standards in EU member states. The EU Charter of Fundamental Rights and Freedoms contains a provision dedicated solely to children's rights.[43] Article 24 contains both two of the general principles of the CRC – the best-interests standard and the right to be heard – while also making substantive provision in Article 24(1) for the child's right to protection and care, and in Article 24(3) for the child's right to maintain a personal relationship and direct contact with his/her parents on a regular basis. As with the Convention on the Rights of Persons with Disabilities, it is significant that the accepted wording of the CRC in these areas has been reiterated here[44] and there is cause for optimism that the introduction of these principles into the Charter will result in a greater child focus being brought to bear on areas of free movement, immigration and asylum, for example. In terms of the potential of the Charter to create a level playing field for children in the exercise of their rights, it is significant also that Article 24 is included in a category headed 'Equality'. Two provisions – Articles 20 (equality before the law) and 21 (no discrimination inter alia on grounds of age) – serve to strengthen the protection of children from differential treatment. Taken together with Article 7 on the right to respect for private and family life and Article 14, which provides for a right to education, it is already apparent that the presence of these standards in the Charter has galvanised political support and action in support of greater children's rights in law and policy-making within the EU,

40 These documents are all available on the website of the Committee on the Rights of the Child at www.ohchr.org.

41 The Convention on the Rights of Persons with Disabilities was adopted by the General Assembly on 13 December 2006 by GA Res. A/RES/61/106. It was opened for signature in March 2007 and came into force on 3 May 2008.

42 Indeed, the CRC is credited with making a mark for the rights of children with disabilities. See M Jones and L A B Marks, "Beyond the Convention on the Rights of the Child: the rights of children with disabilities in international law" (1997) 5 *International Journal of Children's Rights* 177–92.

43 See C McGlynn, "Rights for children? The potential impact of the European Union Charter of Fundamental Rights" (2002) 8 *European Public Law* 387–400. The charter came into force as part of the Lisbon Treaty on 1 December 2009.

44 However, see the concerns of C McGlynn, *Families and the European Union: Law, politics and pluralism* (Cambridge: CUP 2006), pp. 70–1.

notably in the recent adoption of the EU Agenda for the Rights of the Child.[45] Here, it is evident that the CRC has generated sufficient consensus to drive implementation of children's rights in practice, as well as in law and policy, at a European level.

The impact of the CRC is also visible on the broader, political landscape occupied by the Council of Europe. The Council of Europe has drafted several binding treaties in the areas of child and family law, many of which have either been revised or adopted following the entry into force of the CRC. These include the Convention on the Adoption of Children,[46] the Convention on Contact Concerning Children,[47] and the Convention on the Exercise of Children's Rights, concerning the procedural rights of children in family law matters.[48] As Fortin notes, this latter treaty was specifically drafted to remedy a perceived weakness of the CRC, that children might not be able to exercise their substantive rights without the adoption of specific procedural measures to support them.[49] Also notable in this area is the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse which came into force in July 2010.[50] The existence of such a range of children's rights treaties, all informed by the terms of the United Nations Convention but adopted within the political context of the Council of Europe is further evidence of the Convention's dominant influence. Although not all 47 member states of the Council of Europe have yet ratified each treaty, in developing such a body of human rights law on children's issues, the Council is itself reflecting a consensus in favour of giving legal protection to children's rights at international level. The strength of political support for implementation of the CRC is also seen in the development by the Council of Europe of a programme specifically dedicated to children's rights. As part of its children's programme launched in 2005 – Building a Europe with and for Children – the Council of Europe is committed to developing standard-setting instruments and implementing a range of activities to promote children's rights and protect children from violence.[51] In November 2009, the Council of Europe adopted its Guidelines on Integrated National Strategies for the Protection of Children from Violence and, in November 2010, the Committee of Ministers adopted its Guidelines on Child Friendly Justice developed for the first time with the direct input of young people themselves.[52] Further standard-setting instruments are being drafted, directed at the development of child-friendly healthcare and in the area of parental responsibility.[53] Although these do not create legally binding obligations on states – nor are they designed to – their fit with the provisions and principles of the CRC make their supplementary nature very clear. Their innate value, in fact, is to help states work

45 Communication from the Commission to the Euopean Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child, com/2011/0060, http://ec.europa.eu/justice/policies/children/policies_children.

46 European Convention on the Adoption of Children (CETS No. 58) and European Convention on the Adoption of Children Revised (CETS No. 202).

47 The Convention on Contact Concerning Children (CETS No. 192).

48 The European Convention on the Exercise of Children's Rights (ETS No. 160).

49 Fortin, *Children's Rights*, n. 3 above, p. 236, citing M Killerby, "The draft European Convention on the Exercise of Children's Rights" (1995) 3 *International Journal of Children's Rights* 127.

50 The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

51 The programme is currently implementing a three-year strategy covering 2009–2013. See details at www.coe.int/children.

52 See U Kilkelly, *Listening to Children about Justice: Report of the Council of Europe Consultation on Child Friendly Justice* (Strasbourg: Council of Europe 2010), available at www.coe.int/childjustice.

53 See also Recommendation CM/Rec. (2008) 11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures drawing on the CRC provisions on youth justice and detention.

towards greater implementation at a national level of both Council of Europe standards and, indeed, the CRC itself.

Impact on the ECHR

Staying within the Council of Europe, the impact of the CRC has long since been visible on the caselaw of the European Court of Human Rights (ECtHR). One of the now well-documented uses to which the CRC has been put is the recourse to its provisions made by the ECtHR in its implementation of the European Convention on Human Rights (ECHR).[54] Although first signs of this approach were noted in the physical punishment case of *A* v *UK*,[55] it is apparent that caselaw in a whole range of areas concerning children has clearly been influenced either directly or indirectly by the principles and provisions of the CRC.[56] Most notable here are those cases concerning the right of the child to be heard. For instance, in a series of cases against Germany,[57] and in the case of *C* v *Finland*,[58] the judgments of the ECtHR appear to have been directly informed by the duty under Article 12 to ensure that children's views are heard and taken into account in decisions that concern them.[59] This principle has also formed part of the court's decision-making in the criminal cases of *T*, *V* and *SC* against the UK.[60] Here, the influence of Article 12 of the CRC is evident on the court's development of the principle of "effective participation" as part of the child's right to a fair trial under Article 6 of the ECHR. It is difficult to imagine that these principles would have emerged through the ECtHR's caselaw were it not for the influence of the CRC. The caselaw in other areas also bears witness to the CRC's influence; the identity case of *Mikulic* v *Croatia*[61] and the many significant child protection cases epitomised by *Z and Others* v *UK*,[62] to name but two. Moreover, the 2008 case of *Maslov* v *Austria* arguably saw a significant shift in the court's approach to the use of the Convention.[63] This case concerned the deportation of the applicant who had been convicted of a number of criminal offences as a child. According to the court, where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate the child's reintegration, in line with Article 40 of the Convention, which makes reintegration an aim to be pursued by the juvenile justice system. In the court's view, reintegration would not be achieved by severing the child's family or social ties through expulsion. The CRC was thus

54 U Kilkelly, "The best of both worlds for children's rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child" (2001) 23(2) *HRQ* 308–26.

55 *A* v *UK* (1999) 27 EHRR 611.

56 See Kilkelly, *Listening to Children*, n. 52 above; U Kilkelly, "Effective protection of Children's rights in family cases: an international approach" (2002) 12(2) *Transnational Law and Contemporary Problems* 336–54 and U Kilkelly, "Strengthening the framework for enforcing children's rights: an integrated approach", in M Ensalaco and LC Majka (eds), *Children's Human Rights: Progress and challenges* (Boulder: Rowman and Littlefield 2005), pp. 53–80.

57 See, for example, *Sahin* v *Germany* (2003) 36 EHRR 765 [GC] and *Sommerfeld* v *Germany* (2004) 38 EHRR 35 [GC].

58 *C* v *Finland* [2006] 2 FLR 597.

59 Clearly, however, these are judgments of considerable complexity. See, further, Fortin, *Children's Rights*, n. 3 above, p. 312.

60 *T* v *UK* (1999) 30 EHRR 121; *V* v *UK* (1999) 30 EHRR 121; *SC* v *UK* (2004) 40 EHRR 10. On these cases and related international standards, see U Kilkelly, "Youth courts and children's rights: the Irish experience" (2008) 8(1) *Youth Justice* 39–56.

61 (2004) 48 EHRR 43.

62 [2001] 2 FCR 246.

63 [GC] 23 June 2008.

one of the grounds used to find that the expulsion was a disproportionate interference with the applicant's rights under Article 8.

Conclusion

This brief survey of the Convention's legal status and impact considered the extent of the Convention's influence nationally and internationally. It was by no means an exhaustive account of those issues; nor did it consider the Convention's role in domestic jurisprudence, in the pursuit of policy objectives, or in practice: all of which are important topics worthy of complete analysis in their own right. Rather, the aim of this piece was to reflect on the Convention's role and its contribution to law itself through incorporation at national level and its support for a proliferation of instruments, binding and non-binding at international level.

Although further study is necessary to fully evaluate the nature of the Convention's influence, any assessment of the Convention's involvement in the development of legal standards, nationally and internationally, is likely to acknowledge this contribution as nearing the top end of the scale. This is arguably due to the increasing cross-fertilisation of legal standards that has coincided with an increasingly globalised world, which has seen the principles and provisions of the CRC being argued before national, regional and international bodies with increasing frequency and effect. This convergence takes place not just, as this article has shown, at an international level, or between the international and the domestic fora, but also between the international, the regional and the national. As the CRC continues to influence the caselaw of the ECtHR, for example, so too will its impact be felt in those legal systems in which the ECHR has become part of national law, even where the CRC has not. As competence in the EU grows in this area, the effect of the CRC will become more direct both through the EU Charter and through instruments like the Brussels Regulation on parental responsibility that are already directly effective in national law.[64]

At national level, the ultimate example of the influence of the CRC is arguably its use by the Supreme Court of the United States in *Roper* v *Simons*,[65] the juvenile death penalty case decided in 2005. Here the court drew on the CRC ban on the death penalty notwithstanding that the US has neither ratified nor incorporated the Convention into national law. Although not uncontroversial, the acceptance of the Convention's standards by a court not bound by those standards is truly significant. These developments suggest that uncharted territory may lie ahead for the Convention which may prove fertile ground for researchers and for lawyers; they also offer significant potential, opportunity and indeed challenge for all those seeking to maximise the Convention's use to ensure greater protection of the legal rights of children.

64 Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing reg. 1347/2000/EC, OJ 2003 L338/1. For a children's rights analysis see H Stalford, "Brussels II and beyond: a better deal for children in the EU?", in K Boele-Woelki (ed.), *Unification and Harmonisation of Family Law* (Antwerp: Intersentia 2003), pp. 471–82.

65 543 US 551 (2005).

NILQ 62(2): 153–66

Religion, human rights law and the rights of the child: complexities in applying the Sharia in modern state practices

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1 Introduction

The application of laws that are ostensibly divinely inspired remains a complex subject in today's world.[1] The implementation of Islamic law, the Sharia, poses significant challenges to both constitutional practices and modern human rights law.[2] The compatibility of the Sharia with modern human rights laws continues to provoke considerable heated yet inconclusive debate.[3] The present article examines the rights of the child from the perspective of the Sharia with particular reference to its application in modern state practices. In highlighting the continued relevance of the Sharia principles in domestic laws, it engages with problematic yet contentious practices such as child marriages, the so-called "option of puberty", and the prohibition of adoption in classical

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1 J Rehman and S Breau (eds), *Religion, Human Rights and International Law: A critical examination of Islamic law and practices* (The Hague: Martinus Nijhoff 2007); J Rehman, "Conflicting values or misplaced interpretations? Examining the inevitability of a clash between 'religions' and 'human rights'" in N Ghanea (ed.), *Does God Believe in Human Rights?* (The Hague: Martinus Nijhoff 2006), pp. 65–88; A A An-Na'im, "The compatibility dialectic: mediating the legitimate co-existence of Islamic law and state law" (2010) 73 *MLR* 1.

2 See A A An-Na'im, *Toward an Islamic Reformation: Civil liberties, human rights and international law* (Syracuse NY: Syracuse UP 1990); J Rehman, "Accommodating religious identities in an Islamic state: international law, freedom of religion and the rights of religious minorities" (2000) 7 *International Journal on Minority and Group Rights* 139; J Rehman, "Freedom of expression, apostasy and blasphemy within Islam: *sharia*, criminal justice systems, and modern Islamic state practices" (2010) 79 *Criminal Justice Matters* 4.

3 On children's rights within Muslim jurisdictions, see S S Ali, "A comparative perspective of the United Nations Convention on the Rights of the Child and the principles of Islamic law: law reform and children's rights in Muslim jurisdictions'" in S S Ali, S Goonesekere, E G Mendez, and R Rios-Kohn, *Protecting the World's Children: Impact of the Convention on the Rights of the Child in diverse legal systems* (Cambridge: CUP 2007), pp. 142–208; K Hashemi, "Religious legal traditions, Muslim states and the Convention on the Rights of the Child: an essay on the relevant documentation" (2007) 29 *HRQ* 194; S M Sait, "Islamic perspectives on the rights of the child" in D Fottrell (ed.), *Revisiting Children's Rights* (The Hague and London: Kluwer Law International 2000), pp. 31–50; S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Leiden: Martinus Nijhoff 2007).

interpretations of Islamic law. The paper argues that a narrow interpretation or application of the Sharia would violate child rights. However, the paper advances the argument that within the Sharia there is sufficient inbuilt latitude and flexibility to accommodate and ensure child rights as provided in the Convention on the Rights of the Child (CRC).

This article is divided into five sections. After the introductory section, section 2 highlights the relevance of Sharia for modern legal systems and in so doing assess its compatibility with human rights law. Section 3 examines the interaction of the Sharia with international provisions on the rights of the child as contained in the CRC (1989). Section 4 focuses on two particularly contentious aspects of children's rights within the Sharia – the legitimacy of child marriages and the prohibition of adoption. Section 5, the concluding section, offers a number of personal reflections on the subject.

2 Relevance of the Sharia to modern social orders and the Sharia's compatibility with human rights law

Amidst the wider analysis of the "war-on-terror" and the "clash of civilizations", Sharia's[4] compatibility with modern norms of human rights law forms a critical and charged debate.[5] Muslims constitute approximately 20 per cent of the total world population.[6] Projected estimates are that by the first quarter of the twenty-first century, Muslims are likely to reach 30 per cent of the global population.[7] The continued relevance of Islam and Islamic law is highlighted by the consistent invocation of the Sharia principles within international, regional and national legal systems.[8] Several states purport to place reliance on the principles of Sharia in implementing their domestic constitutional law and conducting their international relations. At present 15 constitutions name Islam as the official religion; five states have declared themselves to be Islamic republics.[9] Sharia is not only relevant for those states which actively promote and claim to implement Islamic law within their domestic legal systems; Islamic legal principles have also been of increasing relevance in states such as the United Kingdom, France and the United States, which have significant Muslim minorities.[10]

In the European context, the requirements of the Sharia have been invoked in such contentious matters as the wearing of the veil, headscarves and *jilbab* at work and in

4 Islamic law is often referred to as the Sharia. The concept of the Sharia, however, is not confined to legal norms, but conveys a more holistic picture. See R Landau, *Islam and the Arabs* (London: George Allen Unwin 1958), p. 141.

5 See, generally, J Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A critique of the "clash of civilizations" in the new world order* (Oxford: Hart 2005).

6 W B Hallaq, *An Introduction to Islamic Law* (Cambridge: CUP 2009), p. 1.

7 S P Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster 1996), p. 117; D McGoldrick, "Multiculturalism and its discontents" in N Ghanea and A Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Leiden: Martinus Nijhoff 2005), pp. 211–35, p. 228.

8 *LLAMCO Award* 20 ILM (1981) 37, at 201; *SCC Egypt* Case No. 8 of Judicial Year 17 (18 May 2006) – for translation see N J Brown and C B Lonbardi, "The Supreme Constitutional Court of Egypt on Islamic law, veiling and civil rights: an annotated translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)" (2006) 21 *American University International Law Review* 437; *Pakistan* v *Public at Large* PLD 1986 SC 304; *Iftikharuddin* v *Federal Government* (1992) PLD FSC 188; *Hazoor Bakhash* v *Federation of Pakistan* (1980) PLD FSC 145.

9 M A Baderin, *International Human Rights and Islamic Law* (Oxford: OUP 2003), p. 8 (see text accompanying n. 33). According to an earlier study, there are 23 countries recognising Islam as the state religion. See IR al-Fariqi (ed.), *Historical Atlas of the Religions of the World* (1974), p. 279 cited in J L Payne, *Why Nations Arm* (Oxford: Blackwell 1989), pp. 122–3.

10 S Poulter, *English Law and Ethnic Minorities* (London: Butterworths 1986); S. Poulter, *Ethnicity, Law and Human Rights: The English experience* (Oxford: Clarendon 1998).

educational institutions;[11] formalities and the capacity to enter into a marriage;[12] the validity of arranged or forced marriages;[13] recognition of polygamous marriages;[14] the consequences of the *talaq* (unilateral divorce by the husband);[15] and Muslim religious obligations during employment.[16] The continued application of the Sharia in contemporary legal systems has inevitably led to question marks over its compatibility with modern human rights laws and constitutional practices at the domestic level. The subject is contentious and emotive and, not surprisingly, the opinions of international courts and jurists differ radically on this subject. In the *Refah Partisi* case, the European Court of Human Rights (ECtHR) held Sharia to be incompatible with human rights law.[17] In accepting that the dissolution of the Refah Partisi (Turkish Welfare Party) – a party which had advocated the replacement of secularism with the Sharia – by the Turkish Constitutional Court was not a violation of freedom of expression or association as provided for in Articles 10 and 11 of the European Convention on Human Rights (ECHR), the court made the following observations:

> like the Constitutional Court, the Court considers that *sharia*, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of *sharia*, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on *sharia*, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts . . . *In the Court's views, a political party whose actions seem to be aimed at introducing the sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.*[18]

11 *Jilbab* is the plural for *jilaabah*, a term that refers to a long garment worn by Muslim women which normally covers the entire body except for the head, face and hands. See *R (On the application of Begum (by her litigation friend, Rahman)) (Respondent)* v *Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15 (wearing of *jilbab*, a covering more extensive than *hijab*). On the veil, see *Azmi* v *Kirklees MBC, ET* [2007] ELR 125, 6 October 2006, EAT [2007] ICR 1154, 30 March 2007. See also *Bradford Corporation* v *Patel* (1974) unreported (conviction of a Muslim father under the provisions of the 1944 Education Act for failing to send his daughter to a co-educational school on religious grounds).

12 On under-age marriages see *Alhaji Mahammad* v *Knot* [1969] 1 QB 1; [1986] WLR 1446, [1968] 2 All ER 563. See the Immigration Rules, paras 277 (Immigration and Nationality Directorate www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/part8. S Poulter, "The claim to a separate Islamic system of personal law for British Muslims" in S Mallat and J Connors (eds), *Islamic Family Law* (London: Graham and Trotman 1990), pp. 147–66.

13 See *Hirani* v *Hirani* (1983) 4 FLR 232; *R* v *Immigration Appeal Tribunal, ex p. Iqbal* [1993] Imm AR 270.

14 See *Quorasishi* v *Quorasishi* [1983] FLR 706; *Bibi* v *Chief Adjudication Officer* (*Gazette* 94/27, 9 July, 22).

15 *Quazi* v *Quazi* [1980] AC 744; *Chaudhary* v *Chaudhary* [1985] FLR 476; Family Law Act 1986 (Part II); *R* v *Secretary of State for Home Department ex p. Ghulam Fatima* [1986] 2 WLR 693. See UK Visas Enquires www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1038489156801.

16 See *Ahmad* v *Inner London Education Authority* [1978] QB 36, [1977] 3 WLR 396, [1978] 1 All ER 574 (Court of Appeal); *Ahmad* v *UK* (1982) 4 EHRR 126.

17 *Case of Refah Partisi (the Welfare Party) and Others* v *Turkey*, judgment of 13 February 2003 App. Nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 123.

18 *Case of Refah Partisi (the Welfare Party) and Others* v *Turkey*, judgment of 31 July 2001, App. Nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 72 (italics added). Cited in *Case of Refah Partisi (the Welfare Party) and Others* v *Turkey*, judgment of 13 February 2003 App. Nos 41340/98, 41342/98, 41343/98 and 41344/98, para. 123.

In another case, *Dahlab* v *Switzerland*, it was held that prohibiting a primary school teacher from wearing a headscarf was permitted in the circumstances, despite the fact that she had taught in the same school for three years without action being taken and without complaints being made. The ECtHR "[f]urther noted that the impugned measure had left the applicant with a difficult choice, but considered that State school teachers had to tolerate proportionate restrictions on their freedom of religion".[19] More recently, the neutrality of the state education system was held to be a legitimate aim when restricting freedom of religion. This sentiment was echoed in *Leyla Sahin* v *Turkey*[20] where the banning of headscarves by a university was held to be justified and proportionate to the aim. In *Leyla Sahin*, the applicant Ms Sahin complained that a rule established by Istanbul University prohibiting the wearing of the Islamic headscarf during classes and exams violated her Article 9 rights under the ECHR.[21] Ms Sahin regarded wearing the headscarf as a religious obligation, and insisted that wearing the headscarf was a matter of personal choice and that such a personal decision was not incompatible with the principles of secularism as guaranteed by the Turkish constitution.[22] The Turkish government contested the applicant's position and argued that the idea of secularism was vital to the Turkish state remaining a liberal democracy and that the headscarf represented an association with extreme "religious fundamentalist movements" presenting a threat to Turkey's value of secularism.[23] The aforementioned cases indicate the ECtHR's view of the Sharia and its incompatibility and incongruity with evolving norms of modern human rights law in Europe.

At the other end of the spectrum, there is a significant amount of jurisprudence and legal literature, both within Europe and globally, to suggest compatibility between Sharia and human rights law and constitutional principles.[24] Recent advocates of the acceptance of elements of Sharia within domestic law, and specifically the United Kingdom domestic law, have included the Archbishop of Canterbury, Dr Rowan Williams.[25] A system of regulation of Muslim personal law has developed in the United Kingdom which, to a certain extent, achieves this aim.[26] Sharia councils have existed in the United Kingdom since the 1970s, however, "voluntary compliance to Islamic laws in Britain can only pertain to matters concerning the family (marriage, divorce, maintenance, inheritance, etc.) and contractual relationships between two parties".[27] Nevertheless, despite the controversy that surrounded

19 *Dahlab* v *Switzerland*, judgment of 15 February 2001, App. No. 42393/98, 12.

20 Leyla *Sahin* v *Turkey*, judgment of 10 November 2005, App. No. 44774/98. See also *Refah Partisi (the Welfare Party) and Others* v *Turkey*, judgment of 13 February 2003, App. No. 41340/98, 41342/98, 41343/98, 41344/98.

21 *Leyla Sahin* v *Turkey*, judgment of 10 November 2005, App. No. 44774/98. paras 85–101.

22 Ibid. para. 85.

23 Ibid. paras 90–93.

24 See C G Weeramantry, *Islamic Jurisprudence: An international perspective* (Basingstoke: Palgrave Macmillan 1988); G Eaton, *Islam and the Destiny of Man* (Cambridge: Islamic Texts Society 1994); S S Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, unequal before man?* (The Hague: Kluwer Law International 2000); S Mahmassani, *Arkan Huquq-al-Insan* (Beirut: Dar-'ilmli'-Malayin 1979); S Mahmassani, "The principles of international law in the light of Islamic doctrine" (1966) 117(I) *Recueil des Cours de l'Académie de Droit International* 205; M A Baderin "Human rights and Islamic law: the myth of discord" (2005) 2 *European Human Rights Law Review* 165.

25 Archbishop of Canterbury, Dr R Williams, "Archbishop's Lecture – Civil and Religious Law in England: A religious perspective", Royal Courts of Justice, 7 February 2008, www.archbishopofcanterbury.org/1575.

26 R C Akhtar, "British Muslims and the evolution of the practice of Islamic law with particular reference to dispute resolution" (2010) 6 *Journal of Islamic State Practices in International Law* 26; I Yilmaz, "Law as chameleon: the question of incorporation of Muslim personal law into the English law" (2001) 21 *Journal of Muslim Minority Affairs* 297.

27 Akhtar, "British Muslims", n. 26 above, p. 28.

the Archbishop of Canterbury's comments,[28] some 85 informal Sharia councils are thought to operate in the United Kingdom.[29] Further, the English courts have taken a positive attitude towards the Sharia in two recent cases: in *Noah* v *Desrosiers t/a Wedge* an employment tribunal found indirect discrimination in a case where an applicant was not considered for a position at a hairdressing salon due to her wearing of the *hijab*;[30] and in *Uddin* v *Choudhury and Others* the court was willing to accept evidence of marriage under Sharia law.[31]

3 International conventions and the interaction of the Sharia with child rights at the international and domestic levels

The most pertinent international instruments related to children are the CRC[32] and the Convention on the Elimination of Discrimination against Women.[33] Both treaties, in raising concerns about the potential conflict with the Sharia, have been the subject of substantial reservations by Islamic states. Following the adoption of the CRC, a large number of Islamic states entered reservations or declarations either to the entire Convention or to specific provisions.[34] Although several reservations have been based on constitutional and national laws, Ali makes the valid point that: "Muslim countries are unique in the fact that they have specifically identified the Islamic religion and Islamic law as justification for many of these reservations."[35] Further, these reservations have been a cause for concern, as the problem:

> [i]s not so much with the number of reservations as it is with the nature and impact of the reservations that have been made. Many states, particularly, Islamic states, have made broad, general reservations that aim to modify or exclude the application of any provisions of the convention that are at variance with Islamic values and laws.[36]

While a number of Islamic states have made broad general reservations, described by Hashemi as "General *Shariah* based reservations",[37] a significant number of Islamic states have also made reservations to specific articles of the CRC. Article 14, on freedom of religion, and Article 21 in relation to adoption have, in particular, been subject to a significant number of reservations by Islamic states. Therefore:

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28 See, for example, S Doughty and M Seamark, "Sharia law row: archbishop is in shock as he faces demands to quit and criticism from Lord Carey", *Daily Mail*, 9 February 2009, www.dailymail.co.uk/news/article-512876/sharia-law-row-Archbishop-shock-faces-demands-quit-criticism-Lord-Carey.html; R Gledhill and P Webster, "Archbishop of Canterbury argues for Islamic law in Britain", *The Times*, 8 February 2008 www.timesonline.co.uk/tol/comment/faith/article3328024.ece; J Petre and A Porter, "Adopt Sharia law in Britain, says the Archbishop of Canterbury Dr Rowan Williams", 8 February 2008, at www.telegraph.co.uk/news/uknews/1578017/Adopt-sharia-law-in-Britain-says-the-Archbishop-of-Canterbury-Dr-Rowan-Williams.html.

29 Akhtar, "British Muslims", n. 26 above, p. 29.

30 A *hijab* is a female head covering in the Islamic tradition, usually through a headscarf: *Noah* v *Desrosiers t/a Wedge* [2008] Employment Tribunal Case No. 2201867/07 (29 May 2008).

31 *Uddin* v *Choudhury and Others* [2009] EWCA Civ 1205 (21 October 2009).

32 Adopted at New York, 20 November 1989. Entered into force 2 September 1990. UN GA Res. 44/25 Annex (XLIV), 44 UN GAOR Supp. (No. 49) 167, UN Doc. A/44/49 (1989) at 166; 1577 UNTS 3. 28 ILM (1989) 1448.

33 International Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, UN, Treaty Series, vol. 1249, p. 13.

34 See W Schabas, "Reservation to the Convention on the Rights of the Child" (1996) 18 *HRQ* 472.

35 Ali, "A comparative perspective", n. 3 above, p. 142.

36 L J Leblanc, "Reservations to the Convention on the Rights of the Child: a macroscopic view of state practice" (1996) 4 *International Journal of Children's Rights* 357, p. 379.

37 Hashemi, "Religious legal traditions", n. 3 above, p. 198.

> [i]n the context of the Children's Convention, there are serious concerns that Islamic States parties will merely give formal recognition to some of the fundamental rights provisions laid down in the Convention without giving them substantive effect in domestic law.[38] Additional impediments to the enforcement of the CRC, have been noted in relation to Islamic and Arab States, such as Jordan where "like many Arab countries, there are strong and deep-rooted tribal notions that the welfare of the collective supersedes that of the individual, and that children are the property of the collective family".[39]

A particularly problematic subject has been that of the definition of the "child" within international law and within the Sharia. Article 1 of the CRC in providing a definition of the child, notes as follows:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

This provision represents a compromise since states, especially those purporting to implement Sharia-based principles, differ in their views on the age of majority. At the same time the phrase "unless, under the law applicable to the child, majority is attained earlier" has seriously undermined any positive feature within this article. According to McGoldrick:

> Article 1 clearly permits the national law of a State to provide that majority is attained at an age earlier than eighteen. Although that individual is then entitled to all the human rights of an adult, the special protection applicable to children no longer covers them. A minimum age limit for the declaration of majority by national laws should have been included.[40]

A lack of clarity – resulting from the position adopted by several Islamic states during the drafting stages of the convention – has led to unfortunate instances whereby domestic laws impose duties, obligations and criminal responsibility on children. The concepts of maturity and childhood are interrelated in Islamic legal traditions with the consequence that upon reaching maturity, the child:

> is subject to all the rights, duties and responsibilities of an adult. These responsibilities and rights include criminal responsibility, the right to dispose of and possess his/her property as well as the right to make decisions regarding his/her marriage.[41]

While several Islamic states have accepted that 18 is the age of maturity, as contained in Article 1 of the CRC, huge inconsistencies still exist in relation to the permissible age of marriage and the age of criminal responsibility. Hashemi makes the point that at 15, a child is legally regarded as having the age of maturity and the age of criminal responsibility in several states including Syria, Sudan, Pakistan and Iran.[42] In relation to criminal responsibility in Nigeria, Ogunniran explains that while the Kaduna State Criminal Procedure Code forbids sentences of *hudood* or *qisas* under the age of *taklif*, this does not

38 S Syed, "The impact of Islamic law on the implementation of the Convention on the Rights of the Child: the plight of non-marital children under Shari'a" (1998) 6 *International Journal of Children's Rights* 359, p. 360.

39 L Hammad, "Rights in context: questioning universality in the implementation of children's rights using Jordan as a case study" in A Alen et al. (eds), *The UN Children's Rights Convention: Theory meets practices* (Antwerp: Intersentia 2007), pp. 3–21, p. 7.

40 D McGoldrick, "The United Nations Convention on the Rights of the Child" (1991) 5 *International Journal of Law and Family* 132, at p. 133.

41 Hashemi, "Religious legal traditions", n. 3 above, p. 198.

42 Ibid. p. 200.

seem to have been implemented in practice.[43] Further, the permissible age of marriage varies significantly in Islamic states, with Saudi Arabia not setting a permissible age and Iran setting the permissible age at 15 for boys and 13 for girls, raising additional questions of gender-based discrimination.[44]

An additional concept, which has been a cause of difficulty for several Islamic states, particularly in child custody cases, is that of "the best interests of the child". Article 3(1) of the CRC provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In this respect, Egypt has argued "that the best interests of a child: 'would inevitably have to take into account the environment, conditions and customs in a given society; the best interests of the child could not refer to a uniform standard throughout the world'".[45] The application of this principle raises particular issues in marital disputes involving custody and guardianship of children. Islamic law specifies a difference between *hiznat* (custody) and guardianship. Hashemi notes:

> [a]nother distinction is that [Islamic law] recognizes specific rules in regard to the custodial rights of either the father or the mother. In the case of divorce, deciding custody issues in [Islamic law] was primarily based on the child's age, rather than "the child's best interests".[46]

Ali in this respect argues:

> One does not come across any verse of the Quran establishing the father as the sole legal guardian. However, there is a saying of the Prophet Mohammed (PBUH), which is an extract of his sermon on the occasion of the Last Pilgrimage (Hijjat-ul-Widah) to the effect that "[T]he child belongs to him/her on whose bed it is born." Within the patriarchal set up of society, the man (in this case the husband) has to provide the household effects including the bed on which the child is born. It is therefore inferred that the child belongs to the father. This is in line with the earlier mentioned Islamic law argument of the father being made to pay for feeding and rearing his child even if it be by the child's own mother. But it may be argued here that these injunctions/recommendations are always prefaced by the economic superiority of the man. The question that we would like to pose here is: What would be the position if one was to reverse situations and the woman/mother was the breadwinner/provider of the family? Another thought that surfaces here is that in the Quranic verses on joint parental obligations regarding child rearing, the emphasis is on consensus. If the father was the sole "owner" of the child, it would enable him to exercise arbitrary powers within these relationships and

43 *Hudood* is the plural of *had*, which refers to a crime against the law of God. Seven crimes are specified within the Muslim holy book, the *Quran*, and for which prosecution and punishment in case of guilt is deemed mandatory. *Qisas* (or *quesas*) are crimes against the person, such as murder, homicide, maiming, serious bodily harm. The Sharia provides for retaliation or compensation (*diyya*) once guilt is established. *Taklif* is legal responsibility. I Ogunniran, "The Child Rights Act versus Sharia law in Nigeria: issues, challenges and a way forward" (2010) 30 *Children's Legal Rights Journal* 62, p. 69.

44 See, generally, L Askari, "The Convention on the Rights of the Child: the necessity of adding a provision to ban child marriages" (1998) 5 *ILSA J Intl and Comp L* 123, p. 124.

45 S Harris-Short, "International human rights law: imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child" (2003) 25 *HRQ* 130, pp. 152–3 quoting Egypt, Summary Record of the 680th Meeting: Egypt, UN Committee on the Rights of the Child, UN Doc. CRC/C/SR.680, 51.

46 Hashemi, "Religious legal traditions", n. 3 above, p. 213.

> the best interests of the child would not be of primary consideration as it presently is.[47]

The award of automatic legal guardianship (or *wali*) to the father and the decision to grant custody based on age rather than upon the principle of the best interests of the child departs radically from the spirit and provisions of the CRC. As the second periodic report from Pakistan noted:

> [u]nder the provisions of Islamic law, as applied in Pakistan, the general rule is that custody of a boy who has not attained the age of 7 and that of a girl who has not attained puberty is to remain with the mother. The male child up to this age, and the female child during most of her young age, is considered to be better off in the custody of the mother.[48]

Notwithstanding the overwhelming ratification of the CRC, domestic courts within Islamic states regularly interpret the Sharia to the detriment of the mother and girl child.[49]

4 Child rights and the issues facing the Islamic world – the application of *kafalah*, child marriages and the "option of puberty"

The central argument which this paper advances is that a rigid application of the Sharia principles not only negates the provisions of the CRC, but would also be hugely detrimental to constitutional principles designed to ensure the welfare of the child within domestic legal frameworks. In order to illustrate this point, two examples are presented. These relate, firstly, to issues arising from the Islamic systems of child marriage and the so-called "option of puberty" and, secondly, to *kafalah*.[50] In each instance, although complication arises through the application of the Sharia within Islamic states, there are transnational legal consequences. The first controversial example, as noted above, relates to the age of marriage and the so-called "option of puberty" existing and being valid within modern Islamic states. As already observed, within Islamic states the permissible age of marriage varies

47 Ali, "A comparative perspective", n. 3 above, p. 158.

48 A A A Fyzee, *Outlines of Muhammadan Law* (Delhi: OUP 1974), pp. 208–9. Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second Periodic Reports of States Parties due in 1997 (CRC/C/65/Add. 21) (11 April 2003) para. 89. This position was confirmed by the High Court of Justice in *Mst Farah Iqbal (Petitoner)* v *Muhammad Anwar and Two Others (Respondent)* where the court made the following observations: "Decisions relating to [the] custody of minors are regulated under Islamic Personal Law and there is [a] consensus amongst the Muslim jurists that, for her right of custody (*hizanat*) the mother is entitled to keep . . . custody of [a] male child up to the age of 7 years, when he becomes independent, himself capable of [taking care of himself], drinking, eating and performing other natural functions without assistance and thereafter the custody devolves upon the father or next parental relation. Thus the right of the mother to custody in respect of [a] male child ceases at the age of 7 years. The right of '*Hizanat*' qua a female child pertains to [the] mother till the appearance of menstrual discharge i.e. [the] age of puberty. Thereafter, [the] father becomes entitled to the custody of [a] female child. [Moreover], the mother['s] . . . custody of [the] child becomes disentitled or [she] loses the right of custody of a minor on the following grounds: (1) If she marries a person not related to the female child within the prohibited degree; or (2) If she goes to reside during the subsistence of the marriage, at a distance from the minor's father's place of residence; (3) If she is leading an immoral life, as . . . a prostitute; or (4) If she neglects to take care of the child." See *Mst Farah Iqbal (Petitioner)* v *Muhammad Anwar and Two Others (Respondents) Constitutional Petition* N370 of 2002, decided on 7 April 2003; PLD 2003 Quetta 131, at 134.

49 For the case of Iran, see Z Mir-Hosseini, *Marriage on Trial: A study of Islamic family law in Iran and Morocco; Islam and gender* (London: IB Tauris 2000).

50 *Kafalah* is a voluntary undertaking to take care of a minor, including maintenance and protection of the minor in a manner similar to the natural parents towards their child. *Kafalah* has some similarities with but, in the light of major differences, is not regarded as equivalent to adoption. *Kafeel* describes a person who undertakes *kafalah*. See F Pereira, *The Fractured Scales: The search for a uniform personal code* (Calcutta: Stree 2002); T Monsoor, *Judiciary and Gender on Trial: Reported and unreported decisions of family courts* (Dhaka: British Council 2004).

significantly. Saudi Arabia has not set a permissible age, Iran permits lawful marriages for boys at 15 and 13 for girls, Muslim child marriages (sanctioning the marriage of girls as young as nine) continue to be deemed lawful within the South Asian traditions of Pakistan and Bangladesh.[51] It is also the case that certain Islamic schools including the predominant Islamic school, the *Hanafi* school, grant authority to the parent or the guardian (*wali*) to enforce child marriages, with the so-called "option of puberty". Thus, as one scholar has put it "under the Muhammadan law of all schools, the father has the power to give his children of both sexes in marriage without their consent, until they reach the age of puberty".[52] Under this interpretation of Muslim family laws, the guardian's power to agree to the child marriage comes to an end once the child has attained the age of puberty. Once the child has reached the age of puberty, he or she could invoke the "option of puberty" in order to rescind the marriage provided that the consummation of marriage has not taken place.[53]

The "option of puberty" is legitimised and legislatively enshrined within the constitutional frameworks of several modern Islamic states. In Pakistan and Bangladesh, in legitimising the "option of puberty" the Dissolution of Muslim Marriage Act (1939) (as amended by the Muslim Family Law Ordinance 1961) provides:

> **2. Grounds for decree for dissolution of marriage.**
>
> A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:
>
> . . . that she, having been given in marriage by her father or other guardian before she attained the age of [eighteen][54] years, repudiated the marriage before attaining the age of [nineteen][55] years: Provided that the marriage has not been consummated

Contrast this legislative authority and considerable rampant practices of child marriages to the vocal criticism and condemnation, emanating from and including the Islamic world. Thus, the Rabat Declaration on Child Issues calls "upon all Member States to take the necessary measures to eliminate all forms of discrimination against girls and all harmful traditional or customary practices, such as child marriage and female genital mutilation".[56] While no provision in the CRC explicitly refers to child marriage, it is patently obvious that child marriages would violate fundamental principles, such as the right to life (Article 6), the right to health (Article 24), the right to be protected from harmful practices (Article 24), the right to freedom from abuse and exploitation (Articles 19, 34, 39), contained within the CRC.[57] Having regard to these concerns, the Committee on the Rights of the Child considered the minimum age for marriage during its general discussion day on the girl child:

> The Committee had also identified certain areas where law reform should be undertaken, in both the civil and penal spheres, such as the minimum age for marriage and the linking of the age of criminal responsibility to the attainment

51 For a survey of the relevant legal position, see www.law.emory.edu/ifl/. A A An-Na'im, *Islamic Family Law in a Changing World: A global resource book* (London: Zed Books 2002).

52 Fyzee, *Outlines of Muhammadan Law*, n. 48 above, pp. 208–9.

53 D Pearl and W Menski, *Muslim Family Law* (London: Sweet & Maxwell 1998), p. 157, also see *Said Mohammod* v *The State*, PLD 1995 FSC 1.

54 Substituted by s. 2 of the Muslim Family Laws Ordinance (VIII of 1961).

55 Ibid.

56 Rabat Declaration on Child's Issues in the Member States of the Organization of the Islamic Conference www.isesco.org.ma/english/.../Final%20Agreed%20Declaration.pdf.

57 See International Planned Parenthood Federation and the Forum on Marriage and the Rights of Women and Girls, *Ending Child Marriage: A guide for global policy action* (London: IPPF 2006), p. 25.

> of puberty. In several States the minimum age for marriage was different for girls and boys. To explain this, States had often argued that girls attain physical maturity earlier. However, maturity cannot be identified simply as physical development; social and mental development also had to be taken into account. Moreover, on the basis of such criteria, girls are considered as adults before the law upon marriage, thereby being deprived of the comprehensive protection of the Convention.[58]

Furthermore, Article 16(2) of the Convention on the Elimination of Discrimination against Women states "[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory".[59] Notwithstanding the denunciation of child marriages, this practice persists alongside the application of the so-called "option of puberty". The combined effect of child marriage and the application of the "option of puberty" result in a valid marriage for minors, provided the guardian was an adult with a sane mind and able to provide an effective consent. Recent years have witnessed the extension of the application of the "option of puberty" not only to minors, but also to adults without the capacity to provide a valid consent, such as those with mental disabilities. This point was substantiated in the case of *City of Westminster* v *IC and KC and NNC*.[60] In this case, the issue before the English courts was whether consent given to marriage by the father of a 26-year-old man (who was himself suffering from autism) was valid consent for the purposes of telephonic marriage conducted with an adult and sane woman in Bangladesh.

In his judgment of December 2007, Mr Justice Roderic Wood (dated 21 December 2007) made the following observations:

> Is IC's "Marriage" Lawful in Sharia Law and Bangladesh Civil Law?
>
> I have recorded above the unanimity of view that IC's marriage is lawful both in Sharia and in Bangladeshi civil law . . .
>
> Despite IC's incapacity to consent, a mentally incapable adult can contract a legally valid marriage under Islamic law. I need not set out the bulk of the conditions, but what is essential is that for these purposes IC has a guardian (a marriage guardian) who has full mental capacity, and who has the right to give his consent for his son's marriage, notwithstanding the incapacity of IC.
>
> A further requirement is that the bride, in this case NK, was herself without disability, and consented freely. She is and she did.
>
> Irrespective of IC's ability or inability to consent, the father of IC (his marriage guardian) "may legitimately act in the best interests of his Ward to arrange, solemnise and contract a marriage for that individual which binds that individual and the spouse in all respects". (paras 53–9)

This point remained valid and was accepted by the Court of Appeal on appeal in the decision of Roderic Wood J.[61]

58 CRC, General Discussion on the Girl Child, UN Doc. CRC/C/38 [294] www2.ohchr.org/english/bodies/crc/discussion2008.htm.

59 See J Rehman, *International Human Rights Law* (London and New York: Longman 2010), pp. 520–54.

60 *City of Westminster* v *IC, KC and NNC* [2007] EWHC 3096.

61 See *KC and Another* v *City of Westminster Social and Community Services Department and Another* [2008] EWCA Civ 198, paras 32 and 49.

While they have undertaken the international obligations (as contained in the CRC and the Convention on the Rights of Persons with Disabilities 2007),[62] a number of Islamic states continue to legitimise sexual abuse of disabled persons under the guise of the Sharia. In order to ensure respect for the dignity and physical health of disabled persons, such exploitative practices must come to an end.

The second, controversial, example relates to the application of the Sharia laws on *kafalah*.[63] Sharia, as is well known, does not recognise a Western-style concept of the adoption of minors. In prohibiting adoption, the Sharia offers the alternative scheme of *kafalah*. Ali has elaborated upon the purposes of prohibition on adoption in Islamic law which:

> were to contain and, in certain cases, to root out social evils. For example, the tribal Arab psyche of "accumulation" if one may use the term, of male children provided extra hands during tribal warfare, and so on . . . Second, the issue of adopted children coming within prohibited degrees of relationship had to be considered . . . Third, the right of a child to be informed of and give the right to use his parents' identity was sought to be established.[64]

Further, the Organization of the Islamic Conference Declaration on the Rights and the Care of the Child in Islam proclaims:

> Islam has given every child the inalienable right to a relationship of lineage to his or her "father". Therefore, Islam prohibits adoption because it deprives the child of this right. At the same time, Islam does not prevent any family from providing Kafalah to and caring for a child alien to the family. Indeed, Islam strongly urges such deeds.[65]

The *kafalah* system differs radically from the English law on adoption including the following obvious distinctions. Firstly, the adopted child retains the surname of his or her biological parent and does not take the name or identity of the adoptive parent. Secondly, the adopted child does not have any automatic entitlement to inheritance from the adoptive parents and inherits from the biological parents. Thirdly, and most crucially, the adopted child is not regarded as a blood relative and, therefore, cannot be regarded as *mahram* to members of the adopting family. Hence, once the child grows, he or she is not within a category which prevents marital relations amongst members of the adopting family.[66] This later aspect was characterised in the personal experience of the Prophet Mohammad (PBUH), the Prophet of Islam, whereby he was able to marry his adopted son's divorced wife: the abolition of the practice of adoption, allowed the Prophet to renounce the hitherto relationship between himself and his adopted son, Zaid, and his divorced wife Zinayab. The varying schools of Sharia reflect considerable flexibility in the operation of *kafalah*, and there is clearly no doubt again from the examples of the Prophet's own tradition (the Prophet himself being an orphan) of the paramount nature of love and care

62 Adopted by the UN General Assembly during its 61st Session: see GA Res. 61/611 (13 December 2006) A/61/611; 15 IHRR 255.

63 See S Ishaque, "Islamic principles on adoption: examining the impact of illegitimacy and inheritance related concerns in context of a child's right to an identity" (2008) 22 *International Journal of Law, Policy and the Family* 393; J H Chamberlayne, "The family in Islam" (1968) 15(2) *International Review for the History of Religions* 119–41; J Bargach, *Orphans of Islam: Family, abandonment, and secret adoption in Morocco* (Lanham MD: Rowman & Littlefield 2002).

64 Ali, "A comparative perspective", n. 3 above, p. 154

65 Declaration on the Rights and Care of the Child in Islam, www.oic-oci.org/english/conf/fm/22/resolution22-c.htm#16.

66 *Mahram* is a kin with whom marriage or a sexual relationship is prohibited. See J Bargach, "A study on abandonment and the practice of Kafala in Morocco for Amici Dei Bambini", www.childout.org/data/doc/doc_e7f9dc3540c6be0a3b79ac8d90e02b07.pdf.

for orphans and needy children.[67] Under the *kafalah*, adopted children may be given gifts and bequests made in their favour. Similarly, Sharia principles establish that, in instances where the adopted child is raised by the *kafeel* mother through breastfeeding, it establishes the bond of being a *mahram* thereby preventing the possibility of any subsequent marital relationship either with the mother or with the siblings in the family.

The concept of *kafalah* is recognised by the CRC in Article 20 which states:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21 continues: "States Parties that recognize and/or permit the system of adoption shall ensure . . .": consequently, State Parties that do not recognise adoption are not obliged to abide by this provision. While the CRC, clearly does not try to enforce adoption in states where it is not permitted, a number of Islamic states have nevertheless lodged reservations in this respect. Syria explains that:

> The laws in effect in the Syrian Arab Republic do not recognize the system of adoption, although they do require that protection and assistance should be provided to those for whatever reason permanently or temporarily deprived of their family environment and that alternative care should be assured them through foster placement and *kafalah*, in care centres and special institutions and, without assimilation to their blood lineage (*nasab*), by foster families, in accordance with the legislation in force based on the principles of the Islamic *Shariah*.[68]

Notwithstanding this broader interpretation, Islamic *kafalah* continues to pose problems. In the Islamic world, a significant majority of the children placed in *kafalah* are abandoned children or are orphans. An inability to adopt the identity and to inherit from the adopting parents is particularly unfortunate for those who have been condemned by the state as well as the society. A further highly tragic consequence in the existing manipulative societies is the probable risk of sexual or physical abuse of young vulnerable children, especially if these minors are not to be regarded as *mahram*. The implementation of *kafalah* across national jurisdictions is equally problematic. Thus, if a family from the UK intends to undertake an adoption in a country such as Morocco which allows international adoptions, there remain serious impediments. Firstly, the *kafeel* parents have to be Muslims.[69] Once they are able to satisfy the local judge of their ability to act as *kafeel* parents, an order can be made in their favour. However, they are never in real terms recognised as the equivalent of adoptive parents. The child's guardianship remains in the

67 Ali, "A comparative perspective", n. 3 above, p. 153

68 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

69 See Bargach, "A study on abandonment", n. 66 above.

control of a local judge, the Judge of Minors' Affairs.[70] The judge oversees that the conditions of adoption are complied with, including education and upbringing. A failure to comply with these conditions will allow the judge to terminate the *kafalah*.[71] In order to provide for any inheritance, the *kafeel* parents need to approach the Judge of Minors' Affairs who prepares the relevant documents. In order to take the child abroad, specific permission is needed from the Judge of Minors' Affairs. If the child is to reside abroad, the consulate of the country is required to consistently provide the Judge of Minor's Affairs with a follow-up report on the conditions of the adopted child. These requirements of *kafalah*, as in the case of Morocco, have raised considerable difficulties, in particular for couples wishing to undertake international adoptions. In the face of such stringent requirements, courts are often challenged as how best to deal with the *kafalah* orders delivered under Islamic jurisdictions.[72]

5 Comprehending the Sharia – flexibility and reform process within Islamic state practices: concluding reflections

Analysed through the spectrum of such abominable practices as child marriages or enforced marriages for persons with disabilities, the legitimacy of the Sharia is substantially undermined. The critics of the Sharia would therefore endorse the scepticism expressed by the ECtHR over Islamic law's ability to offer compatibility with the changing human rights values. Similarly, states following the Sharia could never legitimately claim to protect child rights within modern societies. Fortunately, the picture is not as bleak as the critics of the Sharia might portray. The difficulty is not so much with the application of the Sharia within modern domestic frameworks as it is with the interpretation and continual reform within Islamic legal traditions. Laws sanctioning child marriages (or authorising the father or guardian to have the right to marry children or wards) performed under the "option of puberty" represent archaic segments of indigenous tribal traditions – these traditions persist, preventing reform movements projected by the Sharia or by modern human rights laws. Child marriages, enforced marriages or discrimination against the girl child have not only been issues within Muslim societies, but are phenomena with historic roots in South Asia, the Americas, Africa and Europe. The Sharia, with a literal meaning of "path to the running water", has a reform mechanism built into it, with substantial possibilities of evolution within Islamic legal traditions. The true essence of the Sharia is brought out by Parwaz who notes that: "[t]he *sharia* refers to a straight and clear path and also to a watering place where both humans and animals come to drink water, provided the source of water is a flowing stream or spring".[73] It is, therefore, as another scholar argues "no slight irony

70 According to Article 7 of the "Adoption of Neglected Children (Kafala)" 01-15, issued by Dahir number 1.02.172 (2002) of Morocco "the judge . . . responsible [for] . . . minors['] affairs has the right of custody or guardianship . . . [of] neglected children for the prosecution of legitimate and legal prosecution[s] provided in the Personal Status Code and the Code of Civil Procedure", www.sgg.gov.ma/BO/bulletin/Ar/2002/BO_5031_ar.pdf.

71 Ibid. Article 24.

72 *Re J (Adoption: Consent of Foreign Public Authority)* [2002] EWHC 766 (Fam); [2002] 2 FLR 618; [2002] 3 FCR 635; [2002] Fam Law 651; *Newcastle City Council* v *Z (S (A Child), Re)* [2005] EWHC 1490 (Fam); [2007] 1 FLR 861; [2007] Fam Law 10; *Re Dra* (Unreported, 24 March 2004) (CE (F)) (commentary available (2005) (Autumn) *PL* 658–60).

73 GA Parwez, *Lughat-ul-Quran: Lexicon of the Quran* 4 vols (Tulueislam 1960), p. 941.

and tragedy that the sharia, which has the idea of mobility built into its very meaning, should have become a symbol of rigidity for so many in the Muslim world".[74]

The Sharia has made numerous positive contributions, such as the prohibition of infanticide, the enhancement of the rights of the girl child and restraining polygamous marriages.[75] In a similar vein, as has been considered earlier, the *kafalah* system in itself is not antithetical to promoting and protecting the best interests of the child. There are considerable examples within Islamic traditions to reflect both the positive features as well as flexibility in the *kafalah* system – there is no doubt from the examples of the Prophet's own tradition of the paramount nature of love and care for orphans and needy children. Under the *kafalah* system, adopted children can be given gifts or bequests. Similarly, the Sharia principles establish that in instances where the adopted child is raised by the *kafeel* mother through breastfeeding, it establishes a bond of being a *mahram* thereby preventing the possibility of any subsequent marital relationship either with the mother or with the siblings in the family. If allowed to prosper and develop, over a period of time, the Sharia principles would undoubtedly shed all discriminatory actions and amalgamate wholeheartedly the evolving norm of child rights and gender-based equality.

74 R Hassain, "The role and responsibilities of women in the legal and religious tradition of Islam", paper presented at a biannual meeting of a Trialogue of Jewish–Christian–Muslim scholars on 14 October 1980 at the Joseph and Rose Kennedy Institute of Ethics, Washington, DC, USA, p. 4.

75 See J Rehman, "The *sharia*, Islamic family laws and international human rights law: examining the theory and practice of polygamy and talaq" (2007) 21 *International Journal of Law, Family and Policy* 108.

NILQ 62(2): 167–82

The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's rights instruments?

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Abstract

Article 40 of the United Nations Convention on the Rights of the Child[1] *requires states parties to take appropriate measures to ensure that children accused of committing offences are treated in a manner that would ensure that their best interests are upheld. South Africa*[2] *ratified the CRC in 1995, the provisions of which have influenced the children's rights clause in its 1996 Constitution. Section 28(1)(g) of the Constitution stipulates that children may not be detained, except as a measure of last resort and, should they be detained, it should be for the shortest appropriate period of time. Section 28(1)(g) goes further to give domestic effect to the following guarantees stipulated in Article 40 of the CRC: (1) the right to be treated in a manner, and kept in conditions, that take account of the child's age; and (2) to have a legal practitioner assigned to the child. Recently, SA has enacted its Child Justice Act 75 of 2008, which came into operation on 1 April 2010. The question to be covered in this article is whether this Act truly complies with the international standards set by the CRC (15 years after SA ratified it); the general comments by the United Nations Committee on the Rights of the Child*[3] *and other non-binding, yet persuasive instruments like the Standard Minimum Rules on the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. This article only examines four aspects of the Child Justice Act, being: criminal capacity; pretrial release and detention; diversion; and sentencing. It concludes that, but for a few technical aspects of the Child Justice Act, SA took significant steps to comply with its international obligations when it domesticated the CRC in relation to children who commit offences.*

1 Introduction

During 1995 the Republic of SA ratified the United Nations CRC. This Convention would in essence require the government of SA to harmonise its provisions in order to comply with the international standards and obligations created. After the ratification of this instrument the government set out on a process of harmonisation by instructing the

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1 The United Nations Convention on the Rights of the Child was adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990. Hereinafter referred to as CRC.

2 Hereinafter referred to as SA.

3 Hereinafter referred to as the Committee.

South African Law Commission (SALRC)[4] to investigate the extent of the existing legislation's compliance with the CRC. At the same time, this harmonisation period had to take into account the advances already made in relation to children's rights by both the interim[5] and 1996[6] constitutions of SA.

Apart from investigating the extent to which the then Child Care Act[7] and other legislation, such as like the Children's Status Act,[8] complied with the Constitution and international law, the SALRC was also tasked with investigating whether the provisions in the current Criminal Procedure Act[9] and other criminal procedural laws complied with the Constitution and international law for children who come into conflict with the law. The result of both these processes was a complete legislative overhaul which saw the enactment of the Children's Act,[10] the Children's Amendment Act[11] and the Child Justice Act.[12] This article will assess whether the Child Justice Act complies with the CRC and other international treaties and rules to which SA is a party/signatory. This article will first assess the international framework against which compliance will be judged, before giving an overview of the Child Justice Act. Once this is completed, an analysis of four provisions in the Child Justice Act will be investigated. These four provisions relate to criminal capacity, detention and release, diversion, and sentencing of children under the Child Justice Act. A conclusion will follow.

This article will only assess the substantive provisions and will not delve into the practical implications of the Child Justice Act, as this Act is only a few months into operation at the time of writing.

2 International framework

In light of the international child justice standards found within the CRC, multiple initiatives were undertaken before the adoption of this treaty and in parallel with its development. These include both the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,[13] the United Nations Guidelines for the Prevention of Juvenile Delinquency[14] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[15] Even though all three of these instruments are of a non-binding nature (based on the fact that they are declarations and not treaties) they do hold great persuasive weight.

The CRC was the first treaty that solely focused on codifying the rights of children in an international arena. Adopted on 20 November 1989, the CRC came into force on 2 September 1990. This comprehensive treaty contains 54 articles which cover a wide range

4 At that time, it was known as the South African Law Commission. Now it is known as the South African Law Reform Commission. This commission is tasked with doing research on creating new legislation. Hereinafter referred to as the SALRC.

5 S. 30 of the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

6 S. 28 of the Constitution of the Republic of South Africa, Act 108 of 1996. Hereinafter referred to as the Constitution.

7 Act 74 of 1983. This Act dealt with the care and protection of children in SA.

8 Act 82 of 1987.

9 Act 51 of 1977.

10 Act 38 of 2005.

11 Act 41 of 2007.

12 Act 75 of 2008.

13 GA Res. 40/33 of 29 November 1985. Hereinafter referred to as the Beijing Rules.

14 GA Res. 45/ 112 of 14 December 1990. Hereinafter referred to as the Riyadh Guidelines.

15 GA Res. 45/ 113 of 14 December 1990. Hereinafter referred to as the JDL Minimum Standards.

of topics including: Article 37, that deals broadly with children deprived of their liberty and the prevention of torture; Article 39, that deals with the physical and psychological recovery and social reintegration of children; and Article 40, which calls for a criminal justice system that is suitable for children who come into conflict with the law.

Article 43 of the CRC establishes a Committee on the Rights of the Child[15] which is tasked with monitoring the implementation of the CRC in domestic laws by countries that have ratified this treaty. A duty of this Committee is to produce general comments which provide states parties to the CRC with recommendations on how specific provisions should be interpreted. During 2007, at its 45th session the Committee released General Comment No. 10 that deals with Children's Rights in Juvenile Justice. In light of creating a criminal justice system that is compliant with the CRC and in the best interests of children, the provisions of General Comment No. 10 play a vital role in interpreting Articles 37 and 40 of the CRC.

3 The Child Justice Act: historical background and overview

SA saw the start of an overhaul of the child justice system during 1995 when the then Minister of Justice, advocate Dullah Omar,[16] instructed the SALRC to investigate and propose a Draft Bill for children who come into conflict with the law. After publishing issue and discussion papers on juvenile justice, the SALRC published an extensive report on juvenile justice and a draft Bill,[17] which was sent to the Department of Justice during July 2000, where it remained for two years before being tabled in Parliament. The draft Bill was introduced into Parliament as the Child Justice Bill 49 of 2002.

In Parliament the contents of the Child Justice Bill were debated for approximately two years by the Portfolio Committee on Justice and Constitutional Development. The deliberations in Parliament ceased for the politicians to focus on the parliamentary elections in 2004.[18] The Child Justice Bill was then set aside until 2008. After all the deliberations in the various houses and committees of Parliament, the Bill was finally sent to the president to sign into law. The president signed the Bill during May 2009, with an implementation date set for 1 April 2010. At this stage, the Bill was known as the Child Justice Act 75 of 2008. The reason for the delay in implementation was to give government and civil society time to put mechanisms and machinery in place for the operation of the Child Justice Act.

The preamble to the Child Justice Act stipulates that it was, among others, enacted:

> to establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the republic.

With this in mind, the Child Justice Act sets out an entirely new procedure for children who come into conflict with law, an area that was previously regulated by the Criminal Procedure Act.

The Child Justice Act is a comprehensive piece of legislation that is divided into 14 chapters. The Act also organises offences, according to the seriousness of the committed

16 The late advocate Dullah Omar was previously the director of the Community Law Centre at the University of the Western Cape, where a plethora of research was undertaken into juvenile justice. Upon taking up a position as the Minister of Justice in Nelson Mandela's cabinet, he made it a priority to start the process of creating a criminal justice system that caters for the needs of children who come into conflict with the law.

17 SALRC, *Report on Juvenile Justice* (Project 106), July 2000.

18 J Gallinetti, "What happened to the Child Justice Bill: the process of law reform relating to child offenders" (2006) 17 *South African Crime Quarterly* 5. Electronic version on file with the author.

offence, into three schedules.[19] Chapter 1 deals with definitions, objects and binding principles of the Act, of which s. 3(i) stipulates that one of the guiding principles of the Child Justice Act which must be taken into account is that the rights and obligations of children with reference to the CRC and the African Charter on the Rights and Welfare of the Child.[20] Chapter 2 regulates the application of the Child Justice Act,[21] criminal capacity of children[22] and matters relating to age,[23] while chapter 3 sets the procedure in motion for a child who has been charged with committing an offence.[24]

Chapters 4 and 5 respectively deal with the pretrial release and detention of children and their assessment. Chapter 4 was framed with the intention of giving legislative recognition to the South African constitutional and international law provisions which stipulate that children should not be detained, and if detained then it should be only for the shortest appropriate period of time.[25] Chapter 5, even though not an entirely new phenomenon in South African law, now regulates the assessment procedure under a comprehensive system of child justice provided by a single statute.[26]

The preliminary inquiry[27] is a new procedure introduced in chapter 7 of the Child Justice Act. This inquiry takes place before a magistrate with the aim of considering the recommendations made by a probation officer during the assessment. At this stage a matter against a child can either be diverted, or sent to the children's court (if it is found that the child is in need of care and protection), or sent to trial at the Child Justice Court, where a different presiding officer will hear the case against the child. The preliminary inquiry is indeed an innovative procedure that caters for the needs of children, which in itself signifies compliance with Article 40 of the CRC.

Diversion from formal court proceedings is regulated by both chapters 6 and 8 of the Child Justice Act. Chapter 6 allows for prosecutorial diversion for minor offences, contained in Schedule 1 of the Child Justice Act. This procedure would allow a child to be diverted even before attending a preliminary inquiry.[28] Chapter 8, in detail, regulates diversion and contains provisions around the types of diversion,[29] the monitoring of diversion,[30] and the accreditation of diversion options,[31] amongst others. Noting that diversion was previously regulated by policy, a legislative regulation is definitely welcomed.

19 Schedules 1, 2 and 3 respectively. The seriousness of the offence, together with the age of the child are two sets of circumstances that would dictate the procedure. E.g. if an 11-year-old boy were to be charged with theft below the value of 1500 South African Rand (a Schedule 1 offence), he could be diverted by a prosecutor before a preliminary inquiry takes place. Whereas, in the case of a 16-year-old boy who had committed treason (a Schedule 3 offence), he would not be able to be diverted before the preliminary inquiry.

20 OAU Doc. CAB/LEG/24.9/49 (1990). This Charter is the regional African Children's Charter that encapsulates the rights of children on the continent. South Africa is a state party to this Charter.

21 S. 4 of the Child Justice Act.

22 Ss. 7–11 of the Child Justice Act.

23 Ss. 12–16 of the Child Justice Act.

24 These are covered in ss. 17–20 of the Child Justice Act.

25 See Article 37(b) of the CRC and s. 28(1)(g) of the Constitution.

26 Previously, the assessment procedure was regulated by the Probation Services Amendment Act 35 of 2002. This Act did not apply to the criminal justice system and only applied as practice in courts.

27 S. 43(1) defines the preliminary inquiry as: "(a) an informal pre-trial procedure which is inquisitorial in nature; and (b) may be held in a court or any other suitable place".

28 S. 41 of the Child Justice Act.

29 S. 53 of the Child Justice Act.

30 S. 57 of the Child Justice Act.

31 S. 56 of the Child Justice Act.

If a child is not diverted away from formal court proceedings, the matter would proceed to trial as regulated in Chapter 9 of the Child Justice Act. The trial takes place like any other criminal trial, except that the identity of the child should not be published and the proceedings should take place in camera.[32] The child must enter a plea and is allowed to call witnesses in his/her defence. Chapter 9 also allows for the diversion of the matter at trial, but this should be done before the prosecution concludes its case against the child.[33]

Chapter 10 of the Child Justice Act allows for a broad spectrum of sentencing options, which a presiding officer can use to guide his/her discretion in sentencing a child. Included in these options are community-based sentences,[34] restorative justice sentences,[35] fines or alternatives to fines,[36] and custodial sentences, such as to child and youth care centres[37] and prisons.[38] Appeals and review procedures are catered for in Chapter 12 of the Act,[39] while legal representation for children is regulated in Chapter 11.[40] Chapter 13 allows for the expungement of criminal and diversion records for certain offences[41] and Chapter 14, amongst other things, provides for general provisions that assist with the implementation of the Act.

4 Analysis of compliance with international law

The following section will investigate the extent of compliance by the Child Justice Act with international law in relation to the four key points for discussion raised above.[42] These are criminal capacity, pretrial release and detention, diversion and sentencing.

4.1 Criminal capacity

Criminal capacity finds its authority in Roman law,[43] and it was previously regulated and shaped by the common law[44] in SA. At common law the minimum age for criminal responsibility was set at seven years old. Thus, children below the age of seven were considered to be *doli incapax*. Children between the ages of seven and 14 years were rebuttably presumed to lack criminal capacity. For children aged 14 years or older, an irrebuttable presumption existed that they were considered to possess criminal capacity and be *doli capax*. The only way children above the age of 14 years could be considered not to possess criminal capacity was if the defence proved that they were mentally incapable of committing an offence, like any other adult. In other words, this would negate the element of criminal capacity in committing an offence.

The CRC does not stipulate any minimum age for criminal responsibility. Article 40(3)(a) stipulates that states parties shall establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". This article should be

32 S. 63(5) of the Child Justice Act.

33 S. 67(1)(a) of the Child Justice Act.

34 S. 72 of the Child Justice Act.

35 S. 73 of the Child Justice Act.

36 S. 74 of the Child Justice Act.

37 S. 76 of the Child Justice Act.

38 S. 77 of the Child Justice Act.

39 Ss. 84–6 of the Child Justice Act.

40 Ss. 80–3 of the Child Justice Act.

41 S. 87 of the Child Justice Act.

42 See section 1 above.

43 J Burchell, *Principles of Criminal Law* 3rd edn (Lansdowne: Juta 2005), p. 359.

44 The South African common law consists of the legal heritage which SA inherited from the British, as part of being a previous colony of England.

read with rule 4.1 of the Beijing Rules that stipulates that the minimum age below which children will not have criminal responsibility should not be "fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity". With this in mind, the Committee set out to interpret what would constitute a fair age below which children could not commit criminal offences in its General Comment No. 10 on juvenile justice. This comment by the Committee relies quite strongly on rule 4.1 of the Beijing Rules, stipulating that "in line with this rule [rule 4.1 of the Beijing Rules] the Committee has recommended States Parties not set a MACR [minimum age of criminal responsibility] at a too low level and to increase an existing low MACR to an internationally acceptable level".[45] The Committee then recommended that the minimum age of criminal responsibility should not be below the age of 12 years.[46]

During the deliberations on the Child Justice Bill, criminal capacity was one of the most contentious issues to be debated. More specifically, the provisions around the minimum age of criminal responsibility were hotly debated. Sloth-Nielsen argues that the reason for this contention was that in practice, the minimum age of criminal responsibility "is inevitably linked to perceptions and preconceptions about serious juvenile crime".[47] In its report on juvenile justice the SALRC recommended:

> The retention of the current Common Law rule that a child who is seven years (or ten years) old, but has not yet turned 14 years, is presumed to be *doli incapax*, with additional measures, such as the requirement of expert testimony for rebuttal of the presumption, to ensure enhanced protection for such children.[48]

The recommendation, surprisingly, was not clear on whether it would be children between the ages of seven and 14 years or children between the ages of 10 and 14 years who would be presumed *doli incapax*. Another consequence of this recommendation would therefore seem the acceptance that the irrebuttable presumption of *doli capax* would still remain against children who were 14 years or older (subject to them not possessing any other mental disability at the time when they committed the offence).

The version of the Child Justice Bill that was debated in Parliament proposed to amend the common law in relation to criminal capacity by stipulating that the minimum age for criminal responsibility should be set at 10 years.[49] The Child Justice Bill then kept the provisions of the common law by stipulating that children between the ages of 10 and 14 years were rebuttably presumed to be *doli incapax*.[50] The Child Justice Bill was also silent on the issue of children above the age of 14 years. Therefore, it was presumed that children above the age of 14 years were irrebuttably presumed to be *doli capax*, subject to them not possessing any other form of mental disability at the time they committed an offence.[51]

The outcome of the Child Justice Act saw no change in what was proposed in the initial Child Justice Bill. Therefore, the South African Parliament did not take the recommendations of the Committee into account when it set the minimum age for criminal

45 Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice (2007) para. 16. Hereinafter referred to as General Comment No. 10.

46 Ibid.

47 J Sloth-Nielsen, "The juvenile justice law reform process in South Africa: can a children's rights approach carry the day?" (1999) 18 *Quinnipiac Law Review* 487.

48 SALRC, *Report on Juvenile Justice*, n. 17 above, p. 25.

49 S. 7(1) of the Child Justice Bill.

50 S. 7(2) of the Child Justice Bill.

51 S. 7(3) of the Child Justice Bill stipulates that "the common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section". This would lead one to then interpret that the common law position of children above the age of 14 years still applies.

responsibility at 10 years and not 12 years. It did this despite being alerted to the Committee's position during the parliamentary debates.[52]

All is not lost, however. As a result of civil society advocacy, Parliament was under pressure to recognise its obligations in terms of General Comment No. 10 and decided to insert s. 8 into the Child Justice Act which stipulates that:

> In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet minister responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament . . .[53]

Even though this would mean that in five years' time Parliament would have the opportunity to review the minimum age of criminal responsibility and reform it in line with General Comment No. 10, s. 8 does not guarantee that the minimum age would be raised. It stipulates that "in order to determine whether or not", thus a possibility still exists for the minimum age of criminal responsibility to stay the same after five years of implementation of the Child Justice Act.

4.2 Pretrial release and detention

The Constitution sets the tone within which pretrial release and detention of children should be interpreted.[54] It stipulates that every child has the right not to be detained, unless detention is a measure of last resort, in which case such detention has to be for the shortest appropriate period of time.[55]

The Correctional Services Act[56] regulated children awaiting trial in detention by stipulating that children can only be detained in prison if it is in the interests of justice and there are no places of safety available to detain such children.[57] Sloth-Nielsen correctly argues that:

52 See submission by the Child Justice Alliance on Child Justice Bill 2008, available at www.childjustice.org.za/submissions/2008Submissions/Child%20Justice%20Alliance.pdf.

53 S. 8 of the Child Justice Act. Furthermore, s. 96(4) of the Child Justice Act stipulates what exactly the Minister of Justice and Constitutional Development should highlight in his/her report to Parliament on the review of the minimum age of criminal responsibility, including matters relating to statistics of children who came into contact with the child justice system. Nowhere in this section does it highlight that research of a psychological nature should be taken into account, relating to the development of children's brain activity or cognitive and conative mental functions, which would serve as a more accurate form of assessing the minimum age of criminal responsibility.

54 Before the dawn of the Constitution, the provisions on bail as stipulated in Chapter 9 of the Criminal Procedure Act applied generally to every person accused of committing an offence. Based on the provisions of Chapter 9 of the Criminal Procedure Act, any person accused of committing an offence could apply for bail with the police, upon being arrested; with the National Prosecution Authority; or in court. If bail was not a viable option for a child who had committed an offence, he or she could certainly also have been granted placement either in a place of safety or under the supervision of a probation officer, in terms of s. 71 of the Criminal Procedure Act. S. 72(1)(b) of the Criminal Procedure Act also allowed for a child to be released into the custody of a person with care over the child without requiring any form of bail. This section has been repealed by the Child Justice Act.

55 S. 28(1)(g) of the Constitution states that: "Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be – (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age."

56 Act 8 of 1959.

57 S. 29 of the Correctional Services Act. S. 29 was an amendment to the Correctional Services Act that was passed during 1997.

> there was no requirement that the decision to detain a child in prison take account of the best interests of the child concerned, nor was the criterion that detention in prison must be considered "necessary in the interests of justice" linked in any way to the seriousness of the offence, to the possibility of danger to society, or to any other test that could give effect to the notion that detention in prison be used sparingly.[58]

Thus the provisions that existed then were somewhat unfortunate, as the consequences thereof would have seen children detained without taking their interests into account. This notwithstanding the fact that this amendment (i.e. s. 29) was temporary, as it was foreseen that the then Child Justice Bill would pass through Parliament relatively soon thereafter.

The JDL Minimum Standards set the framework for the interpretation of Article 37(b) of the CRC, by stating that "detention before trial shall be avoided to the extent possible and limited to exceptional circumstances".[59] The Beijing Rules document, on the other hand, is more specific as it states that police officials must be trained in dealing with children who come into contact with the justice system.[60] One can certainly argue that this would also apply to training police officials on the propriety of arresting children. Paragraph 10.2 of the Beijing Rules also states that "a judge or other competent official or body shall, without delay, consider the issue of release".

Article 37 of the CRC stipulates the provisions within which detention (which includes pretrial detention) should take place. Section 28(1)(g) of the Constitution is framed along the same lines as Article 37 of the CRC. The latter stipulates that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[61]

This article thus calls on states parties to the CRC to enact laws that would see practitioners, like police officials, prosecutors and magistrates, exercise a workable discretion on how to implement the detention of children as a measure of last resort. Together with that, states also have to enact legislation that would ensure that, should children be detained, it is for the shortest appropriate period of time. When examining the international framework where pretrial release and detention is regulated, it is interesting to note that there is no specified age stipulated for the detention of children in prison.[62]

With the dawn of the Child Justice Act in SA, pretrial release and detention is now regulated before and after a pretrial procedure called the preliminary inquiry. Upon being suspected of committing an offence, a child may not be arrested by a police official for committing a Schedule 1 offence,[63] unless certain circumstances exist as stipulated in the

58 J Sloth-Nielsen, *The Role of International Law in Juvenile Justice Reform in South Africa* (unpublished LLD Thesis, University of the Western Cape, Cape Town 2001), p. 166.

59 Para. 17 of the JDL Minimum Standards.

60 Para. 12.1 of the Beijing Rules.

61 Article 37(b) of the CRC.

62 Sloth-Nielsen, *The Role of International Law*, n. 58 above, p. 162.

63 The offences in the Child Justice Act are organised in three schedules annexed to the Act. Schedule 1 offences are the least serious and examples of these include theft below the value of 2500 South African Rand (equivalent to approximately US$375 at the time of writing) and common assault. For a list of offences see Schedules 1, 2 and 3 annexed to the Child Justice Act.

Child Justice Act.[64] Instead, the Child Justice Act requires that a police official return the child to his/her home and hand to a parent/guardian/appropriate adult a written notice indicating when the child should appear at court.[65] Where a child has been arrested for either committing a Schedule 1 or 2 offence,[66] the prosecutor has the authority to release a child on bail.[67] For committing a Schedule 3 offence, a child cannot be released before attending the preliminary inquiry, as s. 21(3)(a) reads that a presiding officer can release a child into the care of his/her parents where the child is accused of committing any offence. With that said, it therefore follows that a child who has committed a Schedule 3 offence[68] will be detained before attending the preliminary inquiry. Even though, in essence, the Child Justice Act is centred on not detaining a child before he or she has to appear before court,[69] it does make allowance for the detention of children who have committed an offence. This seems to highlight the intention of the drafters to uphold the "last resort" detention principle. The qualifying question would be: what constitutes "the shortest appropriate period of time"?

In SA, every person accused of committing an offence has to appear before a court within 48 hours of being arrested.[70] This rule also applies to children.[71] In General Comment No. 10, the committee recommended that every child who is arrested should be brought before "a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours".[72] This requires that a child be brought before somebody who has the capacity to examine solely the issue of whether the child should remain further in detention or not. This examination should therefore not delve into the merits of the case. The Committee did not explicitly stipulate that it has to be a court. It could, therefore, even be persons who work for the prosecuting authority. The Child Justice Act merely stipulates that upon the arrest of a child, the police official should notify a probation officer of this arrest within 24 hours.[73] The probation officer does not have the authority to examine the legality of a child's deprivation of liberty. The officer can only make a recommendation of such deprivation to an inquiry magistrate[74] to consider at the preliminary inquiry. Thus, the Child Justice Act does not contain any provision that would cater for the immediate examination of the legality of a child's deprivation of liberty in order to ensure that, if it is not acceptable, such a child should be released immediately.

64 S. 20(1) of the Child Justice Act. Some of these circumstances include where a police official has reason to believe that a child might not have a fixed address or where the police official believes that the child will continue to commit the offence.

65 S. 21(2)(a) of the Child Justice Act.

66 Some examples of Schedule 2 offences include theft where the value exceeds 2500 South African Rand (equivalent to approximately US$375 at the time of writing), public violence and culpable homicide.

67 S. 21(2)(b) of the Child Justice Act.

68 Some examples of Schedule 3 offences include treason, murder, kidnapping and rape.

69 See Gallinetti who correctly argues that the Child Justice Act should be interpreted with due regard to the least restrictive option possible when detaining a child. Thus, if a child should be detained, he or she must first be considered to be interned in a child and youth care centre, then a police cell (but only prior to the child's first appearance at a preliminary inquiry), and then placement in a prison. – J Gallinetti, "Child justice in South Africa: the realisation of the rights of children accused of crime" in T Boezaart (ed.), *Child Law in South Africa* (Claremont: Juta 2009), p. 659.

70 S. 50(1)(c) of the Criminal Procedure Act.

71 S. 20(5) of the Child Justice Act.

72 General Comment No. 10, para. 28b.

73 S. 20(4)(a) of the Child Justice Act.

74 An "inquiry magistrate" is defined as: "the judicial officer presiding at a preliminary inquiry".

Section 33 of the Child Justice Act stipulates that children may not be held in leg-irons and are only to be handcuffed in exceptional circumstances.[75] The Child Justice Act also requires that children in detention must be separated from adults and that boys be separated from girls.[76] The Child Justice Act is thus certainly in compliance with Article 37(c) of the CRC which requires children who are deprived of their liberty to be "treated with humanity and respect" and "to be separated from adults unless it is considered in the best interest of the child not to do so". However, a contentious provision which found its way into the Child Justice Act relates to the transportation of children who are detained. The Child Justice Act stipulates that children must be transported to court separately from adults, provided that it is possible to do so. The Child Justice Act requires a police official to give reasons to a presiding officer (within 48 hours) on why he or she transported children with adults.[77] Deprivation of liberty should be interpreted broadly to not only include the detention of children, but also the transportation of children who are detained. The only manner in which the proviso in relation to transporting children with adults can comply with the CRC is if it is in the best interests of children to do so. As far as transporting children with adults is in their best interests, s. 33(2)(c) of the Child Justice Act should be interpreted narrowly, as recommended by the Committee.[78]

4.3 Diversion

The third provision to be examined is in relation to the diversion of children away from formal court procedures. Although not an entirely new phenomenon in SA,[79] diversion is for the first time given legislative recognition in the Child Justice Act, as part of an overarching child justice system.[80]

In a research study conducted by the Child Justice Alliance,[81] Gallinetti and Kassan found that diversion had inconsistent application across three magisterial districts in SA before the coming into force of the Child Justice Act.[82] This inconsistent application of diversion related to the fact that, in one magisterial district of the study, diversion was recorded on the charge sheet, while in the other two it was inconsistently recorded or children were hardly diverted away from the criminal justice system.[83] The authors here correctly argue that a legislative framework was needed in order to ensure consistency of practice for diversion.[84]

75 S. 33(1) of the Child Justice Act.

76 S. 33(2)(a) and (b) of the Child Justice Act.

77 S. 33(2)(c) of the Child Justice Act.

78 General Comment No. 10, para. 28c.

79 Gallinetti, "Child justice", n. 69 above, p. 642, states that: "In South Africa, diversion services have been offered since the beginning of 1990s." In the case of *S* v *Z en vier ander sake* 1999 (1) SACR 427 (E), diversion also received judicial approval by the High Court, even in the absence of a legislative framework for it – see p. 429, para. b.

80 Previously, diversion was given legislative recognition in the Probation Services Amendment Act 35 of 2002, where it applied in general to any person who can be diverted.

81 The Child Justice Alliance is a network of over 400 non-governmental organisations and friends in SA working on child justice issues. The alliance was initially created to see one civil society movement back the passing of the then Child Justice Bill through Parliament. Considering that the Child Justice Bill has been enacted, the Child Justice Alliance will now focus on research and advocacy around the implementation of the Child Justice Act. See www.childjustice.org.za, for further details on the Child Justice Alliance.

82 J Gallinetti and D Kassan, *Child Justice Alliance: A baseline study of children in the criminal justice system in three magisterial districts* (Cape Town: Child Justice Alliance 2007), p. 30.

83 Ibid.

84 Ibid.

The Beijing Rules place an obligation on the police or the prosecution or any other agency to have the competency to divert a matter.[85] The Beijing Rules also stipulate the following requirements necessary in order for diversion to succeed:

i. the necessary consent of the child, or his or her parents/guardians; and

ii. a competent authority to review cases that are diverted.[86]

Article 40(3)(b) of the CRC, which should be interpreted in line with the Beijing Rules, sets the standard for the establishment of diversion programmes by requiring states parties to:

> Whenever appropriate and desirable, [enact] measures for dealing with such children [who come into conflict with the law] without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

An important international requirement that needs to be emphasised relates to the significance of ensuring that a competent review mechanism of diverted matters is in existence. Diversion essentially means that a child accused of an offence would admit to having committed such an offence and therefore his/her due process rights – e.g. the right to be presumed innocent until proven guilty by a court of law and the right to remain silent – might be compromised in order to ensure that the matter does not end up in court.[87] General Comment No. 10 creates a protective mantle for children by recommending that states parties to the CRC must ensure that:

> [a] child must be given the opportunity to consult with legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure.[88]

Sloth-Nielsen therefore highlights the following three important reasons why diversion should be regulated in law. She first states that because of its informal nature, a decision to divert a matter will not be subject to judicial scrutiny without legislative recognition.[89] Secondly, she notes that evidence shows that, for historical reasons, there exist wide discrepancies about its practice and the lack of regulation would not see prosecutorial or police policy in this regard subject to parliamentary scrutiny.[90] Her third and probably most important argument (for this article) for why diversion should be regulated is to ensure that legal safeguards are fully respected as required by Article 40(3)(b) of the CRC.[91]

During the law reform process on child justice in SA, the SALRC was certainly correct in stipulating that a legislative framework should exist that would ensure that children benefit from diversion options.[92] More importantly, it was also correct when it emphasised that the approach to diversion should be an "innovative and imaginative" one.[93] Thus, a level of flexibility with a judgment on a case-by-case basis would be the considered approach. Sadly, this flexibility was not favoured by the deliberations in Parliament and a somewhat over-regulated system was adopted by Members of Parliament. This in essence

85 Para.11.2 of the Beijing Rules.

86 Para.11.3 of the Beijing Rules.

87 Skelton highlights this as "a view that restorative justice practice [diversion being one aspect of it] may erode due process rights such as the right to remain silent and the right to be considered innocent until proven guilty. These fundamental elements [she argues] may be placed at risk by a tendency to coerce children to admit guilt in order to be considered for diversion to restorative justice options.": A Skelton "Restorative justice as a framework for juvenile justice reform: a South African perspective" (2002) 42 *British Journal of Criminology* 506.

88 General Comment No. 10, para. 13.

89 Sloth-Nielsen, *The Role of International Law*, n. 58 above, pp. 251 and 252.

90 Ibid. p. 252.

91 Ibid.

92 SALRC, *Report on Juvenile Justice*, n. 17 above, p. 99.

93 Ibid. pp. 99 and 100.

would lead to cases where diversion cannot be considered as a preferred approach and, therefore, the desirability of diverting a case away from the criminal justice system (as encapsulated by Article 40(3) of the CRC) is lost.

The Child Justice Act organises diversion into two levels, the first being for less serious offences than the second.[94] The Child Justice Act allows for diversion to take place at three stages in the child justice system. Firstly, a prosecutor would have the competency to divert a case to a level one diversion option, where the child committed a Schedule 1 offence.[95] Secondly, an inquiry magistrate can order that a child be diverted at the preliminary inquiry, after the necessary consent has been granted by the National Prosecuting Authority.[96] Lastly, a matter can be diverted at the trial in the Child Justice Court, at any time before the close of the prosecution's case against a child.[97] The Child Justice Act is also very clear that a prosecutor would have to consent that a Schedule 2 matter can be diverted[98] and the Director of Public Prosecution would have to consent for Schedule 3 matters to be diverted.[99]

The Child Justice Act does not create any mechanism for the review of a decision to divert a case (as required by para. 11.3 of the Beijing Rules), especially in relation to diversion for a Schedule 1 offence by the prosecutor. It is envisaged in the Child Justice Act that this type of diversion would normally happen before a child appears before a magistrate and therefore the Child Justice Act had at a minimum to create review mechanisms for diversions in cases of this nature. Such review mechanisms would protect children against being coerced into admitting responsibility for committing the offence and would also be a suitable option to ensure that a child's right to silence was respected, together with his or her presumption of innocence.

Even though diversion is now correctly embedded in legislation, the question still remains whether the over-regulation thereof, together with the lack of proper review mechanisms, will comply with the innovative nature of diversion and international principles, as stipulated in the CRC and the Beijing Rules.

4.4 Sentencing

The fourth and final topic which this article examines relates to sentencing of children convicted of offences. Preceding the CRC and the Child Justice Act, the common law, by way of judicial precedent, has always acknowledged that adolescence is a mitigating factor when sentencing a child.[100] At the same time, the death penalty was also a possible sentence to be imposed on a child who committed a heinous offence, like murder.[101] Corporal

94 S. 53(3) of the Child Justice Act highlights the various level one diversion options, while s. 53(4) highlights level two diversion options.

95 S. 41 of the Child Justice Act.

96 S. 52 of the Child Justice Act.

97 S. 67 of the Child Justice Act.

98 S. 52(2) of the Child Justice Act states that this can only happen once the prosecutor has consulted with the victim, where it is possible to do so, and the police investigator.

99 S. 52(3) of the Child Justice Act stipulates that the Director of Public Prosecutions, who has jurisdiction, can only do this once he or she has consulted with the victim, where it is possible to do so, and the police investigator.

100 For example, see *S* v *Lehnberg en 'n ander* 1975 (4) (SA) 553 (A) where the then Appellate Division of the Supreme Court held that it goes without saying that degrees of adulthood exist among teenagers, but the ripeness of being an adult might be absent. Adolescence does not constitute adulthood (p. 561 A–B) (translated by the author from Afrikaans). See also Sloth-Nielsen, *The Role of International Law*, n. 58 above, pp. 375–5 for an in-depth explanation of the history in relation to the sentencing of children.

101 Sloth-Nielsen, *The Role of International Law*, n. 58 above, pp. 377–8.

punishment was also an accepted and often used form of punishment for children convicted of an offence.[102] Thus, even though adolescence could serve as a mitigating factor for sentencing a child, it was still possible to sentence a child to the gallows or cane him or her. This certainly amounted to an unfortunate juxtaposition in South African law.

The Criminal Procedure Act was the statute that regulated the different types of sentences available to presiding officers when exercising their discretion to impose sentences on children. Section 290 of this Act provided the following three options for sentencing, other than that of imprisonment:

(a) placement under the supervision of a probation/correctional officer;

(b) placement under the custody of a suitable person; or

(c) a sentence to a reform school.

This certainly served as a notable attempt by the South African Parliament to impose sentences of a nature other than imprisonment or caning children. However, it remains questionable whether the sentence to a reform school was in compliance with international law. Sloth-Nielsen has raised a concern over this sentence, as it was normally imposed on a child for a period of two years, which could be extended by the then Minister for Welfare and Population Development until the child turned 18 or even 21 years of age.[103]

The Constitution also contributed to the overall sentencing environment through s. 28(1)(g), which called for detention of children to be used as a measure of last resort and stipulated that if detention should occur then it should be for the shortest appropriate period of time.[104]

Article 40(4) of the CRC stipulates very broadly that a range of alternatives should be considered before institutionalising a child.[105] This same article also requires that a proportionate approach should be adopted between the circumstances of the child and the offence committed. This proportionate approach certainly should serve as a major factor in pronouncing a sentence upon a child. Article 40(4) of the CRC should also be read with Article 37, where it stipulates that the imprisonment of children should be used a measure of last resort and for the shortest appropriate period of time.[106] Article 39 of the CRC requires states parties to enact measures that would promote the social reintegration of children. The scope of Article 39 is broad enough to call on states to enact measures of social reintegration of children who were sentenced for committing an offence, especially children who were sentenced to a custodial setting. The Beijing Rules also highlight a large variety of possibilities available that would not see a child sentenced to a custodial setting, namely; community service orders, fines and compensation, and counselling orders, among other measures.[107] Rule 19 more importantly highlights that

102 In the case of *S* v *Williams and Others* CCT/20/94 the Constitutional Court found that ss. 294 and 290(2) of the Criminal Procedure Act were inconsistent with the Interim Constitution of the Republic of SA 200 of 1993. These sections allowed for a child to be "whipped" as a form of punishment for committing an offence. The judgment in this case was handed down before the law reform process started in SA.

103 Sloth-Nielsen, *The Role of International Law*, n. 58 above, p. 380.

104 See section 4.2 above.

105 Article 40(4) reads: "A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

106 Article 37(b) reads: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

107 See rule 18.1(a)–(h).

"the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period".

With this in mind, Sloth-Nielsen correctly highlights the following three important international principles that should serve as a foundation for a judicial officer when considering imposing a sentence on a child: (1) "the injunction that detention must be considered only as a last resort and for the shortest period of time";[108] (2) "the principle of proportional and individualised responses to offending";[109] and (3) "the emphasis on preparing the child offender for his or her return to society where detention has ultimately been deemed necessary".[110]

During the law reform process, the SALRC came to the proposition that retributive sentences should be kept to a minimum, as it "would upset the balance between [the] offender, [the] victim and [the] community".[111] This was certainly a noble approach that is in compliance with Article 37 of the CRC and rule 19 of the Beijing Rules.[112]

The Child Justice Act lists the following five objectives of sentencing:

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;

(c) promote the reintegration of the child into the family and community;

(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

(e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.[113]

The formulation of these objectives is certainly in compliance with international law to the extent that it encapsulates the three principles highlighted by Sloth-Nielsen, being to use the detention of children as a last resort, using a proportional approach to sentencing, and placing an emphasis on the reintegration of the child back into the community. An added and certainly necessary addition to the objectives of sentencing in SA relates to holding the child accountable for the harm that he or she has caused. However, it has to be emphasised that the manner in which this objective would be sought should be in compliance with the best interests of the child principle.

The Child Justice Act also permits a presiding officer to take a number of factors into account when sentencing a child to a custodial setting which include the seriousness of the offence and whether the harm caused would require that a child be sentenced to a residential setting.[114] The Child Justice Act allows a prosecutor to produce evidence of a witness impact statement during sentencing proceedings[115] and requires that probation

108 J Sloth-Nielsen, "Juvenile sentencing comes of age" (2005) 1 *Stellenbosch Law Review* 100.

109 Ibid.

110 Ibid.

111 SALRC, *Report on Juvenile Justice*, n. 17 above, p. 162.

112 See also Sloth-Nielsen, *The Role of International Law*, n. 58 above, p. 364, who states that: "The proposals for juvenile justice reform that were advanced by the South African Law Commission [in relation to sentencing] were shaped by CRC and the Beijing Rules."

113 S. 69(1) of the Child Justice Act.

114 See s. 69(3) and (4) that creates a distinction between factors to be considered for sentences of imprisonment and to a child and youth care centre respectively.

115 See s. 70 of the Child Justice Act.

officers provide the court with pre-sentence reports in which the probationer officer can make a recommendation on the sentence to be imposed on a child.[116]

Lastly, the Child Justice Act allows for a list of innovative sentencing options that can be imposed on a child including: community-based sentences;[117] restorative justice sentences;[118] fines or alternatives to fines;[119] sentences involving correctional supervision;[120] sentences to a child and youth care centre;[121] and, finally, sentences to prison.[122]

The Child Justice Act is very clear that children below the age of 14 years at the time of sentencing may not be sentenced to prison.[123] Gallinetti correctly criticises this provision by warning that the National Prosecuting Authority may at times delay prosecuting children below the age of 14 years to ensure that a child may be eligible to be sentenced to prison.[124] This would essentially be in contradiction with the best-interests of the child principle, as it would not ensure that a trial is speedily completed against a child, and also that strategic and tactical loopholes make it possible to have a child sentenced to prison.

Section 77 of the Child Justice Act also creates a maximum time period that a child can be sentenced to prison by stipulating that children can be sentenced to imprisonment "for a period not exceeding 25 years".[125] Once again Gallinetti warns that the express mentioning of a maximum period could support a presiding officer (who has a discretion to pronounce a sentence) to impose a sentence that is lengthier than would have been imposed in the past.[126] She therefore rightly concludes that it would have been preferable if the Child Justice Act had remained silent on the period that a child can be sentenced to prison.[127]

5 Conclusion

The title of this article poses the question whether SA complies with its obligations in terms of children's rights. The use of just four topics in this chapter might not be enough to measure SA's compliance in totality, but these four topics certainly play an important role in establishing whether the basic legal rights and standards of children who come into conflict with the law are in conformity with international law.

The answer to this research question is not a clear "yes". As can be seen from the analyses above, there are instances where SA does comply with international law through the final provisions of the Child Justice Act. The Child Justice Act raised the minimum age of criminal responsibility from seven years to 10 years; it legislated the principle that children should not be detained and, if they are, it should be for the shortest period of time; diversion in SA now has a legislative existence; and a range of sentencing options are available, other than sentencing a child to a reform school or prison.

116 See s. 71 of the Child Justice Act.

117 See s. 72 of the Child Justice Act.

118 See s. 73 of the Child Justice Act.

119 See s. 74 of the Child Justice Act.

120 See s. 75 of the Child Justice Act.

121 See s. 76 of the Child Justice Act.

122 See s. 77 of the Child Justice Act.

123 See s. 77(1)(a) of the Child Justice Act.

124 Gallinetti, "Child justice", n. 69 above, p. 662.

125 See s. 77(4) of the Child Justice Act. During 2007, Parliament enacted the Criminal Law (Sentencing) Amendment Act, which brought about the option of imposing minimum sentences on children in the age category of 16 and 17 years old. The Constitutional Court found this legislation to be unconstitutional in the case of *Centre for Child Law* v *Minister of Justice and Constitutional Development and Others* CCT 98/08.

126 Gallinetti, "Child justice", n. 69 above, p. 662.

127 Ibid.

It is somewhat unfortunate, however, that there are technical aspects of the Child Justice Act that are not truly in compliance with international law and principles. The Child Justice Act does not stipulate that the minimum age of criminal responsibility should be 12; instead it provides for criminal responsibility at 10 years of age. There is no stipulation in the Child Justice Act that requires, within 24 hours from being detained, that a child's detention is reviewed by a competent authority. Provisions relating to the review of a decision to divert a child are also not catered for, especially those that relate to the diversion of a child by a prosecutor before the child's first appearance at a preliminary inquiry. No provision exists that would require the prosecution not to delay proceedings against a child in order to make sure that the child is 14 years or older, at the time of sentencing, in order to secure a prison sentence.

Therefore, it can be concluded that SA has taken considerable steps to ensure that its relatively new child justice system is compliant with international law and its constitutional provisions. However, the new child justice system is not ideal, as it allows for lacunae which would not be in a child's best interests. This certainly opens the scope for strategic litigation on the constitutionality of the Act and compliance with international obligations which are enforceable in South African courts.

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Positive, humane and expeditious? An analysis of Ireland's implementation of its obligations in relation to family reunification under the CRC

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Abstract

This paper will examine legislative and policy provisions relating to family reunification of persons granted international protection in Ireland and whether these comply with the Convention on the Rights of the Child (CRC). For the most part, the families involved can only hope to reunite in Ireland because return to the country of origin or a third country is impossible. Although the principle of family unity is generally expected in human rights instruments, the CRC is the only widely ratified international human rights instrument to include specific articles addressing the issue of family reunification, and this paper will assess compliance with those articles, and with the core principles obliging states to ensure that the views of children must be heard in all matters relating to them, and making "the best interests of the child" a primary consideration in all decisions concerning children. It will also address the issue of how Ireland's implementation of its obligations under the CRC in respect to family reunification cannot be addressed in isolation from its policies to reduce the number of asylum claims which have seen the number of applications fall in 2010 for the eighth successive year, and its failure until relatively recently to provide adequate care and support for separated children seeking asylum.

Introduction

This paper will examine legislative and policy provisions relating to family reunification for persons granted international protection in Ireland and whether these comply with the CRC. For the most part, such families can only hope to reunite in Ireland because a return to the country of origin or a third country is impossible. Although the principle of family unity is generally expected in human rights instruments, the CRC is the only widely ratified international human rights instrument to include specific articles addressing the issue of family reunification.

Prolonged separation from their families can have detrimental and long-lasting effects on children, in particular unaccompanied and separated children, and this was recognised by the drafters of the CRC. The only article directly addressing the issue of family reunification – Article 10.1 – requires states to ensure that applications for family reunification involving children are dealt with in a "positive, humane and expeditious way". The Convention also obliges states to ensure that children will not be separated from their parents without their consent except in very limited circumstances and only in the best

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interests of the child. The rights of refugee children are addressed in Article 22. It sets out, inter alia, the obligation on states to cooperate in tracing family members of refugee children for the purposes of reunification. In addition, a number of key principles, including that obliging states to ensure that the views of children must be heard in all matters relating to them, and to make "the best interests of the child" a primary consideration in all decisions concerning children, are also relevant.

Many EU states including Ireland have sought to reduce the numbers of applications for asylum and other forms of international protection in recent years. In addition, many states have sought to place barriers in the way of migrants, including those granted international protection, seeking to reunite with family members.

Alice Edwards has pointed out that host states increasingly adopt restrictive measures in relation to refugees:

> either through narrow definitions of who constitute a family, the imposition of immigration type criteria on reunification applications . . . or even bars to family reunifications until after a specified period of time has elapsed.[1] Furthermore, the United Nations High Commission for Refugees (UNHCR) has noted that some states prohibit separated refugee children from applying for family reunification and still others put in place restrictive conditions making reunification difficult or even impossible to achieve for many refugee children.[2]

Ireland's implementation of its obligations under the CRC in respect of family reunification cannot be addressed in isolation from these international developments and from its own policies to reduce the number of asylum claims, which have seen the number of applications fall in 2010 for the eighth successive year,[3] and its failure until relatively recently to provide adequate care and support for separated children seeking asylum.

This article commences by examining family separation in the international protection context and its impact on children. It goes on to briefly consider the principle of family unity and whether the protection afforded to the family unit in international law implies a right to family reunification. The right to family reunification for refugees and other beneficiaries of international protection is considered. While it is recognised that most Western states permit refugees and in certain circumstances other beneficiaries of international protection to be joined by family members, such family reunification provisions are often restrictive and dependent on government policy. The provisions of the CRC will then be considered and the "expansive" views of the Committee on the Rights of the Child expounded in its general comments and concluding observations on states' periodic reports will also be examined. Finally, Ireland's legislation and policy in relation to family reunification and whether it complies with the states' obligations under the CRC will be analysed.

Family separation and its impact on the child

Family separation

War, conflict and human-rights abuses result in family separation with almost 220,000 separated children registered by the International Committee of the Red Cross in Rwanda

1 A Edwards, "Human rights, refugees and the rights 'to enjoy' asylum" (2005) 17(2) *International Journal of Refugee Law* 293–330, p. 308.

2 UN High Commissioner for Refugees, Global Consultations on International Protection/Third Track: Refugee Children, 25 April 2002, EC/GC/02/9, available at www.unhcr.org/refworld/docid/3d6268f64.html.

3 "Asylum claims fell by 28% last year", *Irish Times*, 7 January 2011.

alone.[4] The Inter-Agency Guiding Principles on Unaccompanied and Separated Children enumerate factors leading to separation of children from their families:

> Separation occurs either accidentally – when fleeing from danger or during evacuation – or deliberately when children are abandoned or given over to the care of another individual or a residential centre, perhaps in the belief that they will have a better chance of survival or access to services.[5]

Staver identifies three ways in which families can be separated. First, accidental separation, where, for example, family members follow different routes of escape from conflict. The second way may arise because of a temporary strategy, whereby a member of the family at particular risk, for example, a girl child at risk of female genital mutilation, may be sent to safety. Thirdly, separation may occur when members of the family are imprisoned or abducted.[6] Hathaway has noted that in extreme circumstances some parents may be "compelled" to take the difficult step of separating from their children to enable the children "to take advantage of superior opportunities often available to unaccompanied minors".[7]

Flight from the country of origin with all its attendant dangers can lead to further division among families, with some members reaching safety and others remaining in the conflict zone, their hope of resuming family life dependent on the family reunification policies of the country of refuge.

The impact of separation on the child

Even where states ensure family reunification takes place in an expeditious manner, many refugee families are separated for considerable periods due to the lengthy processing times for applications for refugee status or other forms of international protection. In some countries, this process can take several years. This has negative implications not just for the families themselves but also for the host state. The integration of refugees in the host community which is beneficial to both refugees and the host state is facilitated by family reunification.[8] The lengthy processing time may cause irreparable damage to family relationships. As Jastram and Newland have noted:

> the passage of time alone is damaging to the family, and costly to States, since the likelihood of social problems and even family breakdown is higher with longer periods of separation and this may result in increased costs for States in welfare and other support services.[9]

Lengthy separation from parents and other family members can often have a profound effect on children and they can experience difficulties in establishing family relationships with their parents and other family members when reunification is finally granted. However, studies have shown that "children can cope with horrible experiences and high levels of

4 A Staver, *Family Reunification: A right for forced migrants?*, Working Paper No. 51 (Oxford: Refugee Studies Centre 2008), p. 5.

5 International Committee of the Red Cross, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (Geneva: ICRC 2004), p. 22.

6 Staver, *Family Reunification*, n. 4 above, p. 5.

7 J C Hathaway, *The Rights of Refugees under International Law* (Cambridge: CUP 2005), p. 534.

8 UNHCR, Note on Family Protection Issues, EC/49/SC/CRP, 14 June 1999, para. 16. See also, UNHCR, *Targeted or Mainstream Support to Refugee Integration? Legislation, policy and support in Ireland and selected European countries* (Dublin: UNHCR April 2009), p. 45.

9 K Jastram and K Newland, "Family unity and refugee protection", in E Feller, V Türk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's global consultations on international protection* (Cambridge: CUP 2003), pp. 555–603, p. 559.

stress if they have a secure relationship with parents or effective adult substitutes".[10] Separation from family members, in particular parents, lessens the ability to cope with difficult situations and may lead to long-term problems for the child.

A recent study on the experiences of Somali refugees in Ireland has found that: "The obstacles young and adult refugees encounter in matters related to family reunification have fundamental repercussions on their economic and psychological well-being." It noted that research participants felt "powerless and overwhelmed" by their responsibilities to family members in the country of origin.[11] There is no reason to believe that the experiences of Somali refugees in relation to family reunification are atypical.

The principle of family unity

The family is universally recognised as "the fundamental group unit of society". International and regional human rights instruments also recognise people have a right to enjoy their privacy and family life without unlawful or arbitrary interference. Article 17, para. 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR) reiterates a similar provision in the Universal Declaration of Human Rights and prescribes that "no one shall be subjected to arbitrary or unlawful interference with his . . . family", while Article 23.1 of the ICCPR, adds that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State".[12]

States parties are obliged to ensure that the above rights are to be enjoyed by all individuals "without distinction of any kind".[13] The UN Human Rights Committee recognises that the right to form a family and family life implies reunification in the case of migrants who have been separated.[14] Under Article 10 of the International Covenant on Economic, Social and Cultural Rights, states have undertaken to provide "the widest possible protection and *assistance*" to the family.[15] In its General Comment No. 19 on Protection of the Family, the Right to Marriage and Equality of the Spouses, the Committee states that:

> the right to found a family implies, in principle, the possibility to live together . . . the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be in cooperation with other States to ensure the unity or reunification of families, particularly when members are separated for political, economic or similar reasons.[16]

10 C L Barwick, B Morton and G Edwards, "Refugee children and their families: exploring mental health risks and protective factors", in F J C Azima and N Grizenko (eds), *Immigrant and Refugee Children and their Families: Clinical, research and training issues* (Madison CT: International UP 2002), p. 49, cited in Staver, *Family Reunification*, n. 4 above, p. 6.

11 E Moreo and R Lentin, *From Catastrophe to Marginalisation: The experiences of Somali refugees in Ireland,* Migrant Networks Project, Trinity Immigration Initiative (Dublin: Trinity College Dublin in Association with HAPA (Horn of Africa People's Aid) 2010), p. 48.

12 International Covenant on Civil and Political Rights 1966 (ICCPR), 999 UNTS 171.

13 Article 2(1) ICCPR.

14 The Human Rights Committee is the body of international experts tasked with monitoring the implementation of the ICCPR.

15 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN Treaty Series, vol. 993, p. 3, Article 10(1).

16 Committee on the Rights of the Child, General Comment No. 19, Article 23 (39th session, 1990), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 6 at 149 (2003), para. 5.

Regional instruments including the European Convention on Human Rights also guarantee respect for family life and require states not to interfere with that right in an arbitrary or unlawful manner.[17] Under the European Social Charter, states, recognising the position of the family as the fundamental group unit, undertake to promote the economic, legal and social protection of family life.[18]

While the principle of family unity and the right to family life free from arbitrary interference are well-established principles in international human rights law, the question is whether a right to family reunification can be inferred, even in cases where family unity cannot be enjoyed elsewhere. The UNHCR has argued that, especially where a family has no realistic hope of reunification elsewhere, refusal of family reunification could be seen as an interference with family life or family unity.[19] As Cholewinski has noted:

> To move from the protection of the family unit provided by international human rights law to the recognition of the right to family reunification in the immigration field is not such a significant step to take.[20]

Nevertheless, as he points out, this step has not been taken in an unequivocal manner in any human rights treaties.[21] While human rights law does not specifically recognise the right to family reunification, it is accepted that the right to form a family implies the right of that family to live together and that this may necessitate action by states to ensure the unity of families when "members are separated for political, economic or similar reasons".[22]

The right to family reunification for refugees and other beneficiaries of international protection[23]

For the purpose of this article, family reunification can be described as the social and legal process of reunion of a principal protection status holder with his or her family members in the host state. Family reunification entails bringing separated family members across international borders which, as a number of commentators have recognised, is "a politically sensitive activity".[24] In the case of refugees or other beneficiaries of international protection, reunification means uniting separated family members with the status holder in the country of asylum.[25] According to the Committee on the Rights of the Child, "the granting of refugee status constitutes a legally binding obstacle to the country of origin and

17 European Convention for the Protection of Fundamental Freedoms 1950 (ECHR), ETS No. 5, Article 8.

18 Council of Europe, European Social Charter, ETS No. 163, Article 16.

19 UNHCR, *Summary Conclusions on Family Unity* (Cambridge: CUP June 2003), available at www.unhcr.org/refworld/docid/470a33bed.html.

20 R Cholewinski, "Family reunification and conditions placed on family members: dismantling a fundamental human right" (2002) 4 *European Journal of Migration and Law* 271–90, p. 275.

21 Ibid. p. 275.

22 Committee on the Rights of the Child, General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23), 27 July 1990, para. 5.

23 Family reunification for the purposes of this article refers only to the reunification of family members with refugees and other beneficiaries of international protection in the host state.

24 B McDonald-Wilmsen and S M Gifford, *Refugee Resettlement, Family Separation and Australia's Humanitarian Programme*, New Issues in Refugee Research: Research Paper No. 178 (Geneva: UNHCR November 2009).

25 The 1951 Refugee Convention relative to the status of refugees defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Other beneficiaries of international protection include people who do not meet the criteria for refugee status and are granted a lesser form of protection sometimes referred to as complementary or subsidiary protection.

consequently to family reunification therein".[26] Despite the lack of alternatives open to these families, some host states restrict family reunification rights for refugees and other beneficiaries of protection.

The 1951 Refugee Convention, which is not strictly a human rights instrument, is silent regarding family reunification for refugees. However, this does not mean that the drafters failed to recognise the importance of family life to refugees. They recommended in relation to family unity that:

> [states] take the necessary measures for the protection of the refugee's family especially with the view to . . . ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country[27]

The office of the UNHCR which is responsible for monitoring and providing guidance to states on the implementation of the Refugee Convention has advanced family reunification rights for refugees in the Handbook on Procedures and Criteria for Determining Refugee Status, which emphasises the importance of the right to family unity for refugees and the recommendations of the Convention drafters.[28] In addition, UNHCR's Executive Committee (EXCOM) has also issued a number of conclusions in relation to family unity and family reunification. In Conclusion 24, EXCOM urges states to ensure that reunification takes place with "the least possible delay" and to apply "liberal criteria" when considering which family members to admit for the purposes of reunification. Furthermore, in recognition of the difficulties refugees have in accessing documentation, it advises states not to refuse applications for family reunification solely on the basis of a lack of documentary evidence of marriage or parentage of children.[29] EXCOM also recommends that family reunification should be guaranteed at least to "the spouse and minor dependent children of any person to whom temporary refugee or durable asylum has been granted".[30]

At EU level, two key directives deal with family reunification for refugees while the Council Regulation (EC) No. 343/2003 (hereinafter the Dublin II Regulation) provides for limited family unity rights for people seeking asylum. The Directive on Family Reunification sets out the conditions under which third-country nationals residing lawfully on the territory of the member states may exercise the right to family reunification.[31] The directive narrowly defines the family unit, restricting it to parents and siblings.[32] It also allows member states to restrict the provisions of the directive to situations where the family was formed before

26 Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin (hereinafter General Comment No. 6) CRC/GC/2005/6, 1 September 2005, para. 82.

27 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951 UN Doc. A/CONF.2/108/Rev.1, 26 November 1952, Recommendation B.

28 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev. 1 (Geneva: UNHCR 1979, re-edited January 1992), paras 181–8.

29 UNHCR, Executive Committee (EXCOM) Conclusions, Family Reunification (No. 24 (XXXII) 1981). EXCOM conclusions are not legally binding but are reflective of the views of EXCOM member states (currently comprising 79 states) and are therefore influential.

30 UNHCR, EXCOM Conclusions, Refugees Without an Asylum Country (No. 15 (XXX) 1979).

31 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter the Family Reunification Directive). While the directive applies to migrants generally, it contains a specification relating to refugees: ch. V "Family reunification of refugees".

32 Family Reunification Directive, Article 10(1).

the arrival of the refugee in the particular member state.[33] Where the refugee is a child, family reunification provisions are limited to the parents and where they are deceased or cannot be traced, the child's guardian or other family members may be allowed to join him or her.[34] Ireland has exercised its right to opt out of this directive.

Council Directive 2004/83/EC of 29 April 2004 (hereinafter the Qualification Directive), in addition to laying down minimum standards for granting international protection, also provides for the rights that will accrue to individuals granted protection.[35] Member states have undertaken that the best interests of the child shall be a primary consideration when implementing provisions relating to the content of protection including family reunification.[36] However, the definition of family in the directive is narrow and only family relationships existing in the country of origin will be recognised for the purposes of family reunification; the directive does not consider family relationships formed during flight or in the country of asylum.[37]

In most states, people seeking a declaration of their status as a refugee have few rights, including the right to family unity.[38] Asylum seekers are, as Bhabha noted, "a temporary and increasingly disenfranchised category of non-citizens" with very few rights in many countries of refuge.[39] However, EU law recognises limited rights to family unity for asylum seekers. In February 2003, the Council of the European Union adopted the Dublin II Regulation establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national. The Dublin II Regulation sets out a system for determining responsibility among EU states for examining asylum claims.

Article 6 of the regulation provides that, if an unaccompanied minor makes an application for a declaration as a refugee, responsibility for determining the claim rests with the member state where a member of his or her family is legally present if that is in the best interests of the child. If there are, however, no members of the minor's family legally present, the country where the minor makes the application is responsible for the claim. Research carried out by the UNHCR has revealed that, despite states' obligations under Article 6, in some cases the article is applied incorrectly and unaccompanied minors remain separated.[40]

Article 7 provides for reunification of an asylum seeker with family members who are recognised as refugees in another member state irrespective of whether the family was formed in the country of origin. If the asylum seeker has a family member in a member state whose application has not yet been the subject of a first decision regarding the substance, that member state shall be responsible for examining the application for asylum. In both circumstances, reunification will only be possible if both parties agree. The UNHCR study again found inconsistencies in the practice of states in relation to these articles.[41]

33 Family Reunification Directive, Article 9(2).

34 Ibid. Article 10(3).

35 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter, the Qualification Directive).

36 Qualification Directive, Article 20(5).

37 Ibid. Articles 4(1) and 23(5).

38 Hathaway, *The Rights of Refugees*, n. 7 above, p. 535.

39 J Bhabha, "International gatekeepers? The tension between asylum advocacy and human rights" (2002) 15 *Harvard Human Rights Journal* 155–82, p. 155.

40 UNHCR, *The Dublin II Regulation: A UNHCR discussion paper* (Geneva: UNHCR 2006), pp. 21–2.

41 Ibid, p. 26.

It is widely acknowledged that the notion of "family" varies throughout the world from the narrow, nuclear family in many Western states to the more inclusive extended family common in many African and Asian states. Therefore, "from a cross cultural perspective, the meaning of family – who is in the family and who is not – is not fixed and the configuration of family is made even more complicated".[42] The UNHCR endeavours to respect the "culturally diverse interpretation of family" if it respects human rights standards. UNHCR's definition of family also includes "persons who may be dependent on the family unit, particularly economically but also socially or emotionally dependent".[43] The notion of "family" is not a static concept, however, and family forms are changing both in countries of origin (for example, as they become urbanised) and in traditional countries of asylum where the family based on marriage is often no longer the predominant family type.

The CRC and family reunification

This section examines what are the key obligations imposed on states under the CRC in relation to family reunification and whether these add to the rights already set down in international law. The Preamble to the Convention recognises the family as "the natural environment for the growth and well-being of all its members and particularly children" and goes on to state that in order for the "full and harmonious development" of a child's personality, he or she should grow up in a happy and caring family environment.

The CRC defines a "child" as being a person under the age of 18.[44] However, some states only consider applications for family reunification for children under the age of 15.[45] In addition, the Convention does not define family, merely laying down obligations where children are separated across international borders from "their parents".[46] Similarly, the Committee on the Rights of the Child clarifies states' obligations in relation to reunification of children with their parents in its General Comment on the Treatment of Unaccompanied and Separated Children outside their Country of Origin.[47]

Article 9 obliges states to ensure that children will not be separated from their parents without their consent. Article 9.1 states:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.[48]

This is the only exception permitted under the Convention and is not subject to considerations of public order, public safety, national security or other such concerns which limit the enjoyment of family life under other human rights treaties. The phrase "applicable law and procedures" is not defined in the Convention and it has not been elaborated by the

42 McDonald-Wilmsen and Gifford, *Refugee Settlement*, n. 24 above.

43 UNHCR, *Challenges and Opportunities in Family Reunification: Annual tripartite consultations on resettlement* (Geneva: UNHCR 2008), cited in McDonald-Wilmsen and Gifford, *Refugee Settlement*, n. 24 above.

44 Article 1 states: "For the purposes of the present Convention a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."

45 The Family Reunification Directive permitted states to introduce restrictions on family reunification for children over 15. See K Groenendijk, R Fernhout, D van Dam, R Van Oers and T Strik, *The Family Reunification Directive in EU Member States: The first year of implementation* (Nijmegen: Centre for Migration Law 2007), p. 17, available at http://cmr.jur.ru.nl/cmr/docs/family.rd.eu.pdf.

46 CRC, UN GA Res., 20 November 1989, Article 10.1.

47 Committee on the Rights of the Child, General Comment No. 6, paras 81–3.

48 This article does not specifically refer to separation in the migration context, however, it can be read as including circumstances where refugee or other migrant children are separated from their families.

Committee on the Rights of the Child. It could be argued that it may cover, inter alia, law and procedure in relation to immigration. In most states the right to family unity for migrants is not absolute and in the case of beneficiaries of international protection, while generally permitted, is subject to restrictions. However, the strongly worded article, according to one commentator, requires states to "take all positive measures necessary to assure the realization of [the right to be with both one's parents]".[49]

Article 10.1 obliges states to ensure that applications for family reunification involving children are dealt with in a "positive, humane and expeditious way". The Convention does not provide any further guidance in relation to the processing time. However, UNHCR states that reunification should take place without "unreasonable delay". It also recommends that expedited procedures should be put in place in cases involving separated or unaccompanied children.[50] This article applies whether or not the child is the applicant for family reunification, for example, a separated child refugee applying to be joined by his or her family or an adult refugee, seeking to be joined by his or her children. Article 10 does not, however, guarantee a "right" to family reunification where children are involved and its "careful wording reflects immigration control concerns raised by some countries during the negotiation process of the Convention".[51]

However, it has been argued that both provisions taken together go beyond a simple requirement on states "to efficiently process an application for family reunification" as "failing to grant family reunification rights may bring a State Party into breach of the earlier provisions not to forcibly separate children from their parents".[52] Article 22 requires states to protect and assist refugee children and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. Family tracing is of particular importance to refugee children separated from their parents or customary care-giver. Many states entrust family tracing to organisations such as the Red Cross. Article 22.2 stipulates that states shall provide:

> co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

The Convention is premised on four principles, three of which have particular relevance to the issue of family reunification:

- all children should be entitled to basic rights without discrimination (Article 2);
- the best interests of the child should be a primary consideration in decision-making affecting children (Article 3.1);
- the views of children must be taken into account in matters affecting them (Article 12).

Article 2(1) proscribes discrimination in relation to the rights laid down in the Convention between different groups of children but also between children and adults. Bhabha pointed to one area where discrimination takes place between adults and children

49 E F Abram, "The child's right to family unity in international immigration law" (1995) 17(4) *Law and Policy* 397–439, p. 418, cited in Staver, *Family Reunification*, n. 4 above, p. 15.

50 UNHCR, *Summary Conclusions on Family Unity* (Cambridge: CUP June 2003), available at: www.unhcr.org/refworld/docid/470a33bed.html.

51 Office of the High Commissioner for Human Rights (OHCHR), *Family Reunification, Migration Discussion Papers*, available at www2.ohchr.org/english/issues/migration/taskforce/docs/familyreunification.pdf.

52 Edwards, "Human rights", n. 1 above, p. 315.

which has a knock-on effect on family reunification, namely the reduced likelihood of children being declared refugees following an application for asylum. While, as she points out, children are not discriminated against in relation to access to the asylum process, a "considerably lower proportion" of child applicants are recognised as refugees.[53] As a result, they are ineligible for the domestic family reunification procedures pertaining to refugees in the host state.

The best interests of the child standard has been included in a number of international instruments concluded since the adoption of the CRC.[54] Moreover, it is adopted as policy by a wide range of bodies working with children. While this widespread acceptance of the best interests of the child principle is welcome, it remains the position that many states fall short of their obligations, in particular regarding family reunification where children are concerned. The UNHCR has noted that family reunification wherever possible should be regarded as in the best interests of the child.[55] It could be argued that it is in the best interests of children separated from their parents and other close family members by migration to be reunited with them.

At EU level, immigration control often takes precedence over the best interests of the child.[56] A recent report on the implementation of the EU Family Reunification Directive found that states often do not take into account in a satisfactory manner the best interests of the child, nor do they adequately apply the more favourable provisions for the family reunification of refugees.[57] According to Sandy Ruxton, there is evidence to suggest that:

> [children's interests are not always a] "primary consideration", when drawing up legislation and policy . . . and although the "best interests" principle is positively included in recent asylum and migration instruments, it is sometimes undermined by other specific provisions or inconsistently applied in practice.[58]

Moreover the Committee on the Rights of the Child has also adopted a General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin.[59] In relation to family reunification, it states that, if it is not possible for the child to be united with his or her parents in the country of origin, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, obligations under Articles 9 and 10 of the Convention are engaged, and the Committee reminds states of their obligations, in particular to deal with applications for family reunification in a positive, humane and expeditious way.

The third principle that impacts on family reunification rights, is that the views of children must be taken into account in all matters affecting them.[60] This recognises the fact that although children "lack the full autonomy of adults" they are nevertheless "holders of

53 J Bhabha, "More than their share of sorrows: international migration law and the rights of children" (2003) 22(2) *Saint Louis University Public Law Review* 253–74, p. 259.

54 See above, the EU Qualifications and Family Reunification Directives. The best interests of the child is also reflected in human rights instruments including the ECHR, Article 24.1 and the Convention on the Rights of Persons with Disabilities, Article 7.2.

55 UNHCR, *Guidelines on Determining the Best Interests of the Child* (Geneva: UNHCR May 2008), para. 1.3.

56 D Sutton and T Smith, "Is Europe failing separated children" (2005) 23 *Forced Migration Review* 29–30, available at www.fmreview.org/FMRpdfs/FMR23/FMR2311.pdf.

57 Report from the Commission to the European Parliament and the European Council on the application of Directive 2003/86 on family reunification of third-country nationals, COM/2008/0610final.

58 S Ruxton, *What about us? Children's rights in the European Union* (Brussels: European Children's Network 2005), p. 13.

59 Committee on the Rights of the Child, General Comment No. 6 (2005).

60 CRC, Article 12.

rights". The importance given to these views will be determined by the child's age and level of maturity. The Committee on the Rights of the Child notes that the right of the child to be heard places a clear obligation on states to recognise this right and to ensure its implementation by seeking the views of children and according due weight to these views.[61] It goes on to state that in order to meet their obligations states are required to review or amend legislation in order to ensure that mechanisms are introduced to ensure that children receive appropriate information and adequate support in addition to feedback on the weight given to their views if necessary.[62] Despite their obligations under Article 12 of the CRC, states often do not put in place measures to solicit the views of children, in particular child applicants, during the family reunification process, and in some cases states have not informed children or their guardians in the country of asylum of their family reunification rights and the procedure involved.[63]

An examination of the concluding reports of the Committee on the Rights of the Child reveals that many states fail to implement the CRC in an equitable manner. While the CRC does not confer an absolute right to family reunification, the Committee would appear in recent years to have adopted "an extensive interpretation" of the provisions relating to family reunification.[64] This is evident from an examination of its concluding observations on states parties' periodic reports. While, on the one hand, many of the comments and recommendations seek to ensure that states parties comply with the provisions of the Convention, for example, comments in relation to the length of the procedure, others go further in dealing with the rights to family reunification where children or family members are holders of temporary protection or humanitarian visas and in requesting states to review their definition of the family for the purposes of family reunification.

The Committee urged Australia to introduce legislation and procedures "to guarantee that children of asylum seekers and refugees are reunited with their parents in a speedy manner".[65] It drew the attention of a number of states to lengthy family reunification processing times. In its concluding observations on Finland's second periodic report, the Committee expressed its concern over the length of the family reunification process and the negative impact this may have on children.[66] States have also been reminded of their duties to inform children of the right to make an application for family reunification and the procedure involved. The Committee urged Norway

> to establish a standard procedure through which children and other concerned persons . . . are informed of the possibilities and procedures for family reunification and for these procedures to be implemented systematically in accordance with set guidelines.[67]

The Committee expressed its concern over legislative changes in Denmark to reduce the age limit of a child eligible for family reunification from 18 to 15 years old and

61 Committee on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard, CRC/C/GC/12, 20 July 2009 (hereinafter General Comment No. 12), para. 15.

62 Ibid. para. 48.

63 The Committee on the Rights of the Child has admonished several states parties for failing to provide information to children on their right to family reunification. See below, text relating to nn. 65–74.

64 OHCHR, *Migration Discussion Paper* (Geneva: OHCHR November 2005), p. 4, available at www2.ohchr.org/english/issues/migration/taskforce/docs/familyreunification.pdf.

65 Committee on the Rights of the Child, 16th Session, Concluding Observations of the Committee on the Rights of the Child, Australia, CRC/C/15/Add. 79, 10 October 1997, para. 30.

66 Committee on the Rights of the Child, 25th Session, Concluding Observations on Finland, CRC/C/15/Add. 132, 15 October 2000, paras 37 and 38.

67 Committee on the Rights of the Child, 24th Session, Concluding Observations on Norway, CRC/C/15/Add. 126, 28 June 2000, paras 32–3.

recommended that Denmark ensure that it complies with Article 1 of the Convention which defines a child as under the age of 18.[68] The Committee also expressed its concern regarding the German requirements and procedures for family reunification for those declared a refugee under the 1951 Refugee Convention, which the Committee considered were too complex and too long. It recommended that Germany take measures to ease these procedures.[69] The Committee similarly advised Canada to deal with applications for family reunification in an expeditious manner.[70]

In its concluding comments on France's 2009 report, it noted the lack of comprehensive information on family reunification procedures, their length and the limited possibilities for children to assert their right to family reunification when they arrive in France. It also expressed its concern "over reports on family separation due to deportation of parents due to a law which imposes on recognised refugees more restrictive criteria for family reunification including DNA testing and language proficiency".[71]

At the same session, the Committee urged Sweden to continue to take measures to ensure that the family reunification procedures for refugees are dealt with in accordance with Sweden's obligations under Article 10.1 in order that they do not entail infringing the rights of children under the Convention.[72] In June 2010, the Committee issued a similar recommendation to Belgium, urging it also to ensure family reunification procedures were in the best interests of the child.[73] The Committee recommended that Australia should consider permitting family reunification in cases where children or their family members are holders of temporary protection or temporary humanitarian visas.[74]

Legislation and policy on family reunification in Ireland

Only persons recognised as refugees in Ireland and beneficiaries of subsidiary protection have a statutory right to family reunification. However, while the Refugee Act 1996 (as amended) provides for the resettlement of refugees, referred to as "programme refugees",[75] there is no provision for family reunification for such refugees, primarily as many of them, but not all, arrive as part of a family group. In addition, Irish citizens have no statutory rights to family reunification with non-European Economic Area family members. Individuals who naturalise as Irish citizens do not gain any additional rights to

68 Committee on the Rights of the Child, 40th Session, Concluding Observations on Denmark, CRC/C/DNK/CO/3, 23 November 2003, para. 32.

69 Committee on the Rights of the Child, 51st Session, Concluding Observations on Germany, CRC/C/15/Add. 226, 26 February 2004. This periodic review took place prior to the implementation of the Qualification Directive.

70 Committee on the Rights of the Child, 51st Session, Concluding Observations on Canada, CRC/C/15/Add. 215, 27 October 2003, para. 47(f).

71 Committee on the Rights of the Child, 51st Session, Concluding Observations on France, CRC/C/FRA/CO/4, 11 June 2009, para. 10.

72 Committee on the Rights of the Child, 51st Session, Concluding Observations on Sweden, CRC/C/SWE/CO/4, 12 June 2009, para. 65.

73 Committee on the Rights of the Child, 54th Session, Concluding Observations on Belgium, CRC/C/BEL/CO/3–4, 18 June 2010, paras 74(d) and 75(c).

74 Committee on the Rights of the Child, 40th Session, Concluding Observations on Australia, CRC/C/15/Add. 268, 20 October 2004, para. 65(e)

75 Article 24 of the Refugee Act 1996 (as amended) defines "a programme refugee" as "a person to whom leave to enter and remain in the state for temporary protection or resettlement as part of a group of persons has been given by the Government and whose name is entered in a register established and maintained by the Minister for Foreign Affairs, whether or not such person is a refugee within the meaning of the definition of 'refugee' in section 2".

family reunification and refugees and beneficiaries of subsidiary protection lose their statutory right to be joined by their families.

While family reunification rights for those granted international protection are provided for in legislation, the procedure is often lengthy and bureaucratic. In addition, individuals who are granted leave to remain subsequent to a negative asylum determination do not have a right to family reunification irrespective of the ground(s) on which leave to remain was granted.

Section 18 of the Refugee Act 1996 (as amended) governs the right to family reunification for recognised refugees in Ireland.[76] Two categories of family reunification are provided for. A refugee is entitled to be reunited with his or her immediate family members (subject only to national security concerns and public policy), defined narrowly as the spouse and unmarried child of an adult refugee and in the case of refugee children, the parents of the refugee. A discretionary system by which the minister may also grant permission to reside in the state to a dependent member of the refugee's family is also provided for under this section. Article 18(4)(b) of the Refugee Act 1996 defines "dependent member of the family", in relation to a refugee, as:

> any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.

Section 18 also sets out the procedure for applications for family reunification. A refugee in respect of whom a declaration is in force may apply to the Minister for Justice for permission to be granted to his or her family to enter and reside in the state. The application is subsequently referred to the Refugee Applications Commissioner who is required to investigate the application and submit a report in writing to the minister, setting out "the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person". If the minister is satisfied that the person is a member of the family of the refugee, he or she will grant permission to the person to enter and reside in the state. This applies both to immediate and dependent family members. The legislation fails to provide for an independent appeals process in cases where permission for reunification has been refused. It is open to refugees and beneficiaries of subsidiary protection whose applications have been unsuccessful to make a new application, further prolonging the separation from family members.

Child applicants for family reunification in Ireland must go through the same application process as adults. Such procedures fail to take account of the particular needs of children and their levels of understanding. It may be argued that children in the family reunification process, in particular child applicants, are considerably disadvantaged by legislation and procedure which fails to fully comply with Ireland's obligations under the CRC. This can been seen most clearly in relation to a number of issues including the discriminatory nature of dependency requirements, the lengthy procedural delays and the failure to take into consideration the views of the child regarding family reunification – a matter that is clearly central to their lives.

76 Identical provisions also apply to beneficiaries of subsidiary protection under s. 16 of the European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006).

Dependency and child applicants

A separated child, declared a refugee in Ireland, is automatically entitled to apply for reunification with his or her parents, but the refugee child must demonstrate that any siblings are dependent on him or her, an onerous task, particularly as most separated children are in full-time education. This is surely not in keeping with the spirit of the CRC. According to the Irish Refugee Council:

> The definition of dependent family members in Irish legislation works in favour of adults and discriminates against children who self-evidently will not be able to prove that others depend on them financially.[77]

Moreover, a successful application may result in parents facing a choice of whether to join their child in Ireland, leaving their remaining children alone in the country of origin, or to remain in the country of origin with their other children.[78] Such a narrow definition of the refugee child's family is hardly in keeping with a positive and humane approach to applications for family reunification stipulated in the CRC. There is no provision for a refugee or beneficiary of subsidiary protection to be joined by a family member other than a parent on whom he or she is dependent, again putting child refugees or beneficiaries of subsidiary protection at a disadvantage, as they are more likely to be dependent whether financially, emotionally or otherwise on a member of their family.

Procedural delays

Ireland is not alone among refugee-receiving countries in failing to provide an expeditious family reunification application process. According to Professor Hathaway, "there are often prolonged delays in authorising family reunification in developed states".[79] Neither the Convention nor the Committee on the Rights of the Child have defined "expeditious" in relation to family reunifications, however, the protracted nature of the process in many cases in Ireland could hardly be said to fulfil the state's obligations in this regard. Many applications take at least two years to be processed to completion and some take even longer.[80]

Applications for family reunification are dealt with in chronological order and applications involving children are not prioritised. The European Council on Refugees and Exiles (ECRE) has recommended that applications for family reunification from or regarding separated children should be prioritised given the negative impact of prolonged separation from their parents. It further recommends that all applications for family reunification should be processed within a six-month timeframe.[81]

In a case before the Irish High Court involving an application for family reunification made by a refugee for his wife and minor children where a four-year delay occurred in determining the application, the court held that:

> The requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled

77 N Mooten, *Making Separated Children Visible: The need for a child-centred approach* (Dublin: Irish Refugee Council 2006).

78 The Trinity Immigration Initiative Report describes the experiences of one young Somali woman who arrived in the state aged 17 as a separated child in 2005 and applied for family reunification for her widowed father and her five siblings on receipt of a declaration as a refugee in 2006. In 2010, she was finally informed that only her father had been granted family reunification. Moreo and Lentin, *From Catastrophe to Marginalisation*, n. 11 above, p.47.

79 J Hathaway, *The Rights of Refugee under International Law* (Cambridge: CUP 2005), p. 537.

80 See n. 77 above.

81 ECRE, *Position on Refugee Family Reunification* (Brussels: ECRE July 2000).

> to a decision within a reasonable time . . . The applicant in the present case applied for family reunification in June 2003 and did not receive a decision until August 2007, there was, therefore, a delay of over 4 years. This is a most unsatisfactory state of affairs.[82]

While the court did not set out what could be considered a reasonable time in which to process family reunification applications, it is clear that a delay of four years is excessive. In this case, children were the subjects of the application and it would appear reasonable to suggest that due regard was not given by the minister to the best interests of these children. As the CRC has not been incorporated into Irish law, the state's obligations under the Convention in relation to ensuring that applications for family reunification are dealt with in an expeditious manner were not addressed by the court.

Failure to consider the views of the child

While separated children who have been granted a declaration as a refugee or are beneficiaries of subsidiary protection may apply to be joined by family members, their applications are processed in a similar manner to those of adult applicants. In addition, child-appropriate information regarding the right to family reunification and the procedure involved are not made available to children. The Committee on the Rights of the Child has emphasised through General Comment No. 12 the requirement on states to ensure that the views of children are taken into account in matters concerning them.

Neither s. 18 of the Refugee Act 1996 (as amended) nor s. 16 of the European Communities (Eligibility for Protection) Regulations 2006 address the specific needs of children in the family reunification process, in particular separated children. Little detail is provided in the legislation on the procedure for determining applications for family reunification. For example, while it is clear that the Refugee Applications Commissioner is tasked with carrying out an investigation and submitting a report to the minister, it is unclear whether the minister can make further inquiries or indeed carry out an additional investigation. There is no provision for an oral interview nor for the making of representations or submission of new information. In order to comply with the state's obligations under Article 12 of the Convention, a mechanism for ensuring that the views of children are heard and considered in the family reunification process must be implemented and this should include the provision of age-appropriate information and support.

Ireland's report to the Committee on the Rights of the Child

Ireland presented its last periodic report to the Committee on the Rights of the Child in 2006. In the case of Ireland, the Committee was of the view that the Refugee Act 1966 (as amended) provides for an adequate legal framework for family reunification for refugees. However, it reminded Ireland that family reunification in accordance with Article 10 of the Convention also applies to other situations and that family members in such situations do not have access to procedural information, and that the principle of the best interests of the child is not taken into account in the decision-making process.

It also recommended that Ireland should:

(a) consider reviewing the definition of family in the Refugee Act 1996 to better correspond to the developing understanding of the family;

(b) consider establishing a legal framework for family reunification outside situations under the Refugee Act; and

82 *TV MJELR* [2008] IEHC 361, para. 16.

(c) ensure that the principle of the best interests of the child is always a primary consideration when making decisions involving children under any legal or administrative procedures.[83]

Ireland has largely ignored these recommendations. Despite the recommendations of the Committee on the Rights of the Child, the Immigration, Residence and Protection Bill 2010, which will replace existing legislation in relation to asylum and immigration, does not extend the definition of the family and fails to provide for family reunification for other migrants. Ireland only recognises the family based on marriage for the purposes of family reunification. An unmarried refugee or beneficiary of subsidiary protection is not permitted to apply to be joined by his or her partner whether heterosexual or same sex. This does not change where children are involved and a situation could arise under the current family reunification regime where a refugee or beneficiary of protection who is not legally married but in a long-term relationship may be joined by his or her children but not by the other parent of those children.

Conclusion

Although the Convention does not confer a "right" to family reunification on children or their families, it can be argued that states' obligations regarding family reunification under the Convention are stronger than those set out in other human rights conventions. In addition, the Committee on the Rights of the Child has demonstrated its commitment to ensuring that states comply fully with and implement in a generous way the provisions of the CRC as they relate to family reunification. The Committee recognises the vulnerable situation of unaccompanied and separated children and emphasises the duty on states to ensure that the views of children be heard in all matters concerning them.

The Committee on the Rights of the Child has addressed specific issues in relation to states' implementation of the CRC: the length of the process; the failure of states to provide information to children on their rights to family reunification; the definition of family for the purposes of family reunification; and more restrictive criteria for refugees, including DNA and language testing, in reunifying with their family. It has gone further to urge states to consider permitting family reunification in situations where children or their families have been granted temporary protection or humanitarian status.

It can be argued that, while beneficiaries of international protection in Ireland have a statutory right to family reunification, the state is failing in its obligations under the CRC. The narrow definition of family set out in legislation and the application process, which is beset with bureaucracy and lengthy delays, raise questions regarding the state's commitment to the full implementation of the CRC. Ireland's legislation and policy regarding family reunification cannot be viewed in isolation from its attempts to control migration, including the numbers of applications for a declaration as a refugee. However, the Committee on the Rights of the Child has been unambiguous in emphasising that the rights of children to reunification with their families should not be compromised in the interests of immigration control. The state must at a minimum ensure that the recommendations of the Committee in its concluding comments on Ireland's last periodic report are complied with.

83 Committee on the Rights of the Child, 43rd session, considering reports submitted by states parties under Article 44 of the CRC, Concluding Observations on Ireland, paras 30 and 31.

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Access and the non-custodial parent in the Republic of Ireland

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Abstract

Maintaining a relationship between parents and children following the breakdown of a marriage or relationship can be fraught with difficulties, particularly where acrimony exists between parents. This article explores the right of a non-custodial parent to have access to their child under Irish law and discusses the results of an interview-based study undertaken by the author using qualitative research methods. The interviewees in the study included practitioners as well as separated, divorced and unmarried fathers and mothers who outlined their views on access and the study found that the majority of non-custodial parents had some level of access to their child. The article further outlines the author's experience of successfully applying to attend family court as a bona fide researcher and discusses some of the results of observations in those courts which reinforced the results of the interview-based study. Article 9(3) of the United Nations Convention on the Rights of the Child (CRC) states that in the event of separation of parents, it is the right of the child to maintain personal relations and contact with both parents. Article 7(1) of the Convention further supports the right of a child to be cared for by his or her parents. These articles have proved useful for fathers' rights campaigners who advocate that they should have more contact with their children post-separation. The Convention, however, while ratified by Ireland, has not yet been incorporated into Irish law. The article concludes by examining whether the incorporation of the Convention would advance the rights of Irish children to maintain a relationship with their parents, unless such a relationship would be contrary to the children's best interests. In light of this, this article examines the proposed wording of the Constitutional Referendum on Children which was published in early 2010 and assesses what impact the passing of such a referendum would have on children's rights in Ireland.

Introduction

Following the breakdown of a marriage or relationship, the right of a child to have access with the non-custodial parent is governed in the Republic of Ireland (hereinafter referred to as "Ireland") by the Guardianship of Infants Act 1964.[1] This statute permits the court to make an order for custody to decide with whom the child should live on a day-to-day basis. It also gives leave to the court to make orders for access so that the non-custodial parent (usually the father) is given permission to visit the child on specific dates and at

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1 As amended by the Status of Children Act 1987 and the Children Act 1997.

specified times.[2] The right of a child to maintain contact with his or her parents is an integral part of the CRC. This Convention has placed children's rights at the heart of legislative provisions worldwide. Further, as it was the "first binding universal treaty dedicated solely to the protection of children's rights",[3] it firmly placed the child as an autonomous person at the centre of human rights issues. It applies to all children under the age of 18 years.[4] While Ireland has ratified the Convention, it is not yet part of domestic law. This article will focus on the provision of access to the non-custodial parent and will address how the incorporation of the Convention could strengthen a child's right to have continued involvement with his or her parents after separation or relationship breakdown. It will further examine the text of the proposed wording of the Constitutional Referendum on Children, which if adopted, could be instrumental in paving the way for the Convention to become part of Irish domestic law.

Ireland and the Convention

When the CRC was opened for signature in 1990, Ireland was one of the 61 states to sign up. The CRC was subsequently ratified by Ireland in 1992 and entered into force in October of the same year. Ireland takes a dualist approach to international law. In the Constitution of 1937, Article 15 gives sole and exclusive power to the Oireachtas to make laws and Article 29 provides that for an international treaty to be a source of law domestically, it must have been specifically incorporated into domestic law.[5]

This means that international and domestic law are viewed as two separate legal systems and international law only impacts on domestic law to the extent to which it is incorporated into Irish legislation. As a result, not all international agreements to which Ireland becomes a party are automatically incorporated into domestic law.[6] Therefore, as the CRC has not yet been incorporated it is not legally binding. As a result it cannot be relied on in Irish Courts but may be used as a "source of guidance, rather than a source of hard law".[7] Fottrell argues that domestic courts have relied on the Convention for guidance and when this occurs, it raises the existing standards in that state.[8] Having ratified the Convention, there is a duty on

2 S. 9 of the Children Act 1997 inserted a new s. 11B into the Guardianship of Infants Act 1964 which provides that any person who is related to the child or has acted *in loco parentis* to a child can apply to the court for access to that child. S. 11B(2) of the Principal Act provides that relatives must first apply and be granted leave by the court to make an application for access.

3 D Fottrell, *Revisiting Children's Rights: 10 years of the UN Convention on the Rights of the Child* (The Hague: Kluwer Law International 2000), p. 1.

4 Article 1 of the Convention states that a child is someone under 18 years of age unless the age of majority is attained at an earlier age under domestic law.

5 Article 15.2.1 of the Constitution states: "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State." Article 15.2.2. states: "Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures." Article 29.6 states: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." Note: Oireachtas is the national parliament of Ireland.

6 For example, in *Re O'Laighleis* [1960] IR 93, the applicant argued that the Offences Against the State (Amendment) Act 1940, under which he had been interned, was inconsistent with the European Convention on Human Rights. Maguire CJ in the Supreme Court held that the "Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law": p. 125.

7 Law Society Law Reform Committee, *Rights-based Child Law: The case for reform* (Dublin: Law Reform Committee of the Law Society of Ireland 2006) p. 7.

8 Fottrell, *Revisiting Children's Rights*, n. 3 above, p.13.

the state to ensure that children's rights are enshrined in all domestic law and policy and domestic legislation must comply with the minimum standards outlined in the Convention.

As with all state parties to the CRC, Ireland is obliged to submit periodic reports every five years to the Committee on the Rights of the Child. In its first report in 1996, the Committee observed that there was a lack of guarantees for the child to maintain contact with both parents after divorce, and that the views of the child were not generally taken into account.[9] The Committee recommended the publication of a National Children's Strategy. This strategy entitled *Our children – their lives* was published in 2000 after extensive consultation with parents, children and interest groups. The 10-year plan of this strategy is to improve the quality of children's lives, including the right of children to have a voice in matters affecting them.[10] The second report in 2005[11] and the concluding observations by the Committee in 2006[12] stated that while some progress had been made, there were concerns that "the adoption of a child rights-based approach in policies and practices" had not been sufficiently progressed.[13] In particular, the Committee recommended that the best-interests principle be fully integrated in all legislation relating to children and that children should be provided with an opportunity to be heard in any proceedings affecting them with due weight to be given to their views, especially in circumstances where children have been separated from their parents.[14]

Maintaining contact under the CRC

A number of articles have particular importance in relation to a child's right to maintain contact with his or her parents. In particular, Article 7 of the CRC states:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Further, Article 9(1) specifies:

> State Parties shall ensure that a child shall not be separated from his or her parents against their will, except . . . that such separation is necessary for the best interests of the child.

More particularly, Article 9(3) gives the strongest indication of the right of the child to maintain contact as it states:

> State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.[15]

The CRC was the first international treaty to confirm the relevance of participation rights of children. Article 12 requires state parties to ensure that due weight is given to the views of the child, and that children who are capable of expressing views be heard in all matters concerning them. It provides:

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9 *Ireland's First Report to the Committee on the Rights of the Child* (Dublin: Stationery Office 1996), paras 15–20.

10 National Children's Office, *The National Children's Strategy: Our children – their lives* (Dublin: Stationery Office 2000), pp. 29–36.

11 *Ireland's Second Report to the Committee on the Rights of the Child* (Dublin: Stationery Office 2005).

12 Committee on the Rights of the Child, Concluding Observations on Ireland, CRC/C/IRL/CO/2 (2006).

13 Ibid. para. 6.

14 Ibid. paras 5–6.

15 The wording of Article 9(3) is similar to Article 24(3) of the EU Charter of Fundamental Rights which states: "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

> State 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 child.

As previously mentioned, the CRC has not been incorporated into Irish law but the principles outlined in the Convention have, however, been influential in the Irish courts as a source of guidance in family law cases since its ratification. For example, in *N* v *N*[16] a father claimed that his six-year-old child was being unlawfully retained in Ireland and brought proceedings for the prompt return of his child under Article 12 of the Hague Convention.[17] The key question for the courts was whether the child had a right to be heard under Article 11(2) of Council Regulation 2201/2003.[18] Finlay-Geoghegan J commented in applying Article 11(2) that "it appears to me that it is permissible to have regard to Article 12 of the UN Convention on the Rights of the Child".[19] Hence, the judge concluded that the child had a right to be heard in proceedings affecting him.[20]

Further, the principles in the CRC have been influential in the European Court of Human Rights (ECtHR). For example, in *Keegan* v *Ireland*,[21] the ECtHR referred to Article 7 of the CRC and acknowledged that a child has, as far as possible, a right to be cared for by both parents.[22] In this case an unmarried father whose relationship with the child's mother broke up prior to the birth of his child applied unsuccessfully to the Irish courts for guardianship and custody of the child.[23] The child was subsequently placed for adoption by the mother, against the wishes of the father. At that time, the consent of the child's father was not required unless he had been appointed a guardian of the child, or had care or control over the child at the relevant time, nor had he a right (at that time) to be consulted in relation to any such adoption.[24]

Mr Keegan was appointed a guardian and awarded custody of the child in the Circuit Court but this was appealed to the High Court. Barron J in that court applied a two-part test to determine:

> (1) whether the natural father is a fit person to be appointed as guardian, and, if so:
>
> (2) whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed.[25]

Barron J sent the case to the Supreme Court for an opinion on the test he had formulated. Finlay CJ held in that court that the test applied in the High Court was incorrect

16 [2008] IEHC 382.

17 Hague Convention on the Civil Aspects of International Child Abduction.

18 Also known as Brusells II *bis* or revised Brusells II.

19 [2008] IEHC 382, para. 25.

20 Finlay-Geoghegan J did observe that "[i]n general, the weight to be attached to views expressed by a six year old as to the country in which he would like to live will be less than that to be attached to the views of say a fifteen year old": ibid. para. 31.

21 Case 16969/90, *Keegan* v *Ireland* (judgment of 26 May 1994).

22 Ibid. para. 362.

23 *JK* v *VW* [1990] 2 IR 437. The birth of this child was planned and the couple were engaged to be married at one point.

24 S. 14 of the Adoption Act 1952 which stated: "An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section."

25 [1990] 2 IR 437, para. 456.

as it gave an unmarried father an automatic right to guardianship. If this was the case, the father's consent would be required for the adoption order to be legalised.[26] While the Supreme Court did acknowledge that Mr Keegan had the welfare of the child at heart, it concluded that a natural father did not have an automatic constitutional right to be a guardian, but rather he merely had a right to apply for same. This did not equate his position with that of a married father.[27] The case was returned to the High Court where Barron J concluded that the child remain with her adoptive parents because, if she was removed, she would be in danger of suffering psychological trauma or insecurity by breaking the bonds of attachment with her adoptive parents.[28]

Subsequently, the case was appealed to the ECtHR where the applicant complained that there had been a violation of his right to respect for family life under Article 8 of the Convention, because the child had been placed for adoption without his knowledge or consent. The ECtHR held that the natural father was placed at a considerable disadvantage under Irish law as he was not informed of the adoption of his child.[29] In referring to the CRC, the court noted:

> It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down.[30]

This case was influential in that the legislature subsequently introduced the Adoption Act 1998 which gives unmarried fathers a right to be consulted prior to the adoption of their child.[31]

Access under contemporary Irish legislation

In Ireland, guardianship, custody and access are governed by the Guardianship of Infants Act 1964.[32] Where couples have been married, the father is an automatic guardian sharing guardianship jointly with the child's mother, he will most likely be granted joint custody and unless exceptional circumstances prevail, will have access to his children. Unmarried fathers are not automatic guardians but have a right to apply for guardianship under s. 12 of the Status of Children Act 1987[33] or by agreement with the mother under s. 4 of the Children Act 1997. An unmarried father may apply for custody or access in respect of his child whether or not he also enjoys guardianship rights. Unmarried fathers, however, have no automatic right to guardianship and hence do not have a right to make major decisions in relation to their children, especially in relation to education, religion and consent to medical

26 [1990] 2 IR 437, para. 444.

27 Ibid. para. 446. Finlay CJ stated that the rights of any father would depend on the intensity of the particular relationship between the father and child and that where a child was conceived as a result of casual intercourse, then a father's "rights might well be so minimal as practically to be non-existent": at para. 447.

28 Ibid. para. 461.

29 *Keegan* v *Ireland*, n. 21 above, para. 46.

30 Ibid. para. 50

31 S. 6 of the Adoption Act 1998, inserted a new s. 19A into the principal adoption legislation, being the Adoption Act 1952. In the *Keegan* case, as the child had been with her prospective adoptive parents for over two years and had bonded, the adoption took place.

32 In 2009, the Law Reform Commission published its *Consultation Paper on the Legal Aspects of Family Relationships* (LRC CP55-2009) and recommended the replacing of the terms "guardianship", "custody" and "access" with the terms "parental responsibility", "day-to-day care" and "contact", respectively.

33 S. 12 of the Status of Children Act 1987 inserted a new s. 6A into the Principal Act, being the Guardianship of Infants Act 1964.

treatment or the signing of passport forms for children under the age of 18 years.[34] In theory, when couples separate, the child may reside with either parent, unless the court directs otherwise. In practice, however, the mother is usually the parent with whom the child lives on a day-to-day basis and the father will invariably be granted access rights either by agreement or by the court. Coulter's study of Circuit Family Court cases in Ireland found that in almost 60 per cent of cases, children lived with their mother following the breakdown of a marriage.[35]

Children can also have restricted access to their parents if they are taken into care. Under the Child Care Act 1991 children may be taken into care on a voluntary basis.[36] In the alternative, if exceptional circumstances exist, they can be taken into care without their parents' consent where the child has been, or is suspected of being, abused, neglected or ill-treated in any manner.[37] However, s. 37 of the 1991 Act requires the state and its agent, being the Health Service Executive, to facilitate where possible, access for children who have been taken into care, whether compulsory or voluntary.[38] Such access is subject at all times to the best interests of the child in question. This right of access to children in care has also been recognised by the ECtHR when, in *Eriksson* v *Sweden*,[39] the court held that a child's relationship with his or her family is not terminated by reason of the fact that the child has been taken into care and, as a result, Sweden was found to be in breach of Article 8 of the European Convention on Human Rights.[40] Further, in *Olsson* v *Sweden*[41] it was held that Article 8 was not violated by taking children into care but "it is an inference of a very serious order to split up a family"[42] and therefore the implementation of the care order gave rise of a breach of Article 8 as the maintenance of access between the family was not feasible.

For most children, the difficulty in maintaining contact with their parents is as a result of separation and divorce. Fathers' rights groups often complain that it is difficult for fathers to maintain contact with their children as there is a "generalisation that fathers do not want to look after their children or have custody of their children".[43] In the 1970s, Wrangham J in *M* v *M*[44] described access as "a basic right in the child rather than a basic

34 S. 14 of the Passports Act 2008 permits the issuing of passports for children without the consent of a guardian. S. 14(3) of the Act states: "the Minister [Minister for Foreign Affairs] may issue a passport to a child without the consent to such issue of a guardian of the child if a court in the State makes an order directing that a passport may be issued to the child without the consent to such issue of that guardian of the child." S. 14(5) permits the issuing of the passport if it is not practicable or appropriate to obtain permission, including if the first named guardian and child are ordinarily resident outside the state, unless the parents have objected in writing to the issuing of such a passport.

35 C Coulter, *Family Law in Practice: A study of cases in the Circuit Court* (Dublin: Clarus Press 2009), p. 121.

36 S. 4 of the Child Care Act 1991.

37 The court has the power to make an emergency care order (s. 13), interim care order (s. 17) or a care order (s. 18).

38 S. 37(1) states: "Where a child is in the care of a health board . . . the board shall, subject to the provision of this Act, facilitate reasonable access to the child by his parents, any persons acting *in loco parentis*, or any other person who, in the opinion of the board, has a bona fide interest in the child and such access may include allowing the child to reside temporarily with any such person." The Health Service Executive is the successor to the health boards.

39 Case 11373/85, *Eriksson* v *Sweden* (judgment of 22 June 1989).

40 Ibid. para. 58.

41 Case 10465/83, *Olsson* v *Sweden* (judgment of 24 March 1988).

42 Ibid. para. 72. The children had been placed separately in care from each other and their parents.

43 Available at www.fathers.ie. This group, formerly called Fathers for Justice and Equality have recently been renamed as Families, Fathers and Friends.

44 [1973] 2 All ER 81.

right in the parents".[45] Further, in *MD* v *GD*,[46] Carroll J held that s. 11(1) of the 1964 Act[47] enables the court to make access orders allowing children access to persons other than their natural parents, on the basis that "it is the right of the child with which the court is concerned, not the right of the adult".[48]

In light of this, an essential element of access is that children, where appropriate, should have the opportunity to be heard in order to ascertain their wishes. Section 25 of the Guardianship of Infants Act 1964[49] provides for a court "as it thinks appropriate and practicable having regard to the age and understanding of the child, [to] take into account the child's wishes in the matter". In *W* v *W*,[50] two boys aged 14 and 12 were interviewed by a judge and expressed a view that they would run away if they had to live with their mother. Kenny J stated that "when children of this age express such a strong preference for living with one of their parents, the Court should give effect to it".[51] The obligation to hear a child will depend on that child's understanding and maturity and in *Hokkanen* v *Finland*[52] the ECtHR held that "the obligation of the national authorities to take measures to facilitate reunion is not absolute".[53]

In order for children's voices to be heard in proceedings affecting them, mechanisms must be implemented to ensure that appropriate professionals can assist children in having their voices heard. In custody and access cases, some judges speak to children in their chambers. Coulter nonetheless points out that, while some judges meet children in chambers and speak to them, "others do not do so, suspecting that the children may be manipulated by one parent and not wishing to involve them [the children] in their parents' dispute".[54] Further, s. 28 of the Guardianship of Infants Act 1964[55] makes provision for the views of the child to be ascertained in guardianship, custody and access cases, by means of the appointment of a guardian *ad litem* (commonly known as GAL).[56] A GAL is a separate legal representative for a child, who acts on behalf of the child in proceedings affecting him or her and protects the child's interests. In appointing a GAL, the court should take a number of matters into consideration, namely the welfare of the child[57] and the age and understanding of the child.[58] Section 28 specifies that "special circumstances" must exist before a GAL may be appointed but there is no definition as to what these

45 [1973] 2 All ER 81 para. 85.

46 High Court, unreported, July 1992.

47 S. 11(1) of the 1964 Act: "Any person being a guardian of an infant may apply to the Court for its direction on any question affecting the welfare of the infant and the Court may make such order as it thinks proper."

48 See n. 46 above, p. 12.

49 As inserted by s.11 of the Children Act 1997.

50 Unreported, Supreme Court, June 1975.

51 Ibid. para. 3. The mother in this case was granted access to the children although the children expressed a wish that they did not want weekend access as it would interfere with their weekend activities.

52 Case 19823/92, *Hokkanen* v *Finland* (judgment of 23 September 1994).

53 Ibid. para. 58. In this case, a 12-year-old child's decision not to have access to her father was taken into account.

54 Courts Service, *Family Law Report Pilot Project* (Dublin: Courts Service 2007), p. 44. In 2005, Carol Coulter was appointed by the Courts Service to attend family law court proceedings for one year on a pilot basis: see www.courts.ie/Courts.ie/Library3.nsf/0/4A925BEEEE71148580257245005EEA1C?OpenDocument.

55 Inserted by s. 11 of the Children Act 1997.

56 S. 28 of the Guardianship of Infants Act 1964 states: "If in proceedings under section 6A, 11 or 11B the child to whom the proceedings relate is not a party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interest of the child to do so, appoint a guardian *ad litem* for the child."

57 S. 28(2)(c) of the Guardianship of Infants Act 1964.

58 Ibid. s. 28(2)(a).

"special circumstances" are. It appears, therefore, that appointment would only be made in limited circumstances and when it is in the best interests of the child to do so. Further, as Daly argues, in "private law proceedings, it is the parties themselves (or any other party identified by the court) who must bear the cost of the appointment of a guardian *ad litem*".[59] It appears therefore that such appointments are only made in custody and access cases where severe animosity exists. Unfortunately, even though the provision allowing for the appointment of a GAL in private law proceedings was passed in 1997, this section has not yet been brought into operation.[60]

Fathers' rights groups have been very vocal in their opposition to what they perceive as a bias against them in the family law courts system and argue that the law and courts are gender-biased.[61] These groups have also accused mothers of false and malicious claims against fathers to prevent access taking place, and describe mothers as vindictive and selfish women who routinely refuse to obey contact orders.[62] Kilkelly observes that "Irish law has made no provision, nor does it offer any guidance to the courts for dealing effectively and appropriately with allegations of sexual abuse raised in custody/access cases."[63] In an interview-based study conducted by the author, one father who was a custodian spoke passionately about allegations of abuse made against him by the child's mother during the custody hearing. He was questioned about but never prosecuted for these offences.[64]

The term used to describe a situation where the custodial parent refuses access to the other parent is called parental alienation syndrome. Shannon states that the "alienation can be due to overt or covert actions by the custodial parent designed to turn the child against the absent parent".[65] In the interview-based study, over 60 per cent of fathers interviewed stated that frustration of their access had occurred, while over a quarter of the mothers (36 per cent) admitted that they had refused the father access, but only when they believed the child was in danger.[66]

Rhoades argues that fathers want recognition that they play an equally important role as mothers in their children's lives "regardless of their past inexperience as carers or the father's inability to spend significant periods of time with the children".[67] In fact, Bainham makes the point that a feature of Articles 7 and 9 of the CRC is that "no distinction is

59 A Daly, "Limited guidance: the provision of guardian *ad litem* services in Ireland" (2010) 13(1) *Irish Journal of Family Law* 8–11.

60 Although the Child Care (Amendment) Act 2010 provides clarity in relation to the appointment of a GAL, this Act only relates to public law proceedings. The Act outlines the criteria for the appointment of a GAL, the qualifications required and specifies that the Health Service Executive can apply for costs in relation to any party (Part II, s. 12). For further discussion on this Act, see N Carr, "Child Care (Amendment) Bill 2009 – an attempt to arbitrate on a system's logic" (2010) 13(3) *Irish Journal of Family Law* 63–9.

61 B Geldof, "The real love that dare not speak its name", in A Bainham, B Lindley, M Richards and L Trinder (eds), *Children and their Families* (Oxford: OUP 2003), pp. 171–200, p. 181.

62 R Collier and S Sheldon, (eds), *Fathers Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart Publishing 2006), pp. 63–5.

63 U Kilkelly, *Children's Rights in Ireland: Law policy and practice* (Dublin: Tottel Publishing 2008), p. 154. Although, in practice, if allegations of this nature have been made, a judge would probably order supervised access to the child.

64 See general discussion on the interview-based study later in this article.

65 G Shannon, *Child Law* 2nd edn (Dublin: Round Hall 2010), p. 741.

66 The custodial fathers in the study also acknowledged that they too refused to let the children's mother have access to the child where they believed the mother was unfit to see the child as a result of alcohol or drug addictions.

67 H Rhoades, in Collier and Sheldon (eds), *Fathers Rights Activism*, n. 62 above, pp. 125–46, p. 143.

drawn between *mothers* and *fathers*".[68] Therefore, the right to access with one's child is not based on the gender of the parent but rather on who is the non-custodial parent. In many cases, however, fathers' employment schedules do not in reality leave room for day-to-day care or indeed shared parenting. Shared parenting might not be in a child's best interests if there is a volatile relationship between the parents, as a child could be psychologically damaged by a negative relationship between the parents. Fathers' rights groups have suggested that Article 9(3) supports their claim that children have a right to maintain contact with fathers. For example, one fathers' rights group in Ireland, Parental Equality, in a submission to the All-Party Oireachtas Committee on the Constitution in 1997, argued that when a child is born "the State, through the Constitution should acknowledge the child's right to the care and protection of both parents from the moment of birth".[69]

When children have access to their non-custodial parent, the norm is that children visit the parents at specified times. Interestingly, while Article 9 of the CRC refers to direct and regular contact it does not specify that such contact has to be physical contact. It is acknowledged, however, that the best possible solution for any child is to have physical contact. Doek, writing on Article 9, interestingly argues that, in situations where it is impossible for direct and regular contact to be maintained, this does not mean that personal relations cannot be maintained through email, telephone and correspondence.[70] In fact, the Irish courts in the past have deemed fit to order that parents have access with their children through such means. In *FN and Another* v *CO and Others*,[71] the High Court refused a custody application on behalf of a father of two teenage girls who was himself living in England.[72] Finlay-Geoghegan J stated that "it is in the interests of the welfare of the girls that they be encouraged to have increasing contact with their father".[73] The judge ordered increased access between the father and his daughters by means of weekly telephone calls and unlimited email access as the father thought fit.[74] Further, during the author's observations in the family courts,[75] it was noted that judges ordered that children have telephone access with the non-custodial parent, particularly in circumstances where this parent did not live in close proximity to the custodial parent's home or where it was not feasible for that parent to have access to the child mid-week.[76] Even though Doek was writing as recently as 2006, advances in technology such as Skype and social-networking sites mean that children can maintain contact not only by the written word, but also interactively. Technology is particularly important when parents do not live close to one another, as it can bring the more distant parent back into the lives of their children, although Welsh comments that such technologies should be "used only as a supplement to actual parent time" and should

68 Bainham et al., *Children*, n. 61 above, p. 62.

69 Available at www.parentalequality.ie/pe/images/preJune2008/pdf/submissions. At present, Article 41 of the Constitution of Ireland only recognises a marital union, while caselaw has held that Article 40.3 gives constitutional rights to unmarried mothers who are seen as having the right to the care and custody of their children. See discussion on the Constitution further in this article.

70 J E Doek, *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff 2006), p. 30.

71 [2004] 4 IR 313.

72 The girls were living in Ireland with their maternal grandparents following the death of their mother and had settled.

73 [2004] 4 IR 313, para. 328.

74 Ibid. para. 329. The judge observed that physical access visits could be organised during school holidays but felt that it was important that visiting periods be gradually built up.

75 See discussion on observations in the family courts in Ireland later in this article.

76 In one case, a judge also ordered children to have regular telephone access with their grandparents who lived overseas. For a discussion on the rights of grandparents in Ireland, see A Egan and R McNamara, "Grandparents and the law in Ireland" (2010) 13(2) *Irish Journal of Family Law* 27–38.

not replace actual visiting time.[77] Doek had suggested that legislative measures be introduced to include a provision which would provide the right of the child to maintain personal relations by other means in circumstances where direct and regular contact was not logistically possible.[78] In an Irish context, while there is no express legislative provision providing for access in this manner, the *FN* case is an example of the use of judicial discretion to determine if technology is a suitable means for the child to have access with its non-custodial parent. As the core of the CRC is the protection of children and treating them on a more equal footing vis-à-vis adults, it is suggested that it is better for children to maintain contact with their parents via technology and nurture their relationship on a regular basis, rather than the relationship between parent and child depending on a weekly access visit or a mid-week telephone call.

Interview–based study and court observations

An interview-based study conducted by the author reinforces the fact that the majority of non-custodial parents have some level of access to their children.[79] In total, 40 people were interviewed, made up of 11 solicitors, three barristers and two mediators, as well as 10 fathers and 14 mothers (who were either separated or unmarried).[80] Participants in the study were selected by means of a convenience sample which is defined by Bryman as one "that is simply available to the researcher by means of its accessibility".[81] The solicitors, barristers and mediators were selected on the basis of their expertise in the area of family law. Several methods were employed to recruit parents for the study. Initially, parent groups were contacted to access suitable interviewees, but while some contacts were made via fathers' rights groups, attempts to contact mothers by this method proved more difficult. Two further methods were also employed. Individual solicitors offered to approach their clients resulting in one quarter of the female participants being contacted in this way. The remainder of the female interviewees were referred to the researcher by personal acquaintances. Only 30 per cent of fathers had contact with fathers' rights organisations, while one father was involved in a lone parents' group. The remainder of fathers were contacted through personal acquaintances or through recommendations from the professionals interviewed. The primary method of data collection was semi-structured, face-to-face interviews. While the method is time-consuming, it facilitates the collection of in-depth information about the personal experiences of participants and enables researchers to properly assess and understand the views of all parties interviewed. The data were subsequently analysed using qualitative thematic analysis, by means of coding, to examine the presence of recurring themes and issues that emerged during the interview process.

The study found that while 45 per cent of separated mothers interviewed had joint custody with their former husband, the children resided with their mother who was the primary carer. One-third of the unmarried fathers had joint custody, but again in all such

77 D Welsh "Virtual parents: how virtual visitation legislation is shaping the future of custody law" (2008) 11(1) *Journal of Law and Family Studies* 215–25, p. 223.

78 Doek, *Commentary*, n. 70 above, p. 30.

79 The interview-based study was conducted by the author as part of doctoral research (unpublished). The title of the thesis is *The Rights and Responsibilities of Fathers in Irish Family Law*.

80 Six fathers were separated while the remainder were unmarried. Ten mothers were separated with four mothers unmarried.

81 A Bryman, *Social Research Methods* (Oxford: OUP 2001), p. 97. While geographical spread was not a pre-requisite of this research, it appeared desirable that the research be conducted in more than one area, in order to ascertain the experiences of participants in different District Court and Circuit Court areas. The exact locations and identities of the participants have been disguised, in order to protect the anonymity of the professionals and individuals involved in the research.

cases the children resided with their mother.[82] By contrast, 83 per cent of the separated fathers had joint custody, with only one father having day-to-day care of the children. Unmarried parents on the other hand, were more likely to have sole custody, with all of the unmarried mothers interviewed having sole custody, and one unmarried father having day-to-day care of his children. Conversely, 88 per cent of fathers had access arrangements in relation to their children but almost half of the solicitors interviewed recognised that children can be used as a "pawn", or as a "stick" in separation cases.[83] A minority of solicitors in the study noted that when fathers initially attend for consultation, they frequently request equal time with their children, but this does not always work in reality, primarily because of accommodation or working arrangements.[84] The mothers in the study also acknowledged that the majority of fathers had secured access rights to their children.[85] Separated fathers were more likely to have more flexible arrangements in relation to access but only two separated fathers stated that they were happy with the amount of access available to them, as they saw their children daily. In particular, non-custodial fathers spoke about the difficulties of not seeing their children daily. Those difficulties included missing out on the day-to-day contact with their children, missing their children growing up, and being left out of decision-making in relation to the child.

To supplement the findings in the interview-based study, an application was made by the author under s. 40(3) of the Civil Liability and Courts Act 2004,[86] to the Department of Justice, Equality and Law Reform to attend family law courts as a bona fide researcher attached to an academic institution.[87] As a researcher in a nominated body under the Universities Act 1997, there was an entitlement to apply.[88] Overall, the research in the family courts was conducted by attending the Circuit Family Courts for five days and the District Family Courts for four days.[89]

While the most common applications observed in the District Court were applications to make or vary maintenance orders, the second most common applications in this court were applications to either make or vary an access order.[90] Applications for access were predominantly made by men (63 per cent) but in seven (37 per cent) cases women were the applicants. Access was not denied by the judge to any applicant who sought it. This again was in line with the interview-based study previously mentioned, the vast majority of non-custodial fathers having access to their children. In one case before the District Court, a mother sought access as she had not seen her children due to her own ill health. The father

82 This result is similar to the Courts Service report, *Family Matters*, in 2007 which indicated that while joint custody was granted in the majority of the custody cases studied, the children remained living with their mothers – see Courts Service, *Family Matters* (Dublin: Courts Service 2007), p. 26. See also S Conneely, *Family Mediation in Ireland* (Aldershot: Ashgate Publishing 2002), p. 211, which found that in 89 per cent of cases surveyed, children of the family resided with their mother.

83 45 per cent of solicitors.

84 27 per cent of solicitors suggested this.

85 77 per cent of mothers stated this.

86 The categories of persons who may attend family law courts under SI 337/2005 are: family mediators, persons engaged in family law research who are either nominated by a body specified or approved by the minister or persons engaged by the Court Service to prepare court reports of proceedings under relevant enactments.

87 While the family law court sittings in Ireland are held in camera, the Civil Liability and Courts Act 2004 permits specified persons to apply to attend court and observe cases in these courts.

88 The Universities Act 1997 refers to all National University of Ireland colleges namely those located in Galway, Cork, Dublin and Maynooth. Other specified bodies refer inter alia to Trinity College, Dublin, Institutes of Technology and the Law Reform Commission.

89 Permission was granted by the Minister for Justice, Equality and Law Reform and visits to court were held over a three-month period.

90 21 cases (19 per cent) related to access.

was opposed to any access being granted due to the nature of her illness. The judge, however, suggested supervised access as her children had expressed concerns about their mother's mental state. The judge stated that "she is entitled to access" but the judge stressed that "until I am satisfied beyond doubt, there will be supervised access" until full psychiatric reports were available.

In a minority of cases if there was any doubt in relation to the child's safety the judge ordered supervised access or declared that the interim access order remain in place until an s. 20 report had been sought.[91] An s. 20 report under the Child Care Act 1991 may be sought by the court from the local Health Service Executive in order to undertake an investigation of the child's circumstances. The report gives direction on issues such as custody and access and unless the report indicates significant danger to the child's welfare, the judge will give due credence to the report's findings. If there is doubt about the suitability of the applicant parent in relation to access the judge can order supervised access or can suspend interim access orders already in place. If during the course of a case it is made known to the judge that a child may be in danger, then the judge may order an s. 20 report and adjourn proceedings until such time as this report is received.

A judge also has jurisdiction to order a social report under s. 47 of the Family Law Act 1995,[92] relating to any party to the proceedings or to any other person to whom the proceedings relate, including children.[93] Shannon states that, since the introduction of social reports, "they have become widely used as tools in the resolution of child-centred disputes".[94] In the court observations, however, it was noted that no judge ordered an s. 47 report.[95]

Nevertheless, in 11 cases (10 per cent) witnessed in the District Family Court, an s. 20 report was an integral part of the proceedings in that the judge gave due consideration to a report handed into court or he/she ordered an s. 20 report to be prepared before deciding on these issues and adjourned the case pending the handing in of the report. The more contentious and longer cases in the District Family Court related to issues of access between non-marital couples. For fathers, it can be more difficult to maintain a relationship with their child, as they are more likely to be the non-custodial parent, in particular as they may no longer live in the family home or sometimes within the same district. The CRC therefore is particularly important for these fathers as Article 9(1) suggests that children should not be separated from their parents against their will, while Article 9(3) obliges state parties to respect the child's right to contact with both parents. It appears therefore, that unless it is contrary to the child's best interests, the child should have regular contact with both parents.

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91 In 14 per cent of access applications, supervised access was granted.

92 S. 47(1) of the Family Law Act 1995 states: "In proceedings to which this section applies, the Court may, of its own motion or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of the party to the proceedings or any other person to whom they relate from (a) such probation and welfare officer . . . as the Minister for Justice may nominate, (b) such person nominated by a health board specified in the order as that board may nominate, being the person who, in the opinion of that board, is suitably qualified for the purpose, or (c) any other person specified in the order."

93 The equivalent section in the Family Law (Divorce) Act 1996 is s. 42 which directs that s. 47 of the Family Law Act 1995 applies to divorce proceedings.

94 G Shannon, *Family Law* 2nd edn (Oxford: OUP 2003), p. 57.

95 Clissmann and Hutchinson are critical of the s. 47 reports as they argue that the process of obtaining such reports is slow and thus causes delays in the proceedings – see further I Clissmann and P Hutchinson, "The right of the child to be heard in guardianship, custody and access cases (II)" (2006) 2 *Irish Journal of Family Law* 2–7, p. 3.

Incorporating the CRC in Ireland

It is submitted that the incorporation of the CRC into Irish law could ensure increased rights for children in our society and would lead to a more child-centred approach in Irish family law. By default, it could lead to better protection for fathers, particularly those who have difficulty securing access to their children post-separation, because Article 9(3) of the CRC, in particular, promotes the right of children to maintain contact with their parents and Article 12 gives them a right to have their views heard on all issues affecting them.

In the concluding observations by the CRC on Ireland's second report in 2005, the Committee recommended that Ireland:

> Strengthen its efforts to ensure, through Constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight in particular in families, schools and other educational institutions, the health sector and in communities.[96]

In the second report in 2005, the government announced that a Constitutional Referendum on Children's Rights would be held and a Joint Oireachtas Committee on the Constitutional Referendum on Children (the Joint Committee) was established in 2007.[97] In February 2010, this Joint Committee published its proposed wording of the constitutional amendment, the proposal being to amend the existing Article 42 of the Constitution with a more child-focused alternative.[98] The focus of the present Article 42 is on parents' right to educate their children and the right of the state to intervene only if parents fail in their duty towards their children.[99] The criteria for intervention in marital families is high,[100] as has been determined in *JH (an infant): KC and AC* v *An Bord Uchtála*[101] where Finlay CJ in the Supreme Court held that the welfare of the child "is to be found within the family, unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved".[102]

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96 Concluding Observations by the United Nations Committee on the Rights of the Child on Ireland's second report CRC/C/IRL/CO/2, para. 25.

97 In February 2007, the government published the Twenty-Eight Amendments to the Constitution Bill but the original wording outlined that year was scrapped.

98 www.irishpressreleases.ie/2010/02/16/joint-committee-on-the-constitutional-amendment-on-children-publishes-wording-for-the-proposed-constitutional-amendment-concerning-the-acknowledgement-and-protection-of-the-rights-of-children. The full document is available on www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20100218.pdf.

99 Article 42.5 of the Constitution states: "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard to the natural and imprescriptible rights of the child."

100 For example, s. 3(1) of the Adoption Act 1988 specifies that a child of a marital family can only be adopted if parents have failed for physical or moral reasons in their duty towards the child; it is likely that such failure will continue without interruption until the child attains the age of 18 years; that such failure constitutes an abandonment on the part of the parents of all parental rights and that by reason of such failure, the state, as guardian of the common good, should supply the place of the parents. This section also specifies that for such an adoption order to be made, it must be in the best interests of the child to do so.

101 [1985] IR 375.

102 Ibid. para. 395. In this case, an unmarried mother placed her child for adoption and before the final adoption order was made, she changed her mind and married the father of the child. The marriage to the father legitimised the child and therefore the child and its natural parents constituted a family under Articles 41 and 42 of the Constitution.

At present, while the welfare principle is promoted by legislation,[103] the primacy of the family, and, in particular, the marital family under Article 41,[104] is inhibiting the rights of children to be placed at the heart of all decisions affecting them. The supremacy of the constitutional marital family was never more apparent than in the *Baby Ann* case,[105] where the Supreme Court held that a young couple who married after they had placed their child for adoption could have the child returned to them. McGuinness J held that the case must be "decided under the Constitution and the law as it now stands"[106] and unless compelling reasons existed, a child of a marital family could not be adopted.[107]

The proposed amendment, therefore, if passed, would raise the rights of children to a constitutional level. In particular, the welfare principle would be constitutionally recognised as the amended Article 42(2) would read:

> The State recognises and acknowledges the natural and imprescriptible rights of all children including their right to have their welfare regarded as a primary consideration and shall, as far as practicable, protect and vindicate those rights.

Further, Article 42(3) would read "in the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child, the welfare and best interests of the child shall be the first and paramount consideration".

Particularly important is the proposal at Article 42(2) which states:

> The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including:
>
> i the right of the child to such protection and care as is necessary for his or her safety and welfare;
>
> ii the right of the child to an education;
>
> iii the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity.

Kilkelly comments that the proposed Article 42(2) is a "clear recognition of the status of children as right-holders, independent of adults".[108] Thus, children would not only have a right to protection and care and a right to education, but also a right to have their voices heard in any proceedings affecting them. The Joint Committee observed that:

> [i]t is the view of the Committee that our laws and services for children should be in accordance with the State's obligations under the United Nations Convention on the Rights of the Child.[109]

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103 S. 3 of the Guardianship of Infants Act 1964.

104 Article 41.3.1 pledges to "guard with special care the institution of Marriage, on which the Family is founded, and to protect it from attack".

105 *N and Another* v *Health Service Executive and Others* [2006] 4 IR 374.

106 Ibid. para. 498. In the High Court, McMenamin J had held that the child would be psychologically damaged if she was taken away from her prospective adoptive parents as she had formed an emotional bond with them and concluded that compelling reasons had been established – para. 466.

107 See also *North Western Health Board* v *HW and CW* [2001] 3 IR 622 where the marital parents refused to have their child undergo a heel prick/PKU test after birth. The state wished to take the child into care but the Supreme Court held that while the parents' decision was ill-advised, it did not constitute a failure in their duty to their child. Hardiman J commented that Article 42.5, which permits the state to intervene in exceptional circumstances, "does not constitute the State as an entity with general parental powers" – para. 757.

108 U Kilkelly, "A brave new model for the rights of Irish children", available at www.irishtimes.com/newspaper/opinion/2010/0218/1224264713713_pf.html.

109 Joint Committee, n. 98 above, p. 20.

This amendment, if passed, would bring a child-focused alternative in relation to any decisions made by adults on their behalf. In particular it would emphasise the right of a child to maintain contact with his or her parents and a right to have the voice of the child heard, unless it was contrary to the child's best interests to do so.

Constitutional amendment

The Joint Committee discussed the possibility of direct incorporation of the CRC in the Constitution but suggested that such direct incorporation would give "rise to complex and difficult issues" in particular in relation to the rights of parents already enshrined in Article 41 of the Constitution.[110] This is due to the fact that the rights in relation to children under the Convention are extensive and include not only civil and political rights but also economic, social and cultural rights. At present under Article 41, the marital family is deemed to possess inalienable and imprescriptible rights which could, the Committee suggested, be in conflict with the state's duty to protect the institution of marriage.[111] Further, the Joint Committee stated that "many of the rights provided for in the Convention inhere in children under the provisions of Article 40 of the Irish Constitution".[112] For example, in the *State (Nicolaou)* v *An Bord Uchtála*,[113] a case which was factually similar to the *Keegan* case, an unmarried father argued that his constitutional rights as a father were being infringed due to the fact that his child was adopted and his consent to the adoption was not required. The Supreme Court ruled that an unmarried father is outside the scope of Article 41, as is an unmarried mother but that an unmarried mother may have rights under Article 40.3 of the Constitution.[114] Walsh J. stated:

> the mother of an illegitimate child does not come within the ambit of Article 41 and 42 of the Constitution. Her natural right to the custody and care of her child, and such other natural personal rights as she may have . . . fall to be protected under Article 40, section 3, and are not affected by Article 41 or 42 of the Constitution.[115]

In other words, while unmarried mothers do not fall within the scope of Articles 41 and 42 of the Constitution, Article 40.3 protects their right to the care and custody of their children. As O'Higgins CJ observed in *G* v *An Bord Uchtála*,[116] an unmarried mother has:

> rights which derive from the fact of motherhood and from nature itself . . . as a mother, she has the right to protect and care for, and to have custody of, her infant child.[117]

As an acknowledgment that children are inherently protected under Article 40, the Committee instead opted for specific rights for children, such as a right to be heard.

110 Article 41.1.1: "The State recognises the Family as the natural and fundamental unit group of Society"; and Article 41.3.1: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it from attack."

111 Joint Committee, n. 98 above, p. 71.

112 Ibid.

113 [1966] IR 567. An Bord Uchtála is the Adoption Board. It has recently been renamed as the Adoption Authority of Ireland since the introduction of the Adoption Act 2010.

114 "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

115 [1966] IR 567, paras 643–4.

116 [1980] IR 32.

117 Ibid. para. 55.

Conclusion

The primacy of the marital family under Articles 41 and 42 of the Constitution has meant that children are not given the status they deserve in Ireland at present. While legislation has recognised the welfare principle as the foundation stone of all matters relating to children,[118] the *Baby Ann* case suggested that a child who was seen to have bonded with its prospective adoptive parents could be returned to her natural (and now married) parents. Further, if a child-centred decision had been granted in the *Keegan* case, then it would be unlikely that a child would be adopted where a natural unmarried parent wished to rear that child. Ryan states that: "[i]n principle, the child's right to have meaningful support from and contact with both parents should be respected regardless of the marital status of her parents".[119]

A positive outcome, however, from the interview-based study conducted by the author was that the majority of non-custodial parents had access to their children. This finding was reinforced in the observations in the courts as judges invariably granted a right to access unless exceptional circumstances existed. In the courts, it was also found that, where there was doubt in relation to the capability of the non-custodial parent, then supervised access was granted. In order to promote continued contact between non-custodial parents and children, there may be a need for an increased use of technology to enable this to occur, particularly as parent and child's contact will change as a child grows both emotionally and socially.

The incorporation of the CRC would mean that there is a recognition that children have a right to be cared for by both parents. Therefore, unless it is not in a child's best interests to have access to one parent, the child will have some relationship with the non-custodial parent. As De Londras and Kelly state, the "incorporation of an international treaty can take place at a constitutional or sub-constitutional level".[120] The incorporation of the CRC cannot be realised, however, until, firstly, a constitutional amendment on children has taken place by way of a referendum. The Joint Committee recommended the inclusion of some of the central principles of the CRC in the Constitution, namely the right to equality, a right to be heard, and the child's welfare as the first and paramount consideration in any application concerning their care.[121] An essential element of promoting children's rights is a right to have their voices heard in proceedings affecting them. From the point of view of the non-custodial parent, if the wishes of a child were promoted then that child may wish to have further access with that parent, and a court may be more predisposed to grant further access. The provision to have separate legal representation for children is therefore vitally important, either by means of a GAL or by means of social reports so that children can express their views through their representatives in a non-adversarial environment. The failure to implement s. 28 of the Guardianship of Infants Act 1964 to allow for a GAL in private law proceedings is a stumbling block to this progression.

It is submitted that Ireland's failure thus far to hold a referendum in relation to children is contrary to the principles of the CRC. The Joint Committee suggested that any proposed legislation in relation to such an amendment be published simultaneously with the amendment to allow the electorate to make an informed decision on the proposals.[122] The

118 S. 3 of the Guardianship of Infants Act 1964.

119 F Ryan, "Recognising family diversity: children, one-parent families and the law" (2006) 9(1) *Irish Journal of Family Law* 3–10, p. 5.

120 F De Londras and C Kelly, *European Convention on Human Rights Act: Operation, impact and analysis* (Dublin: Round Hall/Thomson Reuters 2010), p. 9.

121 Joint Committee, n. 98 above, p. 71.

122 Ibid. p. 86.

Minister for Children and Youth Affairs, Barry Andrews, recently acknowledged that constitutional reform will be the "lasting legacy of the Convention [CRC] in this country".[123] There is a move to hold a referendum on children's rights in 2011, which Minister Andrews suggested "could be as early as the first quarter of next year",[124] but until this has taken place and has been passed by the people of Ireland,[125] the CRC will remain a source of guidance and not law for the foreseeable future.

123 Press Release on 20 November 2010 to mark the 21st anniversary of the CRC in Ireland: "Minister Andrews hopes constitutional reform will be 'lasting legacy' of the Convention in Ireland" – see Children's Rights Alliance at www.childrensrights.ie.

124 Minister Andrews gave this speech two days before the announcement that a general election would be held in January 2011 and a possibility exists that the referendum could be put on hold until political stability is in place.

125 Articles 46 and 47 of the Constitution.

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The CRC comes of age: assessing progress in meeting the rights of children in custody in Northern Ireland

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Abstract

This article focuses on the extent to which Convention rights are complied with regarding the treatment of children in conflict with the law in Northern Ireland, and in particular the rights of incarcerated children. Relevant children's rights instruments and principles are identified to establish the benchmarks for this discussion. There follows discussion of the particular social, economic and political context which impacts upon the lives of children in conflict with the law in Northern Ireland. The legislative context for the detention of children in custody in Northern Ireland is explored, and the regimes in the Juvenile Justice Centre (JJC) for Northern Ireland and Hydebank Wood Young Offenders Centre (YOC) are assessed for compliance with children's rights standards. Primary research conducted by the author and her colleagues with children in custody in Northern Ireland[2] and recent inspection and research reports form the basis for the analysis of the state of children's rights in custody in Northern Ireland in the 21st century.

Introduction

The 21st "birthday" of the United Nations Convention on the Rights of the Child (CRC) 1989 provides an opportunity to reflect on what has been achieved through the Convention and to identify deficits and challenges ahead. The focus of this article is on the extent to which Convention rights are complied with regarding the treatment of children in conflict with the law in Northern Ireland, in particular the rights of incarcerated children. The article begins by identifying relevant international children's rights standards and then moves to a discussion of the social, economic and political context within which the lives of children in conflict with the law are situated. There follows an assessment of the extent to which children's rights are respected in the youth justice system in Northern Ireland, especially the rights of children in custody. The findings from primary research by the author with children and staff in the JJC for Northern Ireland (conducted with her colleague Dr Una Convery and published by the Northern Ireland Human Rights

1 Linda Moore is also policy consultant to the Children's Law Centre. She was previously investigations worker for the NIHRC. All views expressed in this article are the author's own and are not attributable to any organisation.

2 See the following reports researched for the NIHRC and co-authored with Dr Ursula Kilkelly and Dr Una Convery: U Kilkelly, L Moore and U Convery, *In Our Care: Promoting the rights of children in custody* (Belfast: NIHRC 2002); U Convery and L Moore, *Still in Our Care: Protecting children's rights in custody in Northern Ireland* (Belfast: NIHRC 2006).

Commission (NIHRC)) are included within this analysis to bring to the fore the voices of children in custody and the staff who work with them.[3]

The CRC and the criminal justice system

The CRC establishes rights for all children under 18 years of age[4] and includes special protections for children in conflict with the law. States which have ratified the CRC are required to report to the United Nations Committee on the Rights of the Child (the Committee) every five years, and the Committee responds through the publication of observations which may be used by non-governmental organisations and campaigning groups as a lobbying tool and to embarrass states which contravene the Convention. The CRC is legally binding under international law but has not been incorporated into domestic law in the UK meaning that the rights therein are not legally enforceable in domestic courts. Courts may, however, use the Convention in interpreting rights contained within the European Convention on Human Rights (ECHR), introduced into domestic law as the Human Rights Act (1998). Kilkelly observes that "although the ECHR is short on substantial rights for children, a number of its features make the use of the CRC as an interpretive guide both possible and valuable".[5]

Core Convention principles which must underpin children's treatment by the criminal justice system include the right to be free from discrimination,[6] the primacy of the best interests of the child,[7] the right of the child to be listened to and to participate in decisions affecting him or her,[8] and the right to be protected.[9] Children must not be detained unlawfully or arbitrarily and their detention or imprisonment must be used "only as a measure of last resort" and "for the shortest appropriate period of time".[10] Thomas Hammarberg, Council of Europe Commissioner for Human Rights, maintains that the judicial body should represent the "last link in the chain" and everything possible should be done to prevent cases involving children coming into the formal justice process.[11] Article 37C CRC confirms the right of detained children to be treated with "humanity" and "dignity" and forbids the detention of children with adults except in exceptional situations where this is in the child's best interests. Detained children have the right to prompt legal advice and to challenge their detention through the courts.[12] Article 40 requires that the legal process should take account of children's age and the importance of reintegrating into society children who offend; children have a right to a presumption of innocence, to have their case processed without delay, to remain silent without prejudice and to have their privacy respected. Article 40 also requires the establishment of a minimum legal age of criminal responsibility, diversion of children from the justice system where appropriate and provision of a broad range of diversionary measures to avoid so far as possible the

3 Convery and Moore, *Still in Our Care*, n. 2 above.

4 Article 1 CRC.

5 U Kilkelly, "The best of both worlds for children's rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child" (2001) 23(2) *Human Rights Quarterly* 308–26, p. 313.

6 Article 2 CRC.

7 Article 3 CRC.

8 Article 12 CRC.

9 Article 19 CRC.

10 Article 37 CRC.

11 T Hammarberg, *Viewpoint: It is wrong to punish child victims*, 8 January 2007, available at www.coe.int/t/commissioner/Viewpoints/070108_en.asp.

12 Article 37D CRC.

placement of children in institutions. In its judgment in the cases of *T* v *UK* and *V* v *UK*,[13] regarding the trial in an adult court of two boys convicted at age 11 of the murder of two-year-old James Bulger and sentenced to detention during Her Majesty's Pleasure, the European Court found that the boys' right to a fair trial (Article 6 EHCR) had been violated as the children had been "unable to participate effectively in the criminal proceedings".[14] The judgment made reference to the CRC, the observations of the Committee on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules). Kilkelly observes that the case provided "firm evidence that the CRC's standards in the area of juvenile justice have been accepted by the Court".[15]

Alongside the UN Convention, other international instruments for youth justice include the Beijing Rules; the United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (the Havana Rules); and the United Nations Standard Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules). Taken together these instruments provide the basis for a youth justice system based on prevention of offending through support for children, their families and communities; respect for children's privacy; diversion from and alternatives to prosecution; restorative measures; minimal use of detention; and the rehabilitation and (re)integration of children into society. Although no specific age is given for the minimum age of criminal responsibility, the Beijing Rules advise that the age should be broadly consistent with other rights and responsibilities, such as the age of marriage or civil majority.[16]

The Committee on the Rights of the Child in its General Comment on Children's Rights and Youth Justice[17] notes that in all matters regarding youth justice the best-interest principle must be a primary consideration and at all stages of the justice process children's voices must be heard and respected. In effect, this means that "the traditional objectives of repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders".[18] Depriving children of their liberty in general has "very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society".[19] The Committee comments that setting the minimum age of criminal responsibility below 12 years of age is unacceptable and a higher age, between 14 and 16 years, encourages greater use of diversionary and restorative measures and provides greater protection of children's rights.[20] The Committee is critical of lengthy custodial remands which are considered a "grave violation" of the Convention.[21] Children must not be placed in adult prisons as this "compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate".[22] Facilities for children should include "distinct, child-centred staff, personnel, policies and practices".[23] Children

13 *T* v *United Kingdom* (16 December 1999), App. No. 24724/94 and *V* v *United Kingdom* (16 December 1999), App. No. 24888/94.

14 *V* v *UK* (1999) C (89).

15 Kilkelly, "The best of both worlds", n. 5 above, p. 324.

16 Rule 4.1.

17 CRC, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007.

18 Ibid. para. 12.

19 Ibid. para. 11.

20 Ibid. paras 32 and 33.

21 Ibid. para. 80.

22 Ibid. para. 85.

23 Ibid.

should be able to stay beyond their 18th birthday in the children's facility, providing it is in their best interests and not contrary to younger children's interests.[24] Those in authority are required to be well trained and to provide positive role models for children.[25]

In its concluding observations on the United Kingdom in 2008,[26] the Committee on the Rights of the Child welcomed the government's announcement that the reservation to Article 37C, which specified that children should not be held in custody with adults, was to be withdrawn.[27] The Committee also welcomed the intention to introduce a Bill of Rights (BOR) in Northern Ireland and recommended that a specific section of the Bill be dedicated to children's rights.[28] It commented on the deaths of six children in custody in England and Wales since the previous examination in 2002 and on the high levels of self-harm among children in custody.[29] Punitive and stigmatising approaches were criticised as breaching children's rights including anti-social behaviour orders, negative and intrusive media coverage of children, and routine retention of children's DNA.[30] Concern was expressed at the continued use of physical restraint in institutions where children were deprived of their liberty and the Committee stated that restraint should be used only as a last resort and only to protect the child or others from harm.[31] The Committee was critical of the inadequate provision of dedicated mental health services for children and referred to the particular problems for children in Northern Ireland due to the legacy of the conflict.[32]

With regard to youth justice, the Committee once again criticised the low age of criminal responsibility and expressed concern about the high numbers of children in custody, the levels of custodial remand, the absence of a statutory right to education for children in custody and the continued practice of detaining children alongside adults.[33] The Committee recommended full compliance with Convention rights on youth justice as well as compliance with other international instruments, raising the age of criminal responsibility and the development of appropriate alternative measures to avoid the criminalisation of children or deprivation of their liberty.[34]

At the time of writing, the Council of Europe is in the process of finalising new guidelines on child-friendly justice.[35] The draft guidelines were produced following widespread consultation, including with children and young people. Over 3700 responses were analysed by Irish children's rights expert, Dr Ursula Kilkelly. Child-friendly justice is defined as:

> justice that is accessible, age appropriate, speedy, adapted to and focused on the needs of the child, respecting the rights of the child including the rights to due

24 CRC, General Comment No. 10, para. 86.

25 Ibid. para. 13.

26 CRC, 49th Session, Consideration of Reports submitted by States Parties under Article 44 of the Convention: Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR//CO/4, 3 October 2008.

27 Ibid. para. 8.

28 Ibid. para. 11.

29 Ibid. para. 29.

30 Ibid. paras 35 and 36.

31 Ibid. paras 38 and 39.

32 Ibid. paras 56 and 57.

33 Ibid. para. 77.

34 Ibid. para. 78.

35 Council of Europe, Group of Specialists on Child-friendly Justice, *Final Draft Recommendation Containing Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice* (Strasbourg: Council of Europe 2010).

> process, to participate in and understand proceedings, to privacy and to integrity and dignity.[36] The provisions in the guidelines are built upon the principles contained in the other international instruments. With regard to custody, the guidelines state that "in all circumstances, children shall be detained in premises suited to their needs".[37]

A recent European Court decision has given added strength to the principle that children should not be detained in adult institutions. In *Güveç* v *Turkey*,[38] the applicant, Oktay Güveç, alleged that his detention for five years along with adults and his trial at 15 years of age before the State Security Court, rather than a juvenile court, was in breach of his rights under Article 3 of the ECHR. During his imprisonment the applicant had been depressed and suicidal and had set fire to himself, suffering serious burns, but did not receive appropriate medical attention, including effective mental health care. Doctors confirmed that the conditions of imprisonment seriously exacerbated the applicant's mental health problems. The court concluded that:

> having regard to the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and, finally, the failure to take steps with a view to preventing his repeated attempts to commit suicide, the Court entertains no doubts that the applicant was subjected to inhuman and degrading treatment.[39]

Context of poverty, social exclusion and conflict in Northern Ireland

Thomas Hammarberg reminds us that a child in conflict with the law "is sometimes a victim as much as an offender. The social background is often tragic."[40] Developments in criminal justice in Northern Ireland can best be understood within the context of a society emerging from violent conflict. Between 1966 and 2003, over 3700 people lost their lives and more than 40,000 were seriously wounded as a result of the "Troubles"'.[41] Thirty-six per cent of those killed in the conflict were children and young people.[42] Marie Smyth and colleagues report that, of those killed, 274 were children under 18 and 629 were aged 18 to 21.[43] Children in Northern Ireland have been subject to, and witnesses of, many forms of violence carried out by state and non-state groups and individuals including paramilitary punishment attacks, bombings, shootings, sectarian violence and bullying, house-raids, and exile and forced removal from home. Geographically and socially the impact has not been evenly experienced; six Northern Ireland postal areas accounted for 58 per cent of conflict-related deaths of children.[44]

A study scoping children's rights in Northern Ireland published by the Northern Ireland Commissioner for Children and Young People (NICCY) found that children living in high-conflict or interface areas raised issues of "rioting, punishment attacks by paramilitaries,

36 Council of Europe, *Final Draft Recommendation*, n. 35 above, para. 1b.

37 Ibid. para. 6.2

38 *Güveç* v *Turkey*, App. No. 70337/01, Council of Europe, European Court of Human Rights, 20 January 2009.

39 Ibid. para. 98.

40 T Hammarberg, "A juvenile justice approach based on human rights principles" (2008) 8(3) *Youth Justice* 193–6, p. 195.

41 A Edwards and C McGrattan, *The Northern Ireland Conflict* (Oxford: One World publications 2010), p. xviii.

42 Office of the First Minister and Deputy First Minister (OFM/DFM), *Our Children and Young People: Our pledge. A ten year strategy for children and young people in Northern Ireland 2006–2016* (Belfast: OFM/DFM 2006), p. 30.

43 M Smyth, with MT Fay, E Brough and J Hamilton, *The Impact of Political Conflict on Children in Northern Ireland* (Belfast: Institute for Conflict Research 2004), pp. 18–20.

44 M Smyth, *Half the Battle: Understanding the impact of the troubles/conflict on children and young people in Northern Ireland* (Derry/Londonderry: INCORE 1998), para. 3.2.2.

negative attitudes to the police, joy riding, the availability of alcohol and drugs, and the lack of amenities and safe social spaces". Community workers in these areas urged a "reconsideration of how children in conflict with the law are defined and criminalised" and identified a failure to recognise "the generational hand-down of trauma".[45] The government-commissioned Bamford Review of Mental Health and Learning Disability found "major deficits" in child and adolescent mental health services in Northern Ireland and noted the "high price" that society paid for this in terms of "social disruption, education failure, ill health, anti-social behaviour, and hard cash".[46]

Recent research demonstrates that although levels of violence are significantly reduced in Northern Ireland since the paramilitary ceasefires of 1994 and the subsequent Belfast/Good Friday Agreement, violence and conflict have not disappeared and the transition process to peace is difficult and uneven. Goretti Horgan and Marina Monteith found that: "Northern Ireland's most disadvantaged children and young people live in communities which face social exclusion and still experience violence that is the legacy of the conflict." They note "growing evidence that high levels of mental ill-health are significantly related to the conflict, including the psychological distress suffered by those who appeared resilient during the conflict".[47] Despite the evidence that today's children and young people are affected by intergenerational trauma, government concedes that the "quality, consistency and accessibility" of child and adolescent mental health services is inadequate.[48]

McAlister et al.'s recent study of children's lives in six communities in Northern Ireland, based on qualitative research with over 200 children and young people aged 8 to 25 and the adults who work with them, highlighted the negative media constructs of children and young people and their concerns that being labelled as "hoods" and trouble-makers could bring them to the attention of the authorities and result in criminalisation.[49] The study found that the conflict was far from over for many young people who still experienced sectarian threats and violence and were under pressure from paramilitary groups and distrustful of the police. The continued impact of conflict-related trauma was a common theme raised by interviewees:

> There are hundreds of families here and in other communities who are voiceless – the voiceless of the Conflict – they don't get involved or speak out publicly. There are huge amounts of pain there and they are highly traumatised. The children of the conflict have seen their parents medicated with tranquillisers – they never told their story or had their pain recognised.[50]

McAlister et al. conclude that:

> many community representatives and young people expressed frustration that the Peace Agreements had not brought significant change. The impact and legacy of the Conflict had been ignored and communities left without necessary economic and social support.[51]

45 U Kilkelly, R Kilpatrick, L Lundy, L Moore, P Scraton, C Davey, C Dwyer and S McAlister, *Children's Rights in Northern Ireland* (Belfast: NICCY 2004), p. xvii.

46 R McClelland, *The Bamford Review of Mental Health and Learning Disability: A vision of a comprehensive child and adolescent mental health service* (July 2006). Foreword and Annex 1: 1.4.

47 G Horgan and M Monteith, *What Can We Do to Tackle Child Poverty in Northern Ireland?* (York: Joseph Rowntree Foundation 2009), p. 1.

48 OFM/DFM, *Our Children and Young People*, n. 42 above, p. 30.

49 S McAlister, P Scraton and D Haydon, *Childhood in Transition: Children and young people experiencing marginalisation in Northern Ireland* (Belfast: Queen's University/Save the Children/Prince's Trust 2009).

50 Community worker interviewed in ibid. p. 50.

51 Ibid. p. 81.

Concerns were expressed about young people's heavy use of alcohol, and "street fighting" which impacted on their safety and that of others.[52] The police were on the whole viewed as "unwilling, unable or ill-equipped" to deal with the problems posed by young people's offending behaviour.[53]

Protecting the rights of children in custody in Northern Ireland

An assessment of the extent to which CRC rights have been achieved for children in custody in Northern Ireland, must take place within the context of other legal, political and social developments in the jurisdiction. These include the introduction of the Human Rights Act (1998), the signing of the Belfast/Good Friday Agreement (1998),[54] the subsequent review of the criminal justice system, consultation on a BOR for Northern Ireland and the more recent Hillsborough Agreement (2010) which established the devolution of criminal justice. The Belfast/Good Friday Agreement recognised that "young people from areas affected by the troubles face particular difficulties" creating a need for "special community-based initiatives based on international best practice".[55] Recognising the importance of a human rights and equality-based justice system, the Agreement established a range of bodies designed to enhance rights within the justice system. These included independent reviews of policing[56] and the criminal justice system,[57] as well as the creation of independent accountability or "watchdog" bodies such as the Police Ombudsman, Prisoner Ombudsman, Criminal Justice Inspection for Northern Ireland (CJINI), NIHRC and the NICCY.

The Criminal Justice (Children) (Northern Ireland) Order 1998 provides the legislative basis for the use of custody for children in this jurisdiction. The order created a separate youth justice system based on determinate sentencing, ending the historical practice of housing children detained for child welfare reasons in the same institutions as those remanded or sentenced for criminal offences. The order aimed to tackle the problem of children languishing for months, and even years, on remand and on indeterminate sentences and, to this end, it restricted the circumstances in which children could be remanded to custody and placed a requirement on the court to give reasons for the use of custody. The CJINI describes the order as being based on international best practice and on human rights standards,[58] however, the legislation contains breaches of rights in important respects. The requirement in the order that the court must take into account the welfare of the child[59] falls short of the best-interests principle required by CRC Article 3. Contrary to the recommendations of the Committee on the Rights of the Child, the order retains the age of criminal responsibility at 10 years, removing the rebuttal principle of *doli incapax*, the assumption that a child under 10 is incapable of committing an offence unless otherwise established for the court.[60] It provides for a determinate custodial disposal, the juvenile

52 McAlister et al., *Childhood in Transition*, n. 49 above, p. 83.

53 Ibid. p. 74.

54 Agreement Reached in the Multi–Party Negotiations, 10 April 1998 (hereinafter Belfast/Good Friday Agreement). The Belfast/Good Friday Agreement was a multi-party agreement which led to the establishment of devolved power-sharing government for Northern Ireland.

55 Belfast/Good Friday Agreement, para. 6.12.

56 Independent Commission on Policing in Northern Ireland (the Patten Commission) which produced its report in September 1999: *A New Beginning: Policing in Northern Ireland* (Belfast: Northern Ireland Office 1999).

57 The Criminal Justice Review reported in 2000: Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (Belfast: HMSO 2000).

58 CJINI, *Inspection of Woodlands Juvenile Justice Centre* (Belfast: CJINI 2008), para. 1.2.

59 Ibid. Part 2, s. 4a.

60 Ibid. Part 2, s. 3.

justice order (JJO) which may be between six months and two years, half of which are spent in custody and half under Probation Service supervision in the community. "Seriousness" and "persistence" of offending are the basis for the use of JJOs, the latter criteria arguably breaching Article 37B which requires that the use of detention should be a last resort and for the "shortest appropriate period of time". The order retains the power of the court to sentence a child to a period of indeterminate custody at the Secretary of State's "pleasure" for grave crimes[61] and to commit children aged 16 and over to prison service custody for defaulting on fines.[62] Children aged 15 or over may be remanded to the prison-service-run YOC if they are considered a risk to themselves or others.[63] The order initially failed to bring 17-year-olds within the youth court system but this was amended through the Justice (Northern Ireland) Act 2002 following the report of the Criminal Justice Review.

The Criminal Justice Review, established out of the Belfast/Good Friday Agreement (1998), did not initially have youth justice within its focus, but strong lobbying by a group of non-governmental organisations, brought together as the Criminal Justice (Children's) Lobby Group[64] persuaded the review team that, as children's lives had been negatively impacted on by the conflict, so issues concerning children must be central to any future arrangements. In its report in 2000, the review recommended the closure of Lisnevin JJC (a prison-style institution which children's rights campaigners had been calling for the closure of for many years); the establishment of a Youth Justice Agency (YJA); the removal of children under the age of 14 from custodial institutions and their placement instead within the care system; the inclusion of 17-year-olds within the youth court system; a greater emphasis on the use of diversionary measures, reparation and restorative justice; and enhanced complaints and accountability mechanisms. Disappointingly for those concerned with children's rights, the review recommended that although 10 to 16-year-olds should be held in JJCs (within the youth justice system), 17-year-olds should still be accommodated in prison service establishments. The review's recommendation that the age of criminal responsibility should be retained at 10 years of age was also a deep disappointment to the children's rights sector.

Recommendations from the Criminal Justice Review were enacted through the 2002 Justice (Northern Ireland) Act which was implemented in 2005. The Act established the principle aim of the youth justice system as the protection of the public by preventing offending by children.[65] Schedule 11 brought 17-year-olds within the jurisdiction of the youth courts[66] and allowed for the detention of some within a JJC rather than in YOC prison service custody. However, the powers of the courts to give JJOs to 17-year-olds were restricted and only those children who will not reach their 18th birthdays during the period of the order and who have not received a custodial sentence in the previous two years may be considered.[67] Other children serve their detention in Hydebank Wood YOC, which accommodates young adults and is a prison establishment. Two important changes were introduced in the Criminal Justice Order (Northern Ireland) 2008. In response to criticism of the conditions in which girls were held alongside adult women in Hydebank Wood by

61 CJINI, *Inspection of Woodlands*, n. 58 above, Part 6, s. 45(1)

62 Ibid.

63 Ibid. Part 6, s. 13(1)b.

64 Those participating in this group included representatives of Save the Children, Committee on the Administration of Justice, the Children's Law Centre (NI), Include Youth and the National Association of Probation Officers.

65 CJINI, *Inspection of Woodlands*, n. 58 above, Part 4, s. 53(1).

66 Ibid. Part 4, s. 63(1).

67 Ibid. Part 4, s. 64(3A).

the NIHRC and the prisons and criminal justice inspectorates,[68] Article 96 allowed for the court to accommodate 17-year-olds in the JJC where no "suitable" accommodation is available in a YOC. Article 97 removed the requirement that care orders be suspended where children are serving a JJO.

The Belfast/Good Friday Agreement tasked the newly created NIHRC with consulting on the content for a future BOR for Northern Ireland.[69] In its advice presented to government in December 2008, the NIHRC recommended that rights which should be incorporated within a BOR include the right of children in conflict with the law "to be treated in a manner that pays due regard to the child's age, understanding, and needs and is directed towards the child's reintegration into society". The NIHRC also recommended that a future BOR should include clauses stating that children should not be detained except as a last resort and for the shortest appropriate period of time; that children must be held separate from adults; and must be subject to the use of force or restraint only to avoid serious injury to themselves or others.[70] A clause was recommended requiring all public bodies to incorporate the "best-interests" and "participation" principles in all actions.[71] The NIHRC recommended that government should consider increasing the minimum age of criminal responsibility to between 14 and 16 years, in line with the Committee on the Rights of the Child's recommendations, but that this should be accomplished through legislation and policy rather than being included within the BOR itself.[72] Government's response to the NIHRC was to dismiss all but one of the proposed clauses relating to children's rights.[73]

A further development in 2010 was the devolution of criminal justice and policing matters to Northern Ireland's power-sharing government through the multi-party Hillsborough Agreement.[74] The Hillsborough Agreement included provision for the Minister of Justice to establish, among other reviews, a review of prison conditions and oversight and a review of children's experiences in the criminal justice system.[75]

In 2010 in Northern Ireland, there are two custodial institutions used for the detention of children: the JJC for Northern Ireland and Hydebank Wood YOC. The JJC for Northern Ireland was established through a rationalisation of the juvenile justice estate in October 2003, close to Bangor town, about 10 miles from Belfast. The JJC comes under the authority of the YJA and accommodates up to 48 boys and girls, aged 10 to 17. The new JJC building known as Woodlands was opened in 2007 at a cost of £16.8m. Woodlands is a secure establishment comprising six residential units, including one for girls, an

68 P Scraton and L Moore, *The Prison Within: The imprisonment of women at Hydebank Wood: 2004–2006* (Belfast: NIHRC 2007); HM Chief Inspector of Prisons/CJINI, *Report of an Unannounced Inspection of the Imprisonment of Women in Northern Ireland by HM Chief Inspector of Prisons and the Chief Inspector of Criminal Justice in Northern Ireland 28–30 November 2004* (Belfast: CJINI 2004).

69 The rights to be contained within a future Bill were to be supplementary to those contained within the ECHR and reflective of "the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience". The Belfast/Good Friday Agreement also stated that the rights should reflect the "principles of mutual respect for the identity and ethos of both communities and parity of esteem".

70 NIHRC, *A Bill of Rights for Northern Ireland* (Belfast: NIHRC 2008), p. 25.

71 Ibid. p. 51.

72 Ibid. p. 135.

73 Northern Ireland Office, *Consultation Paper: A Bill of Rights for Northern Ireland: next steps November 2009* (Belfast: NIO 2009), p. 62.

74 Agreement at Hillsborough Castle, 5 February 2010.

75 Hillsborough Agreement, para. 7. At the time of writing, the Prisons Review was being conducted by an independent review team headed by Dame Anne Owers, former Chief Inspector of Prisons for England and Wales. The Minister for Justice, David Ford, also announced the establishment of a review of the youth justice system in November 2010. Children's organisations expressed disappointment with the membership and terms of reference for this review.

educational and vocational centre and a sports and leisure centre. The director, team leaders and unit managers are all social work-trained and there is an emphasis on staff training throughout the centre.[76] Children may be remanded or sentenced to detention in the JJC through the provisions of the Criminal Justice (Children) (Northern Ireland) Order (1998) and also detained under the Police and Criminal Evidence (Northern Ireland) Order (1989) (PACE). All girls under 18 in custody in Northern Ireland are now held at Woodlands.

A thematic inspection by the CJINI in 2010 found that delay in the processing of children's cases remains a problem.[77] The Children and Young People's Strategy found that the average time taken to process a child from the date of summons until the date of disposal was 20.7 weeks and established as a target that delays should be reduced.[78] A commitment was expressed for all agencies involved in criminal justice to work to reduce the likelihood of offending by children and young people and it was noted that a "wider range of community alternatives" had been provided to the courts to reduce the need for custodial disposals. Targets regarding youth justice included a reduction in the number of children entering the youth justice system; a reduction in children's offending; and fewer children sentenced to custody.[79]

The primary research on the protection of the rights of children in the JJC for Northern Ireland conducted by the author, with her colleague Dr Una Convery for the NIHRC identified both positive developments and also continued breaches of children's rights.[80] The report *Still in Our Care* was based on primary research with managers, care staff and other professionals, and children at the JJC for Northern Ireland in 2005. As evidenced by recent inspection reports and research conducted by non-governmental organisations (discussed below) the issues highlighted here remain pertinent. Interviews were important in recording the views and experiences of children and bringing the voices of children to the fore. Formal interviews were conducted with 11 boys and one girl (just under half of the children living in the centre at the time of fieldwork) and with 13 care staff members. The research was carried out over 10 days, which was the extent of access granted, and had to be undertaken during times when children were not at school or involved in activities.[81] Given the busy daily routine at the centre, this limited the number of interviews which could be conducted with children. The researchers were also given the opportunity to talk informally with staff and children and observe daily life in the centre. They joined staff and children for lunch in the units, visited the education unit during school hours, and also attended a management meeting. Although these conversations were treated as confidential, they provided further insight into the operation of and atmosphere in the centre. All quotations below unless otherwise referenced are taken from the primary research interviews. The research aimed to take stock of the implementation of previously made recommendations[82] and hoped to inform plans for a new "state of the art facility" which was being developed at that time to replace the existing building on the same site (opened in 2007 as Woodlands JJC).

76 CJINI, *Inspection of Woodlands*, n. 58 above, p. 11.

77 CJINI, *Avoidable Delay: A thematic inspection of avoidable delay in the processing of criminal cases in Northern Ireland* (Belfast: CJINI 2010).

78 OFM/DFM, *Our Children and Young People*, n. 42 above, p. 63

79 OFM/DFM, *Our Children and Young People: Our pledge: action plan 2008–2011* (Belfast: OFM/DFM 2008), p. 68.

80 Convery and Moore, *Still in Our Care*, n. 2 above.

81 Access was initially denied to the Commission by the NIO and was granted only after judicial review proceedings were initiated.

82 Kilkelly et al., *In Our Care*, n. 2 above.

The primary research demonstrated that, contrary to the requirements of CRC Article 37, custodial sentences and remands are not used only as a last resort or for the shortest appropriate time. Care staff raised the issue of the detention of children for relatively minor offences being held alongside children detained for serious offences:

> You could have a boy in because he's broke windows and you could have a boy in because he's attempted murder, and that's a fault . . . You've also got boys in here with maybe 100 car crimes and they're mixing with the window breaker, maybe selling drugs and that.

Staff considered that children were being held for longer than necessary on remand because there was insufficient capacity for bail placements:

> If the courts can give bail after two weeks or one month they should be able to give it after two days, instead young people are in for months . . . some are remanded as long as ones are sentenced.

The need for more community-based provision was reinforced by staff:

> I had concerns around a vulnerable child, a "care child" in the unit with [a young person] who is highly dangerous with serious psychological problems and emotional issues . . . We need more fostering placements.

Children's views supported those of staff: "The judge just had me remanded because they can't get me a place." A further explanation given by staff and children for the over-use of custody was the failure of solicitors and/or social workers to attend court hearings:

> I was remanded because there was no-one there to represent me . . . My solicitor's . . . never there . . . The day I was put in here, he spoke to me for about five minutes and told me that whenever I went up to the court that he would see me. I went up . . . and there was someone there representing me that I didn't even know. (child)

Staff gave examples of the inappropriate use of the JJC for children from care backgrounds. This highlighted the lack of stability experienced by children and inadequate support for their mental health needs:

> He was in and out of the [children's home] consistently . . . He's in for nuisance offences . . . He has serious learning difficulties and there's a concern that this may lead to serious harm. (care staff)

> I think the number of young people getting in from the care side is frightening. Some are disturbed, some are clearly suffering from mental illnesses, psychological problems . . . You could be in a house where you're taken out of it for your own safety and put in a children's home and the first thing you know, you're locked up here. (care staff)

The report also highlighted issues regarding the use of force and physical restraint. Children were brought to the JJC either by the police or a private security firm and it was common for children to be handcuffed during escort. On admission, children were subject to a rub-down (airport style) search and although this did not involve the removal of clothing, the enforced intimacy could prove upsetting for children, many of whom have experienced physical and emotional abuse in their families and communities:

> I hate other men touching my body. I hate people touching my body. I hate anyone touching my body. I don't like people touching my body at all . . . they touch you there [points to top of legs] search you and you feel like hitting them. (boy)

The NIHRC's initial research in 2002[83] expressed serious concern about high levels of physical restraint. Subsequent staff training in therapeutic crisis intervention (TCI) was instrumental in having significantly reduced its use: during the 18 months preceding fieldwork, the highest recorded number of restraints in one month was 30, the lowest four. Restraint involved staff "holding" a child without bringing her/him to the ground. Officially this was not defined as a pain compliance technique but children confirmed that pain was caused. All children interviewed had either seen another child being restrained or had been restrained themselves:

> See when I get out of hand like, it's their job to control me . . . I've seen about ten [staff] on a kid about that size [indicates small child]. It hurts them . . . if they hurt them, it makes them more mad. It really makes them out of control. (boy)
>
> They're not allowed to put handcuffs on for a fact; they put handcuffs on me and then started . . . they nearly broke my wrists. I had cuts and everything right there, they were pulling that hard . . . When I first saw someone else getting restrained, I felt like helping the other wee lad instead of helping staff. This wee lad, a wee small thing, not even five foot and these men about six foot, and he was just getting jumped over . . . it looked like they nearly killed him. He couldn't breathe or nothing. He's going "I can't breathe, I can't breathe" and staff didn't listen to him. (boy)

Incidents of violence and threats of violence by children directed at staff were also documented in house records: "young person threatened to 'break staff's fucking jaw'" (a member of staff was "kneed in the face" in this incident); "tried to head butt staff member"; "threatening to stab staff". Sometimes, crisis intervention techniques were used successfully: "young person lunged towards staff to strike, verbally aggressive but de-escalated very quickly using TCI techniques". However, the researchers also witnessed threats to restrain and isolate a child for refusing to go to bed until he first got a drink of juice. Fortunately, the incident was resolved without the use of restraint.

The report raises the issue of the impact on young children of being detained in custody and separated from family and friends, highlighting problems about family and privacy rights,[84] and also regarding children's right to be safe and cared for.[85] Following reception, a member of staff assessed and settled children and they were permitted to telephone their families. Staff recognised that entering custody, especially for the first time was "an anxious time for children, all kids are scared" (staff member). Staff and other young people's welcoming attitude and the domestic feel of the units helped allay children's fears but the experience of being locked alone in their room at night provoked anxiety:

> It was a bit scary because all I done was sat and stared at the ceiling until about two or three in the morning. (boy)
>
> I think everyone should have TV . . . 'cause when you're in your bedroom, in your room, you can think about things. You can think about strange things, so you can . . . like hanging yourself or something. Thought about it a few times. (boy)

Children confirmed there was no restriction on the frequency of visits by their families but practicalities and the relative inaccessibility of the centre made visits difficult and infrequent for some families. Younger siblings often found visits boring and children suggested that activity-based visits would be more enjoyable. Some children found visits

83 Kilkelly et al., In *Our Care*, n. 2 above.

84 CRC Article 16(1) refers to children's rights to privacy, and Article 7 to their right to know and be cared for by their parents. ECHR Article 8 protects the right to private and family life.

85 CRC Article 19.

upsetting: "Look out the window and see them leaving. It annoys you." Some even refused visits to avoid distress:

> I don't really like visits. Just do without them. Seen my ma and dad once, but they leave and you don't. I don't like when you're sitting here and they go. You'd like to be going back out.

More positively, a support group has now been set up by YJA staff to offer support to parents in a community setting.

Girls are always a small minority in the centre and care staff expressed an awareness of girls' particular vulnerability:

> It's difficult, stressful for girls . . . girls need special programme time. Some young girls have very special needs. (staff)

Boys also commented on girls' distress:

> Some of the wee girls do your head in . . . All the wee girls in here cry . . . they just cry. Everything they do. One of the wee girls [is] doing my head in for nothing, just sitting and watching TV and won't stop crying. (boy)

The centre employed a full-time psychologist, yet the extent to which individual casework could be conducted was limited by the high level of remands and rapid turnover of children. It was considered inappropriate to begin individual casework on deep-seated problems when a child was likely to be in custody for a brief time or when their future was uncertain and issues pertaining to the legal case could not be explored for children on remand.

Children's rights standards require rehabilitation and resettlement to be a primary objective of custody yet staff and children were pessimistic regarding the potential for the programmes offered or the custodial experience in general to "reform" or "rehabilitate". Assessment, planning and rehabilitative work were difficult when children were sometimes in the centre only for short periods and, for children on remand, rehabilitative work directly related to alleged offending could not be carried out for fear of interfering with the presumption of innocence or prejudicing the child's legal case. Staff and children held a shared scepticism about the effectiveness of dedicated crime reduction programmes:

> In my opinion they [programmes] haven't been very effective, but we're hoping to improve . . . the boys are coming back. They're only out a week or a fortnight and they're back having stolen another car. So how do you judge? (staff)

> We know it already [drug awareness] . . . It's a waste of time. (child)

Ultimately, the pressures on children returning to the community were significant:

> We're sending them back to 10 mates [friends] who all steal cars every night and take drugs every night. That peer pressure is massive. (staff)

Staff recognised the need to understand children's offending behaviour within the context of their overall needs:

> We need to address offending behaviour, but we need to look at the bigger picture at the welfare of children, their right to be safe and cared for. (staff)

Discussing the problems he had faced in his young life, a boy provided evidence of the complex and multi-layered issues facing many children in custody, including the impact of bereavement, family breakdown, experience of paramilitaries and being placed in the looked-after care system. He described his grief and anger following his father's death, which he considered the root of his problems:

> Fell out with most of my family. They didn't talk to me for a while. I felt like nobody wanted me. None of my friends would hardly talk to me because I was

> in the children's home . . . I've just been like that from [when] my dad died. My dad died when I was 11 . . . I just get this big thing of anger inside me and it's coming out bit by bit. A wee bit's coming out at a time, but if I get that worked up it's all going to come out at once.
>
> She [the psychologist] asked me about my whole life and I don't really like talking about it because there's that much things has happened in my life, between watching my friends die. You know I've actually seen two of my friends die. And then watching one when he was getting knee-capped, getting shot, punishment beat and whatever. I don't like talking about it because I go nuts. But I've seen myself in anger [while being videotaped by friend]. I ran round my room, I lifted my wardrobe and I clean threw it at the walls, smashed it, head-butted my walls . . . By the time I finished, my room was a bomb-site.

The most recent inspection report found that the centre at Woodlands is "well managed" and children "very well cared for".[86] Inspectors concluded that healthcare was of a high standard, there was a "strong educational ethos" and good use of personal development plans.[87] Ultimately, however, the inspectors noted a high level of "security and safety" commenting that "while Woodlands has a strong childcare ethos, it is fundamentally a custodial facility for children who are charged with criminal offences".[88] The inspectorates' main concerns focused on "high turn-over rate" of children and the over-representation of children in custody of children coming from residential care placements, ranging from 22–58 per cent on any day.[89] The inspectors commented that these children could be detained in custody for the most trivial offences. The most recent figures show that the number of children admitted to the JJC has risen by 34 per cent since the previous year, with 475 children entering the centre.[90] This included a 67 per cent increase in PACE admissions. The YJA explains that much of this rise is due to 17-year-olds being detained in the JJC under PACE, where previously they would have been held in police stations. While this is preferable for those children involved, it also suggests a breach of the principle of custody as a last resort. The admission of a child for fine default last year is also notable and of concern. The NIHRC's findings regarding the over-use of custody and the movement between the care and justice systems was confirmed by a report in 2008 by the CJINI. Some of the children detained in Woodlands have committed serious and violent acts, however, inspectors concluded that "many of the children whom Inspectors met were neither serious nor persistent offenders" but were "troubled children" placed in custody out of "benign intent" of courts and police concerned for children's safety, rather than because of any seriousness in their offending behaviour. Such placements, they concluded "breach international safeguards, and inappropriate use of custody for children remains a more pronounced problem in Northern Ireland than elsewhere in the UK".[91]

The most recent annual report also notes a further reduction in the use of physical restraint: 58 incidents over the 2009–2010 period.[92] Closed-circuit television has recently been introduced in all common rooms in response to the recommendations of a national survey on physical restraint and, while this improves safety, it raises issues regarding children's right to privacy.

86 CJINI, *Inspection of Woodlands*, n. 58 above, pp. vii–viii.

87 Ibid.

88 Ibid. p. 3.

89 Ibid. p. 5.

90 YJA, *Annual Report 2009–2010* (Belfast: YJA 2010), p. 29.

91 CJINI, *Inspection of Woodlands*, n. 58 above, p. vii.

92 YJA, *Annual Report*, n. 90 above, p. 29.

Concerns about the use of custody for children with mental health problems and learning disabilities and difficulties persist. The CJINI reported on a "snapshot" of children in the JJC on 30 November 2007. That day, 20 children had a diagnosed mental health disorder, 17 a history of self-harm, eight were on the child protection register and 14 had a statement of educational needs.[93]

Hydebank Wood, a category C (low security) establishment on the outskirts of Belfast is run by the Northern Ireland Prison Service and has a capacity to accommodate up to 306 children, young men and adult women prisoners. The placing of an adult women's unit within a male young offender institution has been condemned by the NIHRC and the inspectorates. Hydebank Wood is used for the imprisonment of boys and young men aged 17 or over at the time of conviction and serving a period of four years or fewer in custody. Children aged 16 years can also be imprisoned in Hydebank Wood under the Treatment of Offenders (Northern Ireland) Act 1968 for offences which would be punishable with imprisonment in the case of an adult aged 21 or over.[94] Young men can stay at Hydebank Wood until the day before their 24th birthday, after which they will be transferred to a higher security adult prison. Boys as young as 15 years old may be imprisoned in Hydebank Wood if they are considered a danger to themselves or others.[95]

As a prison establishment, staffed by prison officers, the regime at Hydebank Wood YOC is very different to that in Woodlands and the imprisonment of children there alongside young adult men and adult women is contrary to Article 37C of the CRC. Willow House the "juvenile unit" in Hydebank Wood has a capacity for holding up to 19 boys under 18 and as young as 15 years. Although the prison authorities attempt to keep boys separate from the young men and adult women, mixing does occur, for example, during transportation to and from court and during visits. A thematic review by the CJINI found that there was "no routine provision for the treatment of mental health illness among the juveniles" and that judges told inspectors that they considered Hydebank Wood "less well equipped" to deal with mental health issues than the other prisons.[96]

The inspection report published in 2008 found that management at Hydebank Wood was:

> struggling to deal adequately with the complex and competing tasks of managing a variety of remand and sentenced juveniles and adult young men, on a site that also contained a women's facility.[97]

Inspectors found "too little purposeful activity", inadequate opportunity to get fresh air or exercise, insufficient separation of children from young adults, routine use of strip-searching and over-reliance on separation and solitary confinement as a response to self-harm. One child had been held in isolation for several weeks as a punishment for a minor offence, and had been refused a visit from his mother.[98] Young men were "overwhelmingly negative" about the complaints procedures.[99] Overall, the "different and distinct" needs of children were not being met.[100]

93 CJINI, *Not a Marginal Issue: Mental health and the criminal justice system in Northern Ireland* (Belfast: CJINI 2010), p. 50.

94 Ibid. Part 1, s. 5.

95 Criminal Justice (Children) (Northern Ireland) Order 1998, Part 6, s. 13(1)b.

96 CJINI, *Not a Marginal Issue*, n. 93 above, p. 36.

97 CJINI, *Report of an Announced Inspection of Hydebank Wood Young Offender Centre by HM Chief Inspector of Prisons and the Chief Inspector of Criminal Justice in Northern Ireland 5–9 November 2007* (Belfast: CJINI 2008), p. 5.

98 Ibid. p. 12.

99 CJINI, *Report of an Announced Inspection*, n. 97 above, p. 13.

100 Ibid. p. 35.

Responding on behalf of non-governmental organisation Include Youth to the 2007–2008 Independent Monitoring Board (IMB) Annual Report on Hydebank Wood, young people in the YOC told of their frustrations at the nature of the regime.[101] Educational and vocational opportunities were limited and some children and young people were locked up for long periods:

> Some days you can be lucky to get out for breakfast.[102]
>
> Boys like us get locked all the time because we've no job.[103]

Young people reported that although some staff were "sweet" (good) often relationships with staff were negative:

> you can get made to feel really small by the screws, call you names and all.[104]
>
> Some wind you up so you'll crack, so they can lock you in your room.[105]

The Annual Report of the IMB for 2008–2009 confirmed that Hydebank Wood continued to operate a punitive regime for young people, based on the regular and increasing use of solitary confinement, which was having a negative impact on young people's behaviour.[106] The maximum period for which young people could be held in cellular confinement (solitary isolation) had increased from seven days to 14. Poor industrial relations between the prison authorities and the Prison Officers Association and an associated "withdrawal of good will' led to greater lock-down of prisoners, including children, and prisoners found themselves "passive pawns" in the industrial dispute.[107] The reason given for the lock-downs was "staff shortages" and yet the IMB noted that the prison appeared well staffed. The IMB also reported on the "significant weakness" of education and vocational training for boys and young men.[108] Worryingly, there were "no manifestations of the cultural change that was supposed to take place in Northern Ireland's prisons". There had been a "marginal" improvement in the way staff related to young people, but, in general, staff tended to "keep their distance" rather than engaging with prisoners.[109] Seventy per cent of prisoners at Hydebank had mental illness and/or personality disorder and three out of four prisoners had difficulty reading and writing.[110] The IMB found that there was no age-appropriate regime for children in Willow House.[111]

Conclusion

John Muncie argues that, despite the limitations of rights discourses, it is "equally important to appreciate their continuing potential. In this respect the CRC and related international directives . . . provide a strong basis for rethinking juvenile justice."[112] International human rights standards provide a useful benchmark against which we can measure the state's

101 Include Youth, *Young People's Response to the Independent Monitoring Board Annual Report Hydebank Wood YOC and Prison 2007–2008* (Belfast: Include Youth 2010).

102 Ibid. p. 3.

103 Ibid. p. 4.

104 Ibid. p. 5.

105 Ibid. p. 6.

106 IMB, *Hydebank Wood Prison and Young Offenders Centre: Independent Monitoring Board's Annual Report for 2008–2009* (Belfast: IMB 2009), p. 4.

107 Ibid. p. 5.

108 Ibid.

109 Ibid.

110 Ibid. p. 6.

111 Ibid. p. 21.

112 J Muncie, "The United Nations, children's rights and juvenile justice" in W Taylor, R Earle and R Hester (eds), *Youth Justice Handbook: Theory, policy and practice* (Cullompton: Willan 2010), p. 11.

response to children in custody. Speaking at an international conference on Kids Behind Bars, Professor Jaap E Doek, former chair of the CRC, criticised the inadequate response of many states to the protection of detained children, and stressed that meeting international obligations would not only promote the health and well-being of children in conflict with the law, it would also make a positive impact on youth-offending rates.[113] As Thomas Hammarberg, Council of the Europe Commissioner for Human Rights comments, we know that "depriving children of their liberty tends to increase the rate of re-offending".[114] Children's reconviction rates in Northern Ireland are 72.9 per cent for custody, 49.6 per cent for probation order and 44.3 per cent for court-ordered restorative conferences.[115] Although more serious cases may be more likely to result in a custodial rather than community disposition, the reconviction rates are nonetheless an indictment of the effectiveness of child custody in preventing offending and re-offending.

During the life of the CRC, there have been positive developments regarding protection of the rights of children in custody in Northern Ireland. Girl children are no longer held in adult prisons; the regime in Woodlands is better in terms of rights compliance than the punitive regime which pertained in Lisnevin. There is much that still needs to be done to ensure full compliance with the CRC. Rights breaches identified in the youth justice system in Northern Ireland include the low age of criminal responsibility at 10 years and the failure to incorporate the best-interests principle within youth justice legislation. Custody for children is used not only as a last resort or for the shortest appropriate period of time, with an over-use of remand in custody and delays in the system resulting in children spending longer on remand than is necessary. Recent research by Sinead Freeman and Mairead Seymour on the use of remand custody for young people in Ireland documents the potential damage caused by lengthy remand: "The uncertainty that characterizes the remand experience of these vulnerable young people serves to exacerbate their existing difficulties." The effects included "high levels of anxiety", "withdrawal from social contact with others" and "feelings of apathy and hopelessness".[116]

The continued practice of imprisoning boys as young as 15 with young adults in Hydebank Wood YOC is a serious breach of Article 37C, yet, in evidence to a parliamentary committee at Westminster, Baroness Morgan confirmed that government is "content that arrangements for 17 year old boys [in Hydebank Wood] provide sufficient separation from the young adult males accommodated on the same site to meet Article 37 obligations".[117] The state's response in Northern Ireland to the withdrawal of the UK's reservation to Article 37C has been to establish a working group of civil servants and youth justice and prison officials tasked with reducing numbers of children in Hydebank Wood, a wholly inadequate strategy which will leave some of the most distressed and vulnerable children in a prison setting. The regime at Hydebank Wood has been documented in research and inspection reports as punitive and inappropriate for children and young people.

113 J E Doek, CRC chair, "The CRC and kids behind bars", opening statement at the international conference: Kids behind Bars – A child rights perspective, Bethlehem: DCI Palestine 30 June–2 July 2005.

114 T Hammarberg, *Viewpoint*, n. 11 above.

115 Mr Andrew MacQuarrie, YJA, giving evidence to the Committee for Health Social Services and Public Safety at Stormont, 18 February 2010, *Hansard*.

116 S Freeman and M Seymour, "Just waiting: the nature and effect of uncertainty on young people on remand custody in Ireland" (2010) 10(2) *Youth Justice* 126–42, p. 138.

117 Baroness Morgan in House of Lords/House of Commons, Joint Parliamentary Committee on Human Rights, Children's Rights: Government response to the committee's 25th report of session 2008–2009, 10th report of session 2009–2010, HL Paper 65/HC 400, p. 17.

One young person involved with Include Youth's response to the IMB report spoke of feelings that "it's because we're nobody's, because they don't care about us on the outside, we're nothing, we don't matter".[118] Children in custody do matter, and do have rights. The inclusion of provision within the Hillsborough Agreement for a review of children and criminal justice provides an opportunity to show to children and young people in conflict with society that as a society we do care and that as rights-holders they will be respected and protected.

118 Include Youth, *Young People's Response*, n. 101 above, front cover page.