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Challenging the criminalization of children and young people

Securing a rights-based agenda

Phil Scraton and Deena Haydon

The recent history of youth justice theory-into-practice reveals a tension between – and integration of – ‘welfare’ and ‘justice’ approaches. With justification, the application of the criminal law to children and young people is controversial. In the United Kingdom an unusually low age of criminal responsibility (ten in England and Wales; eight in Scotland) assumes that young children are as criminally responsible as adults. Yet the welfarist approach was initiated to divert children from the criminal justice system – away from punishment and retribution and towards adaptive ‘treatment’ programmes. Its positive characterization is that it recognizes and provides for the ‘best interests’ of the child, intervening through state-funded programmes of care and protection while challenging punishment and incarceration (see Chapter 13 of this volume). Critics, however, argue that welfarism abandons legal and judicial safeguards, leaving children to the discretionary, permissive powers of professionals while subjecting them to indeterminate measures without recourse to review or accountability.

The ‘justice’ or ‘just deserts’ approach advocates informed and transparent decisions through the due process of the law, in courts whose powers are adapted to recognize and accommodate children’s status and where criminal justice safeguards applied to adults are extended to children. Punishment is portrayed as rational, consistent and determinate: ‘fitting’ the crime while protecting the child against disproportionate or arbitrary punitive measures masked as ‘treatment’. The tension between welfare and justice approaches is not confined to limiting professional discretion or

SOURCE: Commissioned for this volume. Phil Scraton is Professor of Criminology and Director of the Centre for Studies in Crime and Social Justice, Edge Hill University College, UK. Deena Haydon is a Principal Officer for Research and Development, Barnardo’s, UK, and Research Fellow at the Centre for Studies in Crime and Social Justice.

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treatment versus punishment outcomes. It is concerned fundamentally with children's rights and the application of criminal justice in the broader, structural context of social injustice. This chapter addresses these issues, exploring the relationship between rights and the administration of justice in the context of the 1989 UN Convention on the Rights of the Child (UNCRC), the barriers to its implementation in the United Kingdom and the potential of a rights-based agenda for reversing the spiralling criminalization and incarceration of children and young people.

THE SIGNIFICANCE OF RIGHTS

In established, 'mature' democracies the conceptualization, definition, and formulation of commonly held and institutionally applied rights would seem straightforward. At the heart of internationally agreed conventions, supported by international law, regarding human rights is the recognition that 'the state is obliged not only to refrain from committing certain acts against the individual but also to carry out certain duties of an affirmative nature' (Méndez, 1997, p. 5). The language of rights is instructive. They are 'fundamental', 'inalienable', 'universal'. It is a language of certainty which presents rights as obvious and as absolutes. In principle, at least, human rights extend beyond the borders of sovereign states, universally declared and shared, internationally convened and agreed. Their implementation becomes a significant yardstick through which the progress of states in transition to democracy is monitored. Thus the legal and judicial procedures of rights implementation are derived in the political processes of rights affirmation.

Yet rights discourses are complex – reflecting a long history of contestation. Rights can be defensive or negative in proclaiming the 'right' not to be on the receiving end of the actions of others (e.g. the 'right to life'). Also, they can be proactive or positive – Méndez uses the term 'affirmative' – providing the right to something (e.g. information or consultation). Taken together, an inventory of rights, whether conceptualized as defensive or affirmative, whether socio-economic or civil-political, represents a statement of minimally acceptable standards applied within and across sovereign states. Freedman (1991, p. 11) proposed that a 'satisfactory theory of basic rights' has to meet three key criteria. First, 'rational and logical standards' (philosophical); second, 'terms that are emotionally and culturally attractive' (ideological); third, 'translatable into codes of enforceable action' (legal).

On the second and third criteria the internationalization of rights raises political and ideological issues concerning sovereignty. In the United Kingdom, for example, there has been significant 'emotional' and 'cultural' resistance to what has been perceived and represented as interference with the rule of law. Yet, importantly, internationalization secures the protection of citizens from rights violations *within* their states. In those circumstances, such as the European Convention on Human Rights, where a rights agreement is accompanied by a higher court through which domestic rulings can be reversed, the formalizing of internationally agreed rights is associated with the formalizing of internationally agreed justice. Articles of a convention not only become the conduit through which certain actions are policed and specified freedoms guaranteed, but also they provide mechanisms through which culpability is established and redress delivered. For it is in international courts and tribunals that member states are found wanting in failing to protect the substantive interests and liberties of their citizens.

Rights take on particular significance where the protection of the 'weak', the 'vulnerable', the 'oppressed' or the 'minority interest' is concerned. Central to the cultural imperialism and arrogance of Western democracies is the assumption that their children and young people are the beneficiaries of political and legal processes which identify and safeguard their rights and 'best interests'. Yet abuse, degradation and exclusion of children by adults are global issues. It is important to recognize different social, cultural and political contexts and to guard against crude universalism. But the suffering of children through the words and actions of adults – their helplessness in the face of adult power – is not restricted by class, culture, gender, religion, state or industry. The extent and depth of personal harm, physical and sexual abuse and violence, intimidation and harassment, economic exploitation and poverty, political and social marginalization endured by children in advanced democratic societies is pervasive. It is, like so many forms of oppression, a power relation that silences as well as exploits.

The Children's Rights Office (1995, p. 8) provides a litany of serious problems endured by children in the United Kingdom: 'growing inequality, increased poverty, drug abuse, teenage pregnancy, high levels of violence ... sexual abuse, child prostitution, homelessness ... suicide and mental illness, a deteriorating environment and alienation from the political process'. Without voting rights children 'can only experience change through the actions of others' (AMA, 1995, p. 11). Consequently, children and young people experience 'adult mediation in all matters ... ranging from physical punishment in the home, in childcare or in schools ... to accessing contraception and abortion advice' on the basis of adult definitions of 'competence' (Scraton, 1997, p. 180). Yet, to all intents and purposes, the rights of children are prescribed and protected by the UNCRC, ratified by the UK government in December 1991. The UNCRC comprises over fifty articles, the main aims being to establish the right of children to adequate and appropriate care and protection, to provide services and facilities appropriate to their basic needs and to encourage institutional arrangements which enable effective participation in their society. Binding in international law, the expectation is that states will initiate legal and policy reform and develop formal interventionist practices within the UNCRC's articles. These protect rights and indicate duties across the social and community spectrum; providing a directional framework for all state institutionally based policies and practices and recognizing the role of the state in supporting families and carers in the development, socialization and welfare of children.

That the UNCRC was effective in identifying, codifying and protecting children's rights was brought seriously into question in 1993 following the killing of two-year-old James Bulger by Robert Thompson and Jon Venables, both aged ten. Nine months after their arrest, having been kept in custody without recourse to psychological support or counselling, they were tried for murder in an adult court with little concession to their status as children. They experienced the full glare of the international media and, having been found guilty, their identities and photographs were made public – unleashing an unprecedented media-hyped public campaign of hate against them (see Hay, 1995; Franklin and Petley, 1996; Davis and Bourhill, 1997; Haydon and Scraton, 2000). Despite judicial recommendations that the boys should serve eight years (the trial judge) or ten years (the Lord Chief Justice) the then Home Secretary, Michael Howard, intervened and, bowing to the public campaign, established the minimum period of incarceration at fifteen years. Eventually Howard's

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decision was overturned by the House of Lords and his action drew severe criticism in the European Court of Human Rights, where the UK government was ruled to have violated the European Convention on Human Rights on three counts (fair trial; fixing sentence; periodic review of sentence). Minority opinions within the court were scathing about the UK government's retributive and vengeful prosecution of the boys (Haydon and Scraton, 2000, p. 439).

Further, Dame Butler-Sloss, in the High Court, ruled that on release the identities of both young men should remain undisclosed because of the 'real possibility of serious physical harm and possible death from vengeful members of the public or from the Bulger family' (Butler-Sloss, 2001, p. 44). In taking this decision Butler-Sloss placed the principle of the right to life, enshrined in the European Convention and adopted in the 1998 Human Rights Act, above the right to freedom of expression. What this case demonstrates, from the prosecution through to the release of Robert Thompson and Jon Venables, is that debates over rights and justice do not happen in a social or political vacuum. They are informed, mediated and – to an extent – regulated by the historical and contemporary contexts in which they arise.

RIGHTS AND JUSTICE IN A CLIMATE OF RETRIBUTION

The abduction and killing of James Bulger did not, of themselves, generate the policy and legislative clamp-down on children and young people which began with the 1994 Criminal Justice and Public Order Act and culminated in the 1998 Crime and Disorder Act. It was an exceptional tragedy conveniently exploited to illustrate the most serious end of a continuum of children's criminality and antisocial behaviour. It reflected a 'fermenting body of opinion that juvenile justice in particular and penal liberalism in general had gone too far' (Goldson, 1997, p. 129). The law-and-order rhetoric of the early 1990s was directed towards children and young people as 'joyriders', 'persistent young offenders', 'bail bandits' and 'thugs'. Blackbird Leys (Oxford), Ely (Cardiff), Meadowell (north Tyneside), and other estates in Blackburn, Birmingham and Merseyside, were portrayed as police 'no go' areas where children and youths had free rein, intimidating and bullying residents through fear of violence. The James Bulger case took the debate over childhood indiscipline and lawlessness to a different level. While authors such as Campbell (1993) put forward a more reasoned, critical analysis of the broader context of antisocial, harassing and violent behaviour on the part of boy children and young men, more reactionary perspectives used it as a catalyst to criticize the ineffectiveness of 'liberal', community-based youth justice initiatives.

The velocity and intensity of media coverage and political opportunism regarding a 'crisis' in 'childhood' were so great that the amplification spiral – used by criminologists as an analytical metaphor – became almost tangible. 'New Right' theorists located the 'crisis' within an underclass created by an uncomplicated mix of welfarism, fecklessness and individual pathology (Murray, 1990, 1994). Self-styled 'ethical socialists' shared a version of underclass theory in locating high crime rates, antisocial behaviour and personal irresponsibility in the 'dismembered family' (Dennis, 1993; Dennis and Erdos, 1992). What united these analyses, reflecting the hard-line responses of police organizations, was the assumption that diversionary and decriminalizing interventions within youth justice indicated a state which had 'gone soft' on crime. This was clear in the all-party condemnation of social workers and youth justice professionals in the immediate aftermath of James Bulger's tragic death.

What evolved was a generic process of child demonization. Children had lost all sense of decency, discipline and morality; their 'innocence' had been 'corrupted'. They were claimed to be 'inherently evil', 'barbaric' and 'lawless'; the inevitable progeny of hedonistic, 'broken' homes, excused by 'soft' juvenile justice and abandoned by ineffectual, progressive schooling. What was demanded was the reconstitution of adult authority (see Chapter 26 of this volume). In this, legitimacy is claimed for adult power solely on the basis that adults are adults; their authority prevails whether in the family or state institution and is imposed rather than negotiated. It imposes surveillance disguised as prevention, subservience disguised as discipline and punishment disguised as correction. The 'crisis' in 'childhood', fuelled by the media and seized upon by politicians, carries the 'ideological whiff of child-hate'; a manifestation of power and subordination akin to race-hate, mysogyny or homophobia (Haydon and Scraton, 2000, p. 447). It represents the harsh end of a politics of adultism 'legitimated, reinforced and reproduced through professional discourses' and 'expressed via a language of exclusion and denial; confirming children and young people as outsiders, the "other" to adult essentialism' (*ibid.*, p. 448).

The struggle within criminal justice theory and policy remains locked in the debate over welfarism and care as the most appropriate route to rehabilitation and just deserts and punishment as the fairest and least discretionary means of establishing a universally applied form of justice. While the full persuasive force of righteous indignation demands exemplary punishment for persistent young offenders as a deterrent, and institutionalized leniency is promoted as the primary reason for repeat offending, the 'new retributivists' or 'deserts theorists' defend the principle of proportionality. In his critique of punishment theories Christie (1994, p. 138) argues that deserts theorists establish an unambiguous relation 'between the concrete act and the punishment', the latter reflecting the 'blameworthiness' of a specific act. Put another way, punishment is 'derived from the seriousness of the offence and from the culpability of the offender' (Hudson, 1996, p. 41).

This process aims to achieve the diminution, if not elimination, of social mitigation. Deserts theory proposes that social factors 'obfuscate the clear and supposedly justly deserved punishment resulting from the evil act' and, as a simple and objective mechanism, it 'becomes a most useful theory for fast justice and depersonalization of the offender ...' (Christie, 1994, p. 138). The system becomes tightened. Values other than 'the question of the gravity of the act' are eliminated. In 'matching the gravity of a crime with a portion of pain' the established 'system of justice is converted into a system of crime control' (*ibid.*, p. 175).

Setting tariffs as 'just measures of pain' within crime control systems presumes and demands a calculation which matches the seriousness of crime to the severity of punishment – proportionality. Seemingly rational and progressive, challenging the discretionary and often arbitrarily applied powers of the welfare model, such a measured calculation also prevents the intrinsic injustice of deterrent sentencing and exemplary punishment administered at the height of a moral panic. What this 'gain' has to be balanced against, however, is the 'loss' to offenders of relevant mitigating circumstances. It is a significant loss, given the consequences inherent in the determining contexts of class, 'race', gender, sexuality and age inequalities. Returning to the James Bulger case, surely age in itself mediated, if not mitigated, the circumstances in which the boys acted.

Most recent UK criminal justice policy embodies proportionality in so far as it prescribes the seriousness of offences. Hudson (1996, p. 55) notes that 'getting tough'

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on crime, a persistent and influential ideological construction directed particularly at children, has encouraged policies which suggest that 'deserved retribution' is not the only priority in Western democracies. Others include 'protection from dangerous or persistent offenders' and 'strong action against kinds of offending that become suddenly prevalent'. Elsewhere she argues that 'in popular and political discourse' justice has become 'endangered' through its now inextricable ties with vengeance and punishment. Consequently, justice 'is now very much less important than "risk" as a preoccupation of criminal justice/law and order policy' (Hudson, 2001, pp. 104–5).

According to Christie (1994, p. 24) this 'reactive framework' is the context in which what then happens is placed 'solidly on the person who commits the crime'. It unleashes a 'new situation, with an unlimited reservoir of acts that can be defined as crimes ... unlimited possibilities for warfare against all sorts of unwanted acts'. While the protection of the personal and the material (from, for example, violence and robbery) is essential, there have to be what Christie defines as 'reflections on limits' to criminalization and the formal mechanisms of crime control. For, if the 'reservoir of acts' is tapped relentlessly, and antisocial behaviour of all kind is recast as crimes, the expansion of incarceration is reconstructed as 'destiny, not choice' (*ibid.*, p. 34).

Yet, as Hudson (2001, p. 145) notes, finding 'an adequate definition' of justice which moves beyond criminalization, vengeance and retribution is both 'difficult and inconclusive'. The underlying tension evident throughout the socio-legal and penal debates is the relationship between securing consistency in the administration and distribution of justice where victims have been harmed or wronged and accepting that all actions are, to an extent, unique and mediated by particular circumstances and structural contexts. Taking this last point to its logical conclusion, de Haan (1991, p. 210) calls for a politics of redress via a conceptual and administrative framework inviting 'open discussion about how an unfortunate event should be viewed and what the appropriate response ought to be'. Criminal justice discourse, locked into the negative, reactive and reactionary manifestations of crime and punishment, would then give way to Christie's (1994, p. 11) call for a 'real dialogue'.

Programmes based on principles of redress, restitution or reparation have become increasingly familiar – offering community-related alternatives for achieving just solutions to real problems. They are premised on the establishment of procedures and mechanisms for conflict resolution and interpersonal reconciliation which are not only rational but also prescriptive towards a more tolerant, understanding and diverse social order. Resting on the pillars of negotiation, mediation and arbitration, the 'aim is compensation rather than retaliation; reconciliation rather than blame allocation' (de Haan, 1991, p. 212). The latter is less problematic than the former. Reparation and redress are not imprinted on a clean slate; they are invariably attempted in a reactive context of crime and punishment. Further, the harm done cannot be erased, since reconciliation for the victim/survivor does not mean recovery. Also, the seriousness of the act does matter. So how is an appropriate level of compensation to be set which is not infected by the notion of a 'just measure of pain'? Finally, and crucially, there is the problem of power.

Restorative justice implies a transaction, personal or material or both, between the victim/survivor and offender through which the harm caused and endured through the act can be overcome (see Chapter 16 of this volume). It trades punishment for reparation and, accordingly, addresses the residual fear left with the victim/survivor. But does it? When Muncie comments that a 'conception of crime without a conception of power

is meaningless' he is undoubtedly correct. He is also optimistic that the 'redefining of crime as harm opens up the possibility of dealing with pain, suffering and injury as conflicts and troubles deserving negotiation, mediation and arbitration rather than as criminal events deserving guilt, punishment and exclusion' (Muncie, 2000, pp. 221–3). This provides a discourse 'less concerned with controlling, preventing and punishing and more with enabling and empowering'.

Yet naming power does not challenge its legitimacy or authority. Apart from the major social and ideological transition involved in shifting collective consciousness from one in which most UK citizens would vote for an immediate reinstatement of capital punishment and would consider prisons (even for children) too lenient, the big issue of power remains. Power centres of production, patriarchy, neo-colonialism and age – their inherent structural inequalities wrapped in legal frameworks – persist, as does their currency of exploitation, subjugation and oppression. Corporate negligence, corruption, pollution, state-sanctioned violence, inhuman and degrading treatment, child abuse, neglect, harm and human rights violations remain endemic in advanced capitalist political economies. In this context Hudson's (2001, p. 166) argument for the promotion of 'substantive justice' through 'the development of a rights-based approach which is predicated on difference, on conflicts of rights that will be generated by individual cases' seems apposite. She considers, however, that 'universal statements of rights ... and attempts to interpret them as a practical guide to governance' should be viewed as 'starting points' which could and should 'lead to the development of a jurisprudence of rights geared to deciding conflicts and upholding rights in specific cases'.

FORMALIZING CHILDREN'S RIGHTS: INTERNATIONAL CONVENTIONS AND RECOMMENDATIONS

Cohen (2001, p. 139) comments: 'Historical skeletons are put in cupboards because of the political need to be innocent of a troubling recognition; they remain hidden because of the political absence of an inquiring mind.' Regarding the history of genocide, atrocity, torture and state repression this powerful comment is demonstrable. Yet an 'inquiring mind', even if used as a collective metaphor, requires process and procedure to facilitate redress and, if possible, some form of reconciliation. Politically, as stated earlier, this is found in a discourse of rights made concrete by a framework of rights implementation. While, in Hudson's terms, the UNCRC provided a 'starting point', it is also 'the fullest legal statement of children's rights to be found anywhere' (Freeman, 2000, p. 277). It provides the basis, then, for the unpacking of 'troubling recognition' of child abuse, exploitation and marginalization by the 'inquiring mind' while also establishing a framework through which a 'jurisprudence of rights' can emerge via specific cases.

The UNCRC established a framework of principles and minimum standards for legislation, policy and practice concerning children and young people. Ratification by states implies a commitment to the general principles underpinning the UNCRC and specific articles concerning youth justice. Other complementary international instruments (such as the UN Rules for the Protection of Juveniles deprived of their Liberty, 1990; UN Standard Minimum Rules for the Administration of Juvenile Justice – the Beijing rules, 1985; UN Guidelines for the Prevention of Juvenile

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Delinquency – the Riyadh guidelines, 1990; UN Standard Minimum Rules for Non-custodial Measures – the Tokyo rules, 1990) also relate to the planning and implementation of youth justice programmes.

Several key articles identify general principles informing policy and practice for all children in any circumstances. For example, rights established by the UNCRC should be respected and ensured ‘without discrimination of any kind ... irrespective of the child’s ... race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’ (Article 2.1). In all actions concerning children, ‘the best interests of the child shall be a primary consideration’ (Article 3.1), and ‘the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities’; particularly regarding safety, health, the number and suitability of staff and competent supervision (Article 3.3).

States are expected to ‘ensure to the maximum extent possible the survival and development of the child’ (Article 6.2). While in the care of parents, legal guardians or any other person, ‘all appropriate legislative, administrative, social and educational measures’ should be taken ‘to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’ (Article 19.1). Such measures should include, as appropriate, ‘effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child’, as well as for ‘other forms of prevention’ and the ‘identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment’ (Article 19.2).

Crucially, Article 12.1 states: ‘the child who is capable of forming his or her own views’ should be assured of ‘the right to express those views freely in all matters affecting the child’, its views ‘being given due weight in accordance with the age and maturity of the child’. As well as assuring the child’s right of expression, this obliges adults to hear and take children’s views seriously. In particular, the child should be ‘provided the opportunity to be heard in any judicial and administrative proceedings affecting the child’, either directly or through a representative/appropriate body (Article 12.2).

Regarding youth justice, states should ‘seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law’ (Article 40.3). They should also establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’ (Article 40.3a). The UNCRC defines a child as ‘every human being below the age of eighteen years unless ... majority is attained earlier’ (Article 1). The *Manual on Human Rights Reporting* refers to eighteen as a ‘general upper benchmark’, which should be ‘used by States Parties as a rule and a reference for the establishment of any other particular age for any specific purpose or activity’ (cited in Hodgkin and Newell, 1998, p. 4). Accordingly, states should ensure special protection to every child below this limit.

While international instruments do not specify an appropriate ‘age of criminal responsibility’, the Beijing rules suggest that it should ‘not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’ (Rule 4). The important consideration is ‘whether a child, by virtue of his or her individual discernment and understanding, can be held responsible for essentially anti-social behaviour’. Contextually, the rule recognizes the ‘close relationship between the

notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority)'.

Under the UNCRC 'the arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time' (Article 37b). All children should be entitled to a number of guarantees, including the presumption of innocence 'until proven guilty according to the law' (Article 40.2b; see also Universal Declaration of Human Rights, Article 11; International Covenant on Civil and Political Rights, Article 14.2). Culpability should be 'determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing ... in the presence of legal and other appropriate assistance and ... in particular, taking into account his or her age or situation ...' The child should 'not ... be compelled to give testimony or to confess guilt' (see also Universal Declaration of Human Rights, Article 11; International Covenant on Civil and Political Rights, Article 14.3g). The child should also 'have his or her privacy fully respected at all stages of the proceedings'. If considered to have infringed the law, 'this decision and any measures imposed in consequence' should be 'reviewed by a higher competent, independent and impartial authority or judicial body'.

Throughout the prosecution process, children should be 'treated in a manner consistent with the promotion of the child's sense of dignity and worth'. While reinforcing the child's respect for the human rights and freedom of others, formal responses should take into account the child's age and the desirability of promoting reintegration (Article 40.1). The Beijing rules (Rule 17, Commentary) imply that 'strictly punitive approaches are not appropriate'. Although it is recognized that just deserts and retributive sanctions may have merit in adult cases, or when young people have committed serious offences, such considerations 'should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.

A 'variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; educational and vocational training programmes and other alternatives to institutional care' should 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' (Article 40.4). The Beijing rules (Rule 17.1a) confirm that action taken in criminal cases should be proportionate not only to the 'circumstances and the gravity' of the offence, but essentially to the 'circumstances and the needs of the juvenile'. The use of custodial sentences for children and young people is strongly opposed. In addition to existing 'alternative' sanctions, the Beijing rules encourage the development of 'new alternative sanctions' (Rule 17, Commentary). Finally, the UNCRC states that every child deprived of liberty should: 'be treated with humanity and respect ... and in a manner which takes into account the needs of persons of his or her age'; 'be separated from adults unless it is considered in the child's best interest not to do so'; and 'have the right to maintain contact with his or her family through correspondence and visits' (Article 37c).

In 1994 the UK government submitted its initial report to the UN Committee on the Rights of the Child concerning progress towards implementation of the UNCRC. In its response the committee (UN Committee on the Rights of the Child, 1995) raised a number of concerns. It questioned whether sufficient consideration had been given to the establishment of mechanisms to co-ordinate and monitor the implementation of children's rights. The insufficiency of measures ensuring implementation of the UNCRC's general principles, in particular the 'best interests of the child', was noted.

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It indicated that the low age of criminal responsibility and national legislation relating to the administration of juvenile justice were incompatible with Articles 37 and 40. Of particular concern was the ethos of guidelines for establishing and administering secure training centres, which emphasized incarceration and punishment. The committee was concerned that children placed in care under the social welfare system might be diverted to such centres.

Consequently a range of recommendations was made. The UN committee encouraged the UK government to review its reservations to the UNCRC with a view to withdrawing them (UK government, 1999). It suggested the establishment of a permanent mechanism for monitoring implementation of the 1989 Children Act and the UNCRC throughout the United Kingdom, with regular and closer co-operation between the government and the non-governmental community. It proposed that the general principles of the UNCRC, particularly those relating to the best interests of the child, should guide the determination of central and local government policy making. It recommended appropriate measures for disseminating the principles and provisions of the UNCRC to adults and children, with children's rights incorporated into the training curricula of professionals working with or for children (such as the police, judges, social workers and personnel in care and detention institutions).

In addition to giving greater priority to the general principles of the UNCRC (especially Articles 3 and 12) in legislative and administrative measures, the committee recommended legal reform to ensure that the system of administration of juvenile justice was child-oriented. It recommended that serious consideration should be given to raising the age of criminal responsibility throughout the United Kingdom, and that the 1994 Criminal Justice and Public Order Act should be monitored to ensure full respect for, and compatibility with, the UNCRC. Of specific concern were provisions in this Act allowing the placement of secure training orders on twelve to fourteen-year-olds, indeterminate detention and the doubling of sentences on fifteen to seventeen-year-olds. The committee emphasized the development of programmes and strategies to ensure appropriate measures promoting the physical and psychological recovery and social reintegration of children in the youth justice system.

BARRIERS TO THE IMPLEMENTATION OF THE UN CONVENTION

In November 1996 the Audit Commission (1996) heavily criticized the youth justice system as expensive, inefficient, inconsistent and ineffective. Its controller, Andrew Foster, called for a 'systematic overhaul' to end 'the cycle of antisocial behaviour that has become a day-to-day activity' (*Guardian*, 21 November 1996). Following the 1997 election victory, the Labour government's Home Secretary, Jack Straw, announced a 'root and branch' reform of youth justice. This culminated in the rushed passage of the 1998 Crime and Disorder Act, which not only overhauled youth justice but also introduced: reparation orders; antisocial behaviour orders; parenting orders; child safety orders; local child curfew schemes; final warning schemes; action plan orders and detention and training orders. It abolished the presumption of *doli incapax* for ten to fourteen-year-olds and affirmed a commitment to secure custody for serious or repeat offenders. For Muncie (1999, p. 154), the Act is: 'an amalgam of "get tough" authoritarian measures with elements of paternalism, pragmatism, communitarianism, responsabilization and remoralization whose new depth and legal powers might be best described as "coercive corporatism"'.

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A year later the UK government (1999, p. 179) submitted its second report to the UN committee, claiming that measures directed at children and young people in the 1998 Act would 'be effective in further implementing' the UNCRC. Using a discourse of 'rights' and 'responsibilities', the punitive potential of the Act is reconstructed as enabling, supportive welfare intervention. In an ironic interpretation of Article 3, the report states: 'It is in the interests of children and young people themselves to recognize and accept responsibility, and to receive assistance in tackling criminal behaviour'. The government argued that the welfare of the child is only one factor to be taken into account by courts dealing with children or young people, rather than a factor of 'primary consideration'. Reflecting political priorities and demands for visible accountability on the part of offenders, the others include punishment, risk and public confidence in the system (Howard League, 1999, p. 12). The law consequently focuses on legal priorities – establishing intent, proving guilt and applying punishment – at the expense of welfare. Regarding practice, there is evidence that children have been moved from local authority secure units to young offenders' institutions when, in the opinion of professionals, it has been considered detrimental to the interests of the child (Howard League, 1999, p. 13).

Responding to the UN committee's concern about the introduction of privately managed Secure Training Centres (STCs), the government claims that the committee 'may have misunderstood the purpose and ethos of these institutions, and the circumstances in which young people might be sent there' (UK government, 1999, p. 184). Despite assurances that 'the primary purpose of STCs is not penal', a Social Services inspection of the first STC found excessive use of force; unsatisfactory educational provision; inexperienced and incompetent staff who had not been adequately trained; lack of effective and experienced managers; failure of programmes designed to tackle offending behaviour; virtually no access to fresh air and exercise for some children, left in an enclosed environment for twenty-four hours a day (Howard League, 1999, p. 11).

Having stated that the government intends to abandon custodial remand for fifteen and sixteen-year-olds, the report continues 'but there is currently insufficient provision elsewhere' (UK government, 1999, p. 190). Consequently, the government retains its reservation to Article 37c. Additionally, a child receiving a long sentence will be accommodated initially in a welfare-oriented secure unit and then transferred to a young offenders' institution (run by the prison service for fifteen to twenty-one-year-olds) for completion. The duty of the prison service to 'look after ... young offenders with humanity and help them lead constructive lives while in custody and prepare them for a law-abiding life on release' is affirmed in the report. Yet serious concerns have been raised about the general state of young offenders' institutions (see Howard League, 1995; Goldson and Peters, 2000) and, in his review of young offenders' institutions, the Chief Inspector of Prisons concludes that the prison service is 'neither structured nor equipped to deal with children'. Conditions 'in many cases ... are far below the minimum conditions in Social Services Department secure units required by the Children Act 1989 and the UN Convention on the Rights of the Child' (Ramsbotham, cited in Howard League, 1999, p. 9).

Abolition of the rebuttable presumption of *doli incapax* for ten to fourteen-year-olds in England and Wales means that, from the age of ten, children are treated as having the same criminal intent and maturity as an adult when a court decides on guilt or innocence. In addition, there is no longer a mechanism for the court to establish whether a child is capable of criminal intent, understands the criminal proceedings or

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is capable of giving instructions to legal representatives. The government justifies this change by suggesting that it will ensure that courts are 'able to address the offending behaviour by children between the ages of 10 and 14 at the earliest possible opportunity, and so nip that offending behaviour in the bud' (UK government, 1999, p. 177).

Courts will be allowed to draw inferences from the failure of an accused child to give evidence or answer questions at trial, 'thereby ensuring that all juveniles are treated in the same way in court' (*ibid.*, p. 177). This is also intended to 'contribute to the right of children appearing there [in court] to develop responsibility for themselves' (*ibid.*, p. 180). While children remain protected by the court's discretion not to draw inferences from silence if the court considers the child's mental or physical state makes this undesirable, the government justifies these changes as 'common sense to expect a child who has an innocent explanation for his or her conduct to provide that explanation, rather than to deprive him of her of that responsibility' (*ibid.*, p. 180).

Ignoring the UN committee's recommendation that the age of criminal responsibility should be raised, the government confirms the age of ten (in England and Wales) as 'an appropriate level, reflecting the need to protect the welfare of the youngest'. The priorities of the government's youth justice reform are evident in the report: 'if children aged 10 or older start to behave in a criminal or anti-social way, the Government considers that we do them no favours to overlook this behaviour' (*ibid.*, p. 180). Considering the relationship between the age of criminal responsibility and moral competence, the government maintains that in

today's sophisticated society, it is not unjust or unreasonable to assume that a child aged 10 or older can understand the difference between serious wrong and simple naughtiness, and is therefore able to respond to intervention designed to tackle offending behaviour. If for some reason a child is lacking in this most basic moral understanding, it is all the more imperative that appropriate intervention and rehabilitation should begin as soon as possible.

(*Ibid.*)

It argues that the changes 'will not have the effect of treating children in the same way as adults as far as the criminal justice system is concerned', with the emphasis 'firmly placed not on criminalizing children, but on helping them to recognize and accept responsibility for their actions where this is appropriate, and on enabling them to receive help to change their offending behaviour' (*ibid.*). Given the existence of 'an entirely different set of sentences, graduated by age, for juvenile offenders', a court would be able to 'reflect a young offender's age and level of maturity at the point of sentence' (*ibid.*). However, the then Home Secretary, Jack Straw, was unambiguous in resolving that, from the age of ten, children accused of serious offences should continue to be tried as adults in Crown courts because 'if justice is not open, it cannot be seen to be fair' (Hansard, col. 21, 13 March 2000).

In the administration of youth justice generally, discriminatory practice has been well documented. For example, African-Caribbeans are markedly more likely to be stopped by the police and to be remanded in custody before trial. They are over represented in the prison population and serve a disproportionately large number of long sentences (CRDU, 1994, p. 215). Significant differences in how females and males are treated within criminal justice mean that a higher proportion of girls are

likely to be placed in secure accommodation because of concern about their welfare or behaviour rather than for reasons directly associated with offending (see Goldson, 1999). Youth justice work within local authorities has not been afforded a high priority and significant cuts in youth service budgets have affected provision. Schemes such as drink and drug programmes, off-site school units and innovative youth justice initiatives have been reduced. Preventive measures intended to strengthen social support, ensure the provision of appropriate housing, employment and leisure opportunities are not sufficiently widely available (CRDU, 1994, p. 214).

SECURING A POSITIVE RIGHTS AGENDA

Rights politics in general, and children's rights campaigns in particular, have received criticism across the political spectrum. Scepticism concerning the political opportunism regularly associated with popular discourse around the defence and implementation of rights is well founded. The previous section demonstrates the ease with which draconian measures consolidating the incarceration and exclusion of children and young people can be inverted through a liberal veneer of welfarism and equality of opportunity. As Fionda (1999, p. 46) concludes, the 1998 Crime and Disorder Act reforms amounted to a 'melting pot of principles and ideologies', mixing 'punishment and welfare approaches'.

'Rights' and 'rights discourses' may be criticized for being no more than symbolic gesturing rather than vehicles of effective structural change. This is a significant point, given that it is possible to establish and ratify a convention based on defensive and proactive statements of rights while persisting with, even reinforcing, structural inequalities, pursuing harsh policies and maintaining punitive institutional regimes against the marginalized. Further, and from distinct and different political positions, rights discourses have been portrayed as: too permissive or emancipatory; failing to confront individuals with their social responsibilities; undermining established and significant cultural conventions; over-reliant on the rule of law to redress complex wrongs derived in difficult circumstances; diminishing broader political and collective responsibility through excessive individualism. Despite such wide-ranging criticisms and the 'chasm between the [UN] Convention and practice', Freeman (2000, pp. 279–80) asserts that a 'regime of rights is one of the weak's greatest resources'.

Clearly, UNCRC implementation should be grounded in a welfare approach, its three core principles having significant implications for youth justice. First, children's status requires discrete recognition and different responses from adult status, while taking account of individual experiences and capacities. Second, children's welfare should be prioritized. This implies treatment, support and guidance based on individual needs rather than punishment, retribution and deterrence. Third, children should participate fully in decisions affecting their lives, having had opportunities to gain confidence, explore issues of importance to them, learn the skills required to actively participate, and take action on their own behalf. Freeman (*ibid.*, p. 282) notes the irony of developing a convention which establishes the 'right to participation' while failing to consult children during its formulation. Not only should children's voices be heard, but the existing recognition of differences between children should be extended. Extension should be based around 'inclusion' as proactive in addition to the more reactive conceptualization of 'non-discrimination', emphasizing needs

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specific to children's circumstances. As Freeman suggests, the 'future of children's rights requires us to build upon the Convention by concentrating on neglected groups of children, by revising, reforming and innovating the rights with which we wish to endow children, and by strengthening implementation mechanisms' (*ibid.*, p. 290).

As discussed earlier in this chapter, a positive rights-based agenda both protects and promotes the interests of people within and between states. In protecting, it establishes the rights of all – strong and weak – not to be harmed, intimidated, degraded or abused. In promoting, it provides safeguards for the vulnerable while prioritizing and meeting their identified needs. Children require protective (defensive) and promotional (proactive) rights. Within youth justice a positive rights-based agenda requires a critical rethink of the appropriateness of the justice or just deserts approach. While incorporating some progressive principles regarding locally based crime strategies, multi-agency integrated interventions and anti-discriminatory practices, in effect the 1998 Crime and Disorder Act criminalizes children, young people and their parents. Politically it was mobilized in response to the public clamour for criminalization and punishment. Further, its implementation, far from being consistent and universally applied, remains arbitrary and uneven. This extends to the multi-agency initiatives directed at children and their parents once civil injunctions are applied.

Yet the government's defence of the justice approach relies on the presumption, stated unambiguously to the UN Committee on the Rights of the Child (UK government, 1999), that from the age of ten children's offending and/or antisocial behaviour will be addressed via the 'open', 'visible' and recorded procedures of courts. It is maintained that through their representatives, legal or otherwise, children can participate fully in preparing their defence and in following the progress of their case. This suggests that the justice approach minimizes, if not eliminates, adult discretion in defining the nature and circumstances of the offence, the degree of culpability and proportionality in passing sentence. It reinforces the classical proposition that the courts offer the only appropriate mechanism for establishing and calibrating a 'just measure' of punishment corresponding to the quantifiable seriousness of the crime. Clearly, these claims cannot be sustained – the administration of 'justice' being mediated by a range of social, institutional and structural factors and contexts.

Applying a justice approach to children, whatever the 'welfare' interventions built into the process, denies the status of childhood embodied in all internationally agreed conventions and guidelines. Far from safeguarding or promoting 'rights' and 'responsibilities', the arbitrary use of civil injunctions and the extension of child custody are two examples of adult-oriented justice responses in breach of the UNCRC. As this chapter emphasizes, children's knowledge and understanding – moral, social, cultural – are defined and restricted by their socially and politically imposed status as children and by their life experiences. Given that the social construction and structural location of childhood are unlikely to change significantly, institutional responses to offending or antisocial behaviour must recognize and reflect the complexity of the transition from childhood to adulthood.

Dealing with such complexity does not require the moral certainty, inflexibility and universalism of a renewed justice model, but the adaptability of a rights-based welfare approach. To move away from a 'justice' or just deserts approach, however modified or rationalized, to a more radical welfare approach does not necessarily mean a return to hidden, arbitrary and discretionary punitive welfare interventions. Proportionality, protection, review, transparency and accountability can be built into

professional practice, as can safeguards against net widening. Of course, widespread revelations of institutionalized physical, emotional and sexual abuse of children in residential care demonstrate how adults responsible for the care and protection of children can abuse their power. Such revelations, however, reinforce arguments for reforming welfare interventionism rather than further extending the criminal justice system. As recent studies demonstrate, young offenders' institutions do not inspire confidence regarding the good health and well-being of children in custody (see Chapter 26 of this volume).

The real potential of a positive rights-based welfare approach is its challenge to constructions of children as innocent, vulnerable and weak through promoting their right to information, expression of views and their participation in decision-making. Such an approach prioritizes children's accounts and experiences, the meaning they invest in their acts and their active participation in the process. It also expects full transparency of formal procedures and practices while constructing effective political and professional accountability measures for all interventions. This represents a profound change, extending the promotion of social justice beyond childhood, thus also requiring a radical overhaul of the criminal justice system for adults. A priority here is the necessary challenge to the ever-expanding 'reservoir of acts' defined under new legislation as 'crimes'. Against this tide, the focus should be decriminalization, decarceration and diversion into welfare-based programmes sensitive to the contexts in which individuals live.

For children and young people, the age of criminal responsibility should be raised to sixteen, in line with other social responsibilities within UK legislation. The detention and training orders introduced by the 1998 Crime and Disorder Act should be abolished and an end to youth custody in young offenders' institutions and prison for children under eighteen should be key objectives of a positive rights-based agenda. This reflects not only the UNCRC commitment to incarceration as a 'last resort' but also the damning indictment of young offenders' institutions by the Chief Inspector of Prisons. In opposition to the prevailing ideological (emotional and cultural) discourses in the United Kingdom, the development of a rights-based welfare approach would end the imposition of youth justice via prosecution, sentencing and incarceration for children and young people aged ten to sixteen. This would require a range of welfare-based, multi-agency interventions involving young people in defining their needs. It would acknowledge that young people's 'offensive' or 'offending' acts may be ways of coping with, or reacting to, their experience of social injustice rather than pathological symptoms of a deficient personality or dysfunctional family. It would define acts currently labelled 'crimes' or 'offences' as outside the criminal justice process if committed by children or young people under sixteen, redefining such acts as inappropriate or causing harm. Rather than a punitive response, such acts would lead to social welfare intervention. While recognizing the circumstances in which such acts are committed, welfare-based intervention would help young people appreciate the seriousness of the act, focusing on changing their behaviour through acceptance of responsibility for their actions. In the context of rights, this process would acknowledge the status of children while recognizing their specific needs, promoting their best interests and ensuring active participation.

The debate over rights, as discussed earlier, is not without structural context. Children's offending and antisocial behaviour, like their other life experiences and personal opportunities, are located within powerful, structural determining contexts.

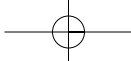
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Through unemployment, poverty and differential opportunities class impacts significantly on communities, families and children. The politics of reproduction, in the context of patriarchy, creates quite different possibilities – and probabilities – for girls and young women in both the private and the public spheres. Sexuality remains forbidden territory until puberty, when gendered ideologies reinforce femininity, hegemonic masculinity and heterosexism. Finally, racism – within the politics of neo-colonialism – remains a formidable barrier to equality of opportunity for any child defined as ‘ethnic minority’. While each individual’s experiences are distinctively mediated, these are powerful ideological as well as material determinants. Yet they remain ‘determining contexts’ rather than mechanisms of total determination. Formally and informally, attitudinal and institutionalized ideologies and practices have been contested and, at all levels, some significant social and political changes have been effected. Despite the resistance and achievements of individuals and the excellent work done by children’s rights organizations and children’s advocates across professions, the advancement of a positive rights agenda remains limited. The success of creating and implementing such an agenda depends on a more fundamental shift in the structural relations and determining contexts of power which marginalize and exclude children and young people from effective participation in their destinies.

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