

The rights of the child in global perspective

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This paper considers the development of the idea of children's rights, firstly at an international level, and then nationally and locally. Focussing on the central 'right' as defined by the United Nations Convention on the Rights of the Child (1989) – that 'the child ... should grow up in a family environment, in an atmosphere of happiness, love, and understanding' – the paper points to a contradiction implicit here between the child imagined as a rights-bearing individual and the child imagined as in need of protection, by the family and, if necessary, by the state.

The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding (United Nations Convention on the Rights of the Child: Preamble 1989).

INTERNATIONAL MOVES TOWARDS DEFINING THE RIGHTS OF THE CHILD

The first attempt to codify a set of universal children's rights arose out of the civilian sufferings of the Great War (1914-1918), and its concerns were primarily with children's welfare, even survival, in contexts where many children were either orphaned or separated from families through the disruption of conflict and its aftermath. The brief, five-point document was adopted by the International Save the Children Union, and endorsed by the League of Nations General Assembly on 26 November 1924 as the World Child Welfare Charter (League of Nations 1924). It read as follows:

By the present Declaration of the Rights of the Child, commonly known as 'Declaration of Geneva,' men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

- (1) The child must be given the means requisite for its normal development, both materially and spiritually;
- (2) The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;
- (3) The child must be the first to receive relief in times of distress;
- (4) The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;
- (5) The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

While a significant twentieth-century document which is the forerunner of later statements on the rights of the child, the influence of nineteenth-century views of the child derived from the charitable discourses of this time is evident in the conception of the child in this charter. The child is seen as standing as much in need of protection as of rights.

The horrors of the Second World War (1939-45) brought an international response to the plight of children geared less to charitable concerns and more to notions of universal citizenship. The United Nations Charter 'reaffirmed faith in fundamental human rights, and dignity and worth of the human person' and committed all member states to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' (United Nations 1948). Children's advocates and women's groups were prominent amongst those pushing for a declaration of Human Rights, but despite a feminist presence on the drafting committee, the formulation of women's rights within the Declaration was not a positive one (Lake 1999, chapter 3). The Declaration was adopted by the United Nations General Assembly in December 1948. The only reference to women and children, in article 25.2, declared that:

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

An earlier article (16.3) – and one with an easier passage through the Assembly – declared that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State (United Nations 1948).

The anti-communist rhetoric which came to dominate western democracies during the 1950s tended to heighten this understanding of the family as 'the the natural and fundamental group unit of society' – an emotional haven in a heartless world. In an interesting contradiction, this haven at once needed social protection and was in danger of having its functions taken over by the welfare state. Within this understanding children's rights were conceived in largely

negative terms, as in need of protection. In November 1959, the General Assembly of the United Nations endorsed a much extended version of the 1924 Children's Charter, the Declaration of the Rights of the Child. Its Principle 2 spelt out the proposition that the positive rights of childhood could exist only if they were properly protected (United Nations 1959):

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him/her to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

But this endorsement of state action in defence of child rights is qualified in Principle 6 of the Declaration by a declaration of the prior need for family protection:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

This double protection – of the child within the family and of the family within the state – is elaborated in the United Nations Convention on the Rights of the Child (hereafter CROC), endorsed by the UN General Assembly in November 1989 (United Nations 1989). It is this Convention which currently shapes the legal theory and administrative practice of children's rights at a national level. The CROC is a much more comprehensive document than its predecessors, giving to children the full range of adult rights such as citizenship, freedom of speech, and freedom of association, and requiring signatory states to incorporate these rights in law, and to amend laws which deny them. But the children's rights are continually hedged about with family and parental rights. Thus while the first clause of Article 3 boldly asserts that:

1. 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

the second clause significantly limits the power of the state to defend those 'best interests':

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal

guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 5 even more specifically defends the family from the power of the state:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 9, on the other hand, asserts the best interests of the child, as interpreted by the state, against those of the parents:

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 ...

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The CROC deals specifically with the various means by which its signatory states should provide 'alternative care' for a child 'temporarily or permanently deprived of his or her family environment'. Article 20.3 spells out that:

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.

Of these forms of alternative care, the CROC addresses only one in detail – adoption, the subject of Article 21. The document's focus here is very much on intercountry adoption, which was by 1989 a matter of international concern. The intention is not to establish any rights relating to adoption, neither a child's right to be adopted nor an adult's right to adopt. Rather the aim is to regulate and even

restrict the practice of intercountry adoption. States Parties are required to recognise that:

inter-country adoption may be considered as an alternative means of child's care, [only] if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

But adoption of the Convention has implications for the practice of adoption within signatory states, requiring them to 'ensure that the best interests of the child shall be the paramount consideration', and to:

ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

This double protection – of the child within the family and of the family within the state – is elaborated in the UN Convention on the Rights of the Child ... It is this Convention which currently shapes the legal theory and administrative practice of children's rights at a national level.

Again the default position, the underlying assumption, is that the child's interests are best served within her natal family, and that state action is a poor, if occasionally necessary, alternative. These principles were spelled out in much greater detail in the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (United Nations 1993). This instrument is seen by some agencies acting on behalf of prospective adopting parents as actively anti-adoption in intention and effect.

There is a huge critical literature assessing the virtues and flaws of these various instruments. Many writers identify tensions and ambiguities around the notion of children's rights. Sara Dillon, writing in the *Boston International Law Review*, finds 'an ideological morass at the heart of international and national adoption law', a morass arising from the failure to articulate 'a child's right not to be institutionalised' (Dillon 2003). Sarah White, in the *Journal of International Development*, points to tensions within the

Convention on the Rights of the Child between state and parents as protectors of children (White 2002):

The Convention on the Rights of the Child recognises the significance of relationship to children's lives in repeated references to parents, guardians and families. These are predominantly seen as mediating the state's relationship to the child ... The state recognises families' authority over children, and should intervene only when the child is suffering serious harm in his or her family's care (Article 19) ... Despite these potential tensions between the state and parents/guardians, however, the best interests of the child are held to govern the action of both parties. The state is imagined, in effect, as the ultimate good parent of all its citizens.

Martin Guggenheim, an American lawyer specialising in children's law, finds the same problems arising in domestic jurisdictions (Guggenheim 2005):

'Children's rights' is both deeper and more shallow than is often recognized ... It has provided very little by way of a useful analytical tool for resolving knotty social problems ... [Rather] it has staying power because it serves adults, too ... 'Children's rights' can be useful for masking selfishness by invoking altruism ... 'Children's rights' has become a mantra invoked by adults to help them in their own fights with other adults in all sorts of contexts ... It is time to candidly appraise whether children's rights serve children's interests.

Certainly the cases made by adoption advocates in Australia might often be characterised as promoting the interests of would-be parents rather than children in need; see, for example, the submissions to the 2005 House of Representatives Standing Committee on Human and Family Services, *Overseas Adoption in Australia: Report of the Inquiry into Adoption of Children from Overseas* (Murphy, Quartly & Cuthbert 2009). But Guggenheim's pessimistic propositions should be set against the more temperate (and complex) position argued by another lawyer, Frederick Zito, in his paper in this collection. Zito believes that the tension between children's rights and family rights cannot be resolved, 'as a child's life necessarily involves many other people whose interests must also be considered'. And while he acknowledges that 'we will [not] ever be able to create a standard, a test, a rule of practice or of law that will be able definitively to establish what is or is not in the best interests of a child', he concludes that 'the child's best interests should always be a primary consideration' ... 'the best we can do in the circumstances'.

CHILDREN'S RIGHTS IN THE LOCAL CONTEXT

Australia ratified the Convention on the Rights of the Child in December 1990, one of the first nations to do so, and adopted the *Hague Convention on Intercountry Adoption* in August 1998. The provisions of the Convention have been brought into Australian law and practice by amendments to the Family Law Act and by an agreement between the states

and the Commonwealth Government, negotiated in 1998 and again in 2008. Under this agreement, the Federal Attorney-General's Department is the responsible agency for implementing the provisions of the Hague Convention, but it delegates to the states the delivery of intercountry adoption services (Australian Government: Attorney-General's Department 2008). At the state government level, this devolves to the state agency responsible for the care of children – generally the department of communities, or of human services. One might assume that this would bring local adoption and international adoption into the same framework of policy and practice. But in most jurisdictions the effect has been to lay down another administrative strand alongside a system in which local adoption was already isolated from other forms of out-of-family childcare like fostering and permanent care. This administrative practice has been primarily driven by the historical function of adoption as a way of making family – a function driven far more by the needs of adults than the rights of children. Thus the international tensions between state and family as determinants of 'best interest' are echoed in local practice.

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Australia has been slow to adopt the growing international trend for legislation defining and defending human rights. Victoria adopted a Charter of Human Rights and Responsibilities in 2006; it remains the only state to do so. The Charter follows very closely the provisions of the sixty-year-old United Nations Charter of Human Rights, reproducing without qualification its vision of children as non-citizens requiring protection (Victorian Government 2006):

Clause 17. Protection of families and children

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

At a national level, the newly released National Human Rights Consultation Report recommends – rather tentatively – the development of an Australian Human Rights Act, together with other rights machinery to work independently or alongside the Act. Children's rights were very rarely raised in the submissions made to the Committee, and they hardly feature in the report (Commonwealth of Australia

2009). The Convention on the Rights of the Child is included amongst the many conventions that government should promote, and a long list of desirable civil and political rights includes (immediately after 'the right to marry and found a family') 'the right of children to be protected by family, society and the State' (Recommendation 25).

Perhaps a more significant reflection of international practice comes with the current move by the Federal Government into child welfare. The report *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-20*, released in 2009, uses rights rhetoric to justify a federal intervention (Australian Government 2009).

Children have a right to be safe, valued and cared for. As a signatory to the United Nations Convention on the Rights of the Child, Australia has a responsibility to protect children, provide the services necessary for them to develop and achieve positive outcomes, and enable them to participate in the wider community. In line with Australia's obligations as a signatory to the UN Convention, the National Framework is underpinned by the following principles:

- All children have a right to grow up in an environment free from neglect and abuse. Their best interests are paramount in all decisions affecting them.
- Children and their families have a right to participate in decisions affecting them.
- Improving the safety and wellbeing of children is a national priority.
- The safety and wellbeing of children is primarily the responsibility of their families, who should be supported by their communities and governments.
- Australian society values, supports and works in partnership with parents, families and others in fulfilling their caring responsibilities for children.
- Children's rights are upheld by systems and institutions.
- Policies and interventions are evidence based.

Here is the strongest statement yet of children's rights within Australian policy. It preserves the traditional and necessary tension between state and family as the protectors of children and the arbiters of their best interests. At the same time it goes beyond the CROC in seeing children as decision makers – 'children ... have a right to participate in decisions affecting them' – and in formulating their rights independently of the family – 'children's rights are upheld by systems and institutions'. Government and non-government agencies across Australia have committed to implementing the framework over a twelve-year period.

Protecting Children is Everyone's Business is not immediately concerned with the provision of out-of-home

care; its first aim is to provide support for families at risk in a time frame that will prevent family collapse. But the rights-based principles underpinning the framework are congruent with the new directions in social work practice signalled in the paper presented by Debbie Sturmfels on the New Zealand 'One Door' policy reproduced here: that 'the child is first presented as a whole, competent and confident person', an 'active and interactive practitioner of social life'. And the national commitment to the framework means that governments and agencies across Australia are committed to making that active, rights-bearing child central to the whole complex of issues involving child protection, family policy and out-of-home care. ■

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