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Children's Rights

Sevda Clark, Norwegian Centre for Human Rights
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HUMR5132 HUMAN RIGHTS LAW IN CONTEXT



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Overview of Lecture

1. CRC
 - i. Philosophies of children's rights
 - ii. Development of children's *human/legal* rights
 - iii. The UN Convention on the Rights of the Child (CRC)
 - iv. An optional protocol to the CRC
 - v. Domestic Law & the CRC: a case study
2. Health
 - i. ICESCR
 - ii. CRC
 - iii. Cases

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Do children have rights?

If so, do they have all the rights that adults have and do they have rights that adults do not have?



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Do children have rights?

- “We agree about the nature of rights *but on condition that no one asks us why*”
 - Exist as *legal* rights
 - Do these translate into *moral* rights?
- Difference between *moral* and *legal* rights
 - The existence of the CRC does not settle the question of whether, morally, children ought to have rights
 - Two kinds of philosophical scepticism:
 1. Do children have rights?
 2. Do children have the rights they are given by the CRC?

The philosophy of children's rights

- Scepticism about children's rights
 - Children do not have rights
 - Children do not have the same rights wherever they live in the world
 - Children do not have the rights that the CRC gives them
 - There are, according to this last criticism, real tensions between the rights in the CRC
- Moral rights theories
 - E.g. Liberationists
 - Children possess *all* rights adults have and to the same extent
 - ‘Choice’ theory
 - ‘Interest’ theory
 - Autonomy

Choice, Interest and Autonomy

Definitions of ‘rights’ has implications for children: whether they can then be described as rights holders at all

- ‘Will’ of ‘Choice’ theory: one can only be a rights holder if one can exercise a choice over a given right
- ‘Interest’ theory: the right to have certain *interests* protected

Changing views of childhood and children's rights

- Childhood is a historical construct
- 1924 Geneva Declaration of the Rights of the Child
- 1959 Declaration of the Rights of the Child
 - paradigm shift in its adoption of the language of entitlement
 - Conceptual parent of the CRC

1924 Geneva Declaration of the Rights of the Child

[...] 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



THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Changing views of childhood and children's rights

- The CRC (1989) – the Trojan Horse of human rights
 - Broad in scope, covering both economic, social and cultural rights and civil and political rights, without the (now redundant) distinction between them
 - Near universal ratification of 193 states (excepting Somalia and the USA)

The CRC – Unique Rights

1. Best interests of the child (Article 3);
2. Preservation of identity (Article 8);
3. Right to express opinions (Article 12) which is "a unique provision in a human rights treaty, which addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights";
4. Prevention of abuse by those responsible for care (Article 19) which is significant as it implicitly extends responsibility to private individuals, thereby destabilising the 'traditional' public private divide, emphasises prevention of intra-familial abuse and neglect 'which has never previously figured in a binding instrument';
5. Adoption (Article 21) which codifies principles that were adopted three years earlier by the UN in the framework of a non-binding declaration.

Unique Rights (cont.)

6. Health and access to care (Article 24) where for the first time State's are under an obligation to work towards abolishing harmful traditional practices and references are made to the advantages of breastfeeding;
7. Rights of child cared for outside the family to periodic review of care (Article 25);
8. Obligation to recover maintenance from those having financial responsibility for the child (Article 27);
9. Education and school discipline to be consistent with child's human dignity (Article 28);
10. Education to meet detailed aims (Article 29);
11. Right to rest, leisure and play (Article 31); and
12. Specific protection from sexual exploitation and abuse, including child pornography (Article 34).

CRC: 4 Guiding Principles

1. **Non-discrimination** (Art 2): The Convention applies to all children, whatever their race, religion or abilities; whatever they think or say, whatever type of family they come from. It doesn't matter where children live, what language they speak, what their parents do, whether they are boys or girls, what their culture is, whether they have a disability or whether they are rich or poor. No child should be treated unfairly on any basis.
2. **Best interests of the child** (Art 3): The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.
3. **Right to life, survival and development** (Art 6): Children have the right to live. Governments should ensure that children survive and develop healthily.
4. **Respect for the views of the child** (Art 12): When adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account.

Empowerment v. Protection: the central tension of the CRC**Article 3**

- "That in all matters affecting the child 'the best interests of the child' shall be a primary consideration"

Article 12

- That "the child who is capable of forming his or her own views" has '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."

'Best Interest' the best model?

- Critiqued in moral theory
- John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', in Philip Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Oxford University Press, 1994)

Unpacking Article 3, CRC

- The word 'right' is not used.
- The key phrase: '*a*' primary consideration [as opposed to 'the' primary or 'a paramount']
- The 'best interests' principle is one of the 4 Guiding Principles of the CRC
 1. Right to life, survival, development
 2. Best interests of the child
 3. Nondiscrimination
 4. Right to participation



CRC: 3 Types of Rights

1. **Survival and development rights:** These are rights to the resources, skills and contributions necessary for the survival and full development of the child. They include rights to adequate food, shelter, clean water, formal education, primary health care, leisure and recreation, cultural activities and information about their rights. These rights require not only the existence of the means to fulfil the rights but also access to them. Specific articles address the needs of child refugees, children with disabilities and children of minority or indigenous groups.
2. **Protection rights:** These rights include protection from all forms of child abuse, neglect, exploitation and cruelty, including the right to special protection in times of war and protection from abuse in the criminal justice system.

CRC: 3 Types of Rights (cont.)

1. **Participation rights:** Children are entitled to the freedom to express opinions and to have a say in matters affecting their social, economic, religious, cultural and political life. Participation rights include the right to express opinions and be heard, the right to information and freedom of association. Engaging these rights as they mature helps children bring about the realization of all their rights and prepares them for an active role in society.
- The equality and interconnection of rights are stressed in the Convention. In addition to governments' obligations, children and parents are responsible for respecting the rights of others—particularly each other. Children's understanding of rights will vary depending on age and parents in particular should tailor the issues they discuss, the way in which they answer questions and discipline methods to the age and maturity of the individual child.

A New Optional Protocol Allowing for Individual Complaints

- A pioneering treaty
- No complaints/communications procedure until earlier this year
- The draft was crafted by an intergovernmental working group over ten days in December 2010 and February 2011
- A strong international campaign
- 17 June 2011: The UN Human Rights Council adopted the new Optional Protocol

Australian Case Study

DOMESTIC LAW & THE CRC

Effect of CRC on Australian Law

- A treaty does not have a direct effect in Australian law unless and until it is incorporated into that law by statute. This fundamental principle was expressed by Mason CJ and Deane J in *Teoh* case
- Australia ratified the CRC in December 1990, but it has not yet been incorporated into Australian law
- *Indirect* influence on Australian law of CRC

**MINISTER OF STATE FOR IMMIGRATION AND
ETHNIC AFFAIRS v. AH HIN TEOH (1995) HCA**

- High Court of Australia (HCA) held (4 to 1):
 - that in decisions under the *Migration Act*, the best of interests of children must be a primary consideration
 - that there was a **legitimate expectation** to this effect based on the CRC, which had not been the subject of legislative implementation
- 'Legitimate expectation':
 - "an interest which falls short of a legal right but which nevertheless provides a basis for implying the common law rules of procedural fairness in relation to an exercise of power"
- Executive response 1997
 - "The Court's decision gave treaties an effect in Australian law which they did not previously have. The Government is of the view that this development was not consistent with the proper role of Parliament in implementing treaties in Australian law."

**THE CHILD'S RIGHT TO
HEALTH****ICESCR, Art. 12**

1. The States Parties to the present Covenant **recognize** the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. **The steps to be taken** by the States Parties to the present Covenant **to achieve the full realization** of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

**Unpacking State Obligations: *respect*,
protect and *fulfil***

- States are under the obligation to ***respect*** the right to health specifically by *refraining from*:
 - denying or limiting equal access for all persons
 - *prohibiting or impeding traditional preventive care*, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments
 - limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters

**Unpacking State Obligations: *respect*,
protect and *fulfil***

- States are under the obligation to ***protect*** the right to health specifically by:
 - adopting legislation or to taking other measures ensuring equal access to health care and health-related services provided by third parties
 - ensuring that privatization of the health sector does not constitute a threat to AAAQ of health facilities
 - Controlling the marketing of medical equipment and medicines by third parties; and ensuring that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct

**Unpacking State Obligations: *respect*,
protect and *fulfil***

- States are under the obligation to ***fulfil*** the right to health specifically by:
 - giving sufficient recognition to the right to health in national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health
 - ensure provision of health care, including immunization programmes against major infectious diseases, and ensure equal access for all to the underlying determinants of health
- To *facilitate*, *provide* and *promote*

Health in the UNCRC: Art. 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures :
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution ;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers ;

- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents ;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Jurisprudence: Litigating the Right to Health

Case studies:

1. *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL) (UK)
2. *The Queen on the Application of Sue Axon v. the Secretary of State for Health* (2006)
3. *TAC v. Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC); 5 July 2002

Questions to Consider

1. Identify a situation that might arise in the context of health care provision where a child's rights might be in conflict with those of the parent – for example:
 - a teenage girl has been brought in to see you by her mother turns out to be pregnant
 - a ten year old boy needs treatment for a chronic condition but his parents refuse to give consent
 - a disabled child refuses a painful corrective treatment which the parents want undertaken
 - a child reveals that she is being abused by a family member
 - a mother with HIV/AIDs wants to breast feed her baby.
 - any other likely conflict

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 (HL)

1983: Mother loses contraception test case

•Victoria Gillick, a mother of 10 had failed to prevent doctors prescribing contraception to under-16s without parental consent. Victoria Gillick appeared at the High Court seeking a declaration that none of her five daughters - aged 1 to 13 - could be prescribed or advised on birth control until they are 16.

•Mr Justice Woolf ruled against her application and also rejected her attempt to prevent the Department of Health and Social Security (DHSS) distributing a circular advising doctors they can give contraception to under-16s without parental consent.



The House of Lords focused on the issue of consent rather than a notion of 'parental rights' or parental powers.

Gillick Competency

Lord Fraser's Guidelines

- The young person will understand the professional's advice;
- The young person cannot be persuaded to inform their parents;
- The young person is likely to begin, or to continue having, sexual intercourse with or without contraceptive treatment;
- Unless the young person receives contraceptive treatment, their physical or mental health, or both, are likely to suffer;
- The young person's best interests require them to receive contraceptive advice or treatment with or without parental consent.

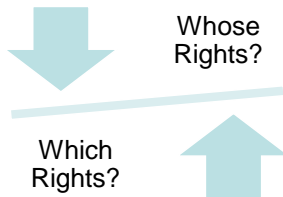


Sexual health law – subsequent case law

- These principles are deemed to apply to other treatments (including abortion and sexual health) beyond contraception.
- Applies to other health professionals, including nurses.
- *The Queen on the Application of Sue Axon v. the Secretary of State for Health* (2006)
 - A challenge to the White Paper entitled 'Best Practice Guidance for doctors and other Health professionals on the provision of advice and treatment to young people under 16 on contraception, sexual and reproductive health'.
 - The gist of her submission was that the 2004 Guidance misrepresented the House of Lords decision in Gillick.

Questions to Consider: MTCT

Consider Mother-to-child transmission of HIV



Whose rights?

Children's Rights and/or Women's Rights?

- Mother-to-child transmission (MTCT) of HIV at first seems to be a children's rights instead of a women's rights issue. This is the way it is often approached by legislators, courts and the media.
- However, significant women's reproductive rights concerns that are under the surface in this case. There are many issues that can only be seen from a women's rights perspective.
 - Medication to prevent MTCT of HIV can be argued for under a woman's right to be informed and have access to health care options, her right to reproductive choice, her right to have children and her right to equal treatment.
- Examining the issue from a women's human rights perspective brings out other issues which must be considered in the implementation of a prevention of MTCT programme.
 - When MTCT of HIV is looked at only as a children's rights issue the pregnant woman is viewed as a transmitter of disease instead of a woman with rights of her own. Women's rights that surround the issue of MTCT include: issues of informed consent, access to safe and legal abortions, and confidentiality.

A national case study: *TAC v. South Africa* (2002)

South African Bill of Rights, Art. 27(1):

“Everyone has the right to have access to –

(a) health care services, including reproductive health care;

... .

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

A national case study: *TAC v. South Africa* (2002)**Context**

•In 2000 the anti-retroviral drug Nevirapine was offered to the South African Government free of charge for five years. The drug offered the potential of preventing the HIV/AIDS infection of 30 – 40,000 children per year. However, the South African Government announced it would introduce Mother-To-Child-Transmission (MTCT) only in certain pilot sites and would delay setting these up for a year, thereby denying most mothers access to treatment.

On what breach of law was the case brought?

•Alleged violation of the following sections of the South African Constitution:

- s.27: ‘Everyone has the right to have access to a) health care services, including reproductive health care;’ The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- s. 28(1)(c) Every child has the right to basic nutrition, shelter, basic health care services and social services;

TAC v. South Africa* (2002)*Result of case**

•The High Court decided in favour of TAC, ordering that Nevirapine be made available to infected mothers giving birth in state institutions and that the government present to the court an outline of how it planned to extend provision of the medication to its birthing facilities, country-wide.

•The Government appealed the decision to the Constitutional Court. The Constitutional Court rejected the appeal, finding that the restrictions of Nevirapine to pilot sites excluded those who could reasonably be included in the programme. The Court ordered the Government to extend availability of Nevirapine to hospitals and clinics, to provide counsellors; and to take reasonable measures to extend the testing and counselling facilities throughout the public health sector.

Contact details

Sevda Clark

📞 22 84 20 20

✉ sevda.clark@nchr.uio.no

📍 NCHR Room 221
