

Towards a global ‘child friendly’ juvenile justice?

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Abstract

The impact of globalisation on juvenile justice is increasingly conceptualised with reference to neo-liberal governance and the intensification of ‘new punitiveness’. Whatever the merits of such analyses, they have the effect of marginalising, if not completely overlooking, the extent to which international human rights instruments might serve to neutralise and/or mediate punitive currents. Indeed, it might be argued that the commitment - repeatedly expressed in official discourse - to both protect and promote the human rights of children in conflict with the law has itself come to comprise a discursive and tangible dimension of global child governance. Key signifiers of this phenomenon - at the global level - include a corpus of interrelated human rights conventions, standards, treaties and rules, formally adopted by the United Nations General Assembly, whilst at the European level authoritative rights-informed guidelines on ‘child friendly justice’, ratified by the Council of Europe, are similarly representative. Against this backdrop, this article seeks to investigate the degree to which individual nation states receive and respond to their human rights and ‘child friendly justice’ obligations. Whilst recognising the mediating capacities of formal human rights instruments, we aim to critically interrogate the relations between globalised rhetoric and localised reality; between the promise of international rights discourse on the one hand and the limitations of territorial jurisdictional implementation on the other.

Key words

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Children, globalism, human rights, informalism, juvenile justice, localism, restorative justice.

Universal human rights instruments and children

The formalisation of universal human rights was consolidated with the creation of the United Nations and the adoption of the Universal Declaration of Human Rights in 1948. Subsequently, the United Nations General Assembly adopted five further pivotal human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Each and all of these treaties apply to children, young people and adults, but it was not until 1989 when the *United Nations Convention on the Rights of the Child* (UNCRC) was adopted by the United Nations General Assembly, and not until 1990 when the Convention came into force, that a universal human rights instrument focussed exclusively and comprehensively on protecting and promoting children's particular interests.

Article 1 of the UNCRC provides that the term 'child' refers to 'every human being below the age of eighteen years'. The Convention comprises 54 articles bringing together children's economic, social, cultural, civil and political rights. General measures incorporated within the UNCRC include a fundamental obligation on governments (referred to as 'States Parties') to develop and sustain a children's human rights infrastructure within their jurisdictional spheres comprising, for example: the right to non-discrimination (Article 2); the primacy of the child's best interests (Article 3); the right to life and maximum development (Article 6); and the right of children and young people to have their views given due weight in all matters affecting them (Article 12). The UNCRC also provides a range of 'civil rights' including: the child's right to freedom of expression and association; the right to receive information; and the right to protection from all forms of violence, abuse, neglect and mistreatment. The Convention further provides for every child's right to

an adequate standard of living and the right to the best possible health care and educational services.

The Universal Declaration of Human Rights (1948), the UNCRC (1989/1990) and each of the intervening human rights instruments, have a bearing on juvenile justice law, policy and practice, be it direct or indirect. Economic, social and cultural rights; civil and political rights; the elimination of all forms of discrimination; safeguards against torture and other cruel, inhuman or degrading treatment or punishment; protection from violence, abuse, neglect and mistreatment; a recognition of the 'special status' of childhood; 'best interest' principles; the right to life and maximum development; the right to be informed and the right to be heard, all have salience regarding the treatment of children in conflict with the law. Furthermore, specific and identifiable provisions of these instruments, together with an additional range of more 'specialist' global and European human rights standards, treaties, rules, conventions and guidelines, relate more explicitly still to juvenile justice.

Global and European human rights instruments and juvenile justice

Global human rights provisions with regard to juvenile justice were initially formulated via three key instruments.

First, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (often referred to as the 'Beijing Rules') were adopted by the United Nations General Assembly in 1985. The 'Rules' provide guidance for the protection of children's human rights in the development of separate and specialist juvenile justice systems. They were a direct response to a call made by the 'Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders' that convened in 1980. Rule 4.1 provides: 'juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles' (United Nations General Assembly, 1985).

Second, the *United Nations Guidelines on the Prevention of Delinquency* (often referred to as the 'Riyadh Guidelines') were adopted by the United Nations General

Assembly in 1990. The Guidelines are underpinned by diversionary and non-punitive imperatives: ‘the successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents’ (para. 2); ‘formal agencies of social control should only be utilized as a means of last resort’ (para. 5) and ‘no child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions’ (para. 54) (United Nations General Assembly, 1990a).

Third, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (often referred to as the ‘JDL Rules’ or the ‘Havana Rules’) were adopted by the United Nations General Assembly in 1990. The ‘Rules’ centre a number of core principles including: deprivation of liberty should be a disposition of ‘last resort’ and used only ‘for the minimum necessary period’ and, in cases where children are deprived of their liberty, the principles, procedures and safeguards provided by international human rights standards, treaties, rules and conventions must be seen to apply (United Nations General Assembly, 1990b).

Furthermore, the core provisions contained within the ‘Beijing Rules’, the ‘Riyadh Guidelines’ and the ‘JDL Rules’/‘Havana Rules’ were bolstered, in 1990, when the UNCRC - the most widely ratified human rights instrument in history - came into force. The ‘Articles’ of the Convention that have most direct bearing on juvenile justice include:

- In all actions concerning children... the best interests of the child shall be a primary consideration (Article 3)
- State Parties should recognise the rights of the child to freedom of association and to freedom of peaceful assembly (Article 15)
- No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence (Article 16)

- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37a)
- No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time (Article 37b)
- Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so (Article 37c)
- Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action (Article 37d)
- States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (Article 40(1))
- States Parties shall 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, and, in particular:
 - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever

appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (Article 40(3)) (United Nations General Assembly, 1989).

The United Nations/global human rights instruments are further buttressed, within the European context, by a movement towards ‘child friendly justice’ that is being driven by the Council of Europe. By extending the human rights principles that inform the ‘European Rules for Juvenile Offenders Subject to Sanctions or Measures’ (Council of Europe, 2009), the Committee of Ministers has more recently formally adopted specific ‘Guidelines for Child Friendly Justice’ (Council of Europe, 2010). The ‘guidelines’ echo the UNCRC in stating that ‘a “child” means any person under the age of 18 years’ (ibid: section II(a)) and they apply ‘to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with... bodies and services involved in implementing criminal, civil or administrative law’ (ibid: section I: para. 2). The Council of Europe emphasises the ‘unifying’ human rights objective of the ‘guidelines’ by explaining that they are intended to:

‘achieve a greater unity between the member states... by promoting the adoption of common rules in legal matters... [and] ensuring the effective implementation of ... binding universal and European standards protecting and promoting children’s rights’ (ibid: Preamble)

and to:

‘guarantee the respect and the effective implementation of all children’s rights at the highest attainable level... giving due consideration to the child’s level of maturity and understanding and the circumstances of the case... [Child friendly] justice is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child’ (ibid: section II(c))

It follows that the European ‘guidelines for child friendly justice’ serve to underline many of the provisions of global human rights instruments including: ‘the minimum age of criminal responsibility should not be too low and should be determined by law’; ‘alternatives to judicial proceedings... should be encouraged whenever these may best serve the child’s best interests’; ‘respect for children’s rights as described in

these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings’ (ibid: section IV(B): paras 23-26), and ‘any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time’ (ibid: section IV(A): para 19)

Collectively the United Nations and the Council of Europe human rights standards, treaties, rules, conventions and guidelines provide what is now a well-established ‘unifying framework’ for modelling juvenile justice statute, formulating policy and developing practice in all nation states to which they apply (Goldson and Hughes, 2010). As such – at face value at least - it might legitimately be argued that the same instruments provide the basis for ‘globalised’ human rights-compliant and ‘child friendly’ juvenile justice. After all, with the notable exceptions of the USA and Somalia, each of the United Nations member states – 193 ‘States Parties’ in total - have formally ratified the UNCRC and committed themselves to its implementation.

Mutated rights translations: juvenile justice in practice

In order to monitor the translation of the UNCRC into the realm of law, policy and practice within the national borders of respective ‘States Parties’, an international monitoring body has been established. The *United Nations Committee on the Rights of the Child* comprises 18 democratically elected members drawn from the 193 ‘States Parties’. The Committee normally meets three times a year in Geneva, Switzerland, and each of its members is required to act in an independent capacity as distinct from being a ‘representative’ of their specific country. The Committee has two principal functions. First, to issue ‘General Comments’ in order to elaborate the means by which the provisions and requirements of the UNCRC should be applied within specific subject-domains³. Second, to periodically investigate the degree to which

³ Between 2001-09 the United Nations Committee on the Rights of the Child issued 12 ‘General Comments’: ‘The Aims of Education’; ‘The Role of Independent Human Rights Institutions’; ‘HIV/AIDS and the Rights of the Child’; ‘Adolescent Health’; ‘General Measures of Implementation for the Convention on the Rights of the Child’; ‘Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’; ‘Implementing Child Rights in Early Childhood’; ‘The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment’; ‘The Rights of Children with Disabilities’; ‘Children’s Rights in Juvenile Justice’; ‘Indigenous Children and Their Rights Under the Convention’ and ‘The Right of the Child to be Heard’.

each 'State Party' is implementing the Convention - and retaining compliance with it - within its corpus of law, policy and practice. On both counts the Committee has identified institutionalised obstructions to the implementation of the UNCRC in general and, more specifically, serious breaches and violations of the human rights of children within particular juvenile justice systems.

The 'General Comment' in respect of juvenile justice (United Nations Committee on the Rights of the Child, 2007) emphasises the principle that jurisdictional systems must seek to safeguard the child's dignity at *every point of the justice process* and stresses that recourse to judicial proceedings (and especially custodial detention) should only ever be operationalised as measures of *last resort*. In short, the 'Comment' provides that the primary aims of human rights-compliant juvenile justice are to meet the child's needs and to protect their best interests. In practice, however, the Committee concludes that implementation of the UNCRC is often piecemeal and that the human rights obligations of 'States Parties' frequently appear as little more than afterthoughts within juvenile justice reform:

'... many States parties still have a long way to go in achieving full compliance with CRC, e.g. in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort... The Committee is equally concerned about the lack of information on the measures that States parties have taken to prevent children from coming into conflict with the law. This may be the result of a lack of a comprehensive policy for the field of juvenile justice. This may also explain why many States parties are providing only very limited statistical data on the treatment of children in conflict with the law' (United Nations Committee on the Rights of the Child, 2007: para.1)

These concerns stem, at least in part, from the fact that the UNCRC is ultimately permissive and breach attracts no formal sanction. In this sense, it may be the most ratified of all international human rights instruments but it also appears to be the most violated, particularly with regard to juvenile justice and, moreover, such violations occur within a context of relative impunity. Indeed, whilst Abramson (2006) presents an otherwise positive assessment of the practical impact of the UNCRC in 'transforming the world of children and adolescents', he argues that juvenile justice is

essentially peripheralised and/or unduly disregarded, even to the point of being ‘unwanted’.

Furthermore, analyses of the United Nations Committee’s jurisdiction-specific reports and ‘Concluding Observations’ imply a similar sense of ‘unwantedness’. Two years after a ‘State Party’ ratifies the UNCRC it is obliged to submit an initial report to the United Nations Committee on the Rights of the Child – outlining how it is applying the UNCRC. Following the submission of the initial report, each State Party is required subsequently to provide periodic reports at five-yearly intervals. The Committee also considers written evidence submitted by discreet government departments, Non-Governmental Organisations (NGOs), national independent human rights institutions (such as Children’s Commissioners and Ombudspersons) and children and young people themselves. The principal purpose of such inquiry is to ascertain the extent to which law, policy and practice within individual nation states is UNCRC-compliant and the degree to which children are treated in accordance with the spirit, if not the word, of the Convention.

With regard to the ‘administration of juvenile justice’ in many Western European States, the United Nations Committee on the Rights of the Child has repeatedly reported violations of children’s human rights (Goldson and Muncie, 2006, 2009; Muncie, 2005, 2008; Goldson, 2009a). The recurring concerns raised by the Committee particularly relate to Articles 37, 39 and 40 of the UNCRC (see above). Indeed, despite having had over 20 years to move towards full implementation, most states appear to have failed to integrate and embed the Convention within juvenile justice law, policy and practice. For example, Austria, Finland, Ireland, Germany, Portugal, Switzerland and the UK (United Nations Committee on the Rights of the Child 2005a; 2005b; 2006; 2004a; 2001; 2002; 2008, respectively) have each been specifically criticized for failing to separate children from adults in custody and/or for facilitating easier movement between adult and juvenile systems owing to diminishing distinctions between the two (as is characteristic of controversial processes of ‘juvenile transfer’ or ‘juvenile waiver’ that allow for the prosecution of children in adult courts in the USA). Similarly, the United Nations Committee (2004a) report on Germany condemned the increasing number of children placed in detention - especially children of foreign origin - including the custodial detention of children

with persons up to the age of 25 years. The report on the Netherlands (United Nations Committee on the Rights of the Child, 2004b) expressed concern that custody was no longer being used as a last resort, whereas in its report of the same year on France the Committee expressed concern over legislation and practice that tends to favour repressive over educational measures, increases in the numbers of children in prison and the resulting worsening of conditions (United Nations Committee on the Rights of the Child, 2004c). The Committee has long been critical of the low age of criminal responsibility adopted in the three UK jurisdictions (Goldson, 2009b). Indeed, in its most recent report on the UK, the Committee recommends ‘that the State Party fully implement international standards of juvenile justice ... [and] raise the age of criminal responsibility’ (United Nations Committee on the Rights of the Child, 2008: para. 78). Moreover, the Committee lists a number of additional concerns with regard to UK jurisdictions, including the inappropriate use of punitive pre-emptive interventions (such as ‘Anti-Social Behaviour Orders’) and the excessive use of custody:

‘The number of children deprived of liberty is high, which indicates that detention is not always applied as a measure of last resort;
The number of children on remand is high;
Children in custody do not have a statutory right to education;...
The recently published Youth Crime Action Plan (July 2008) includes a proposal to remove reporting restrictions for 16 and 17 year-olds facing criminal proceedings “to improve the transparency of the youth justice system”;...
The application to children of the Anti-Social Behaviour Orders (ASBOs), which are civil orders posing restrictions on children’s gathering, which may convert into criminal offences in case of their breach’.
(United Nations Committee on the Rights of the Child, 2008: paras 77 and 79)

Beyond Europe and five years earlier, the Committee’s report on Canada expressed concern:

... at the expanded use of adult sentences for children as young as 14; that the number of youths in custody is among the highest in the industrialized world; that keeping juvenile and adult offenders together in detention facilities continues to be legal; that public access to juvenile records is permitted and that the identity of young offenders can be made public. In addition, the public perceptions about youth crime are said to be inaccurate and based on media stereotypes.
(United Nations Committee on the Rights of the Child, 2003: para. 56)

Similarly, in 2005 when reporting on Australia, the Committee recommended that the State Party:

‘Consider raising the minimum age of criminal responsibility to an internationally acceptable level;
Take all necessary measures to ensure that persons under 18 who are in conflict with the law are only deprived of liberty as a last resort and detained separately from adults, unless it is considered in the children’s best interest not to do so;
Urgently remedy the over-representation of indigenous children in the criminal justice system;
Deal with children with mental illnesses and/or intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings;
Improve conditions of detention of children and bring them into line with international standards;
Take measures with a view to abrogating mandatory sentencing in the criminal law system of Western Australia;
Remove children who are 17 years old from the adult justice system in Queensland;
Address the problems that may be related to the gathering of young people in certain places without necessarily resorting to policing and/or criminalization, and consider reviewing legislation in this respect’
(United Nations Committee on the Rights of the Child, 2005c: para. 74)

And, more recently, a report on Japan concluded:

‘The Committee reiterates its previous concern (CRC/C/15/Add.231) expressed upon consideration of the State party’s second report (CRC/C/104/Add.2) in February 2004 that the revision of the Juvenile Law in 2000 has adopted a rather punitive approach and has restricted the rights and judicial guarantees of juvenile offenders. In particular, the lowering of the age of criminal responsibility from 16 to 14 years reduces the possibility for educational measures and exposes many children between 14 and 16 years of age to detention in correctional centres; children over 16 years of age committing serious offences can be sent to criminal courts; the length of pretrial detention has been extended from four to eight weeks; and the new Saiban-in system, which is a lay judge system, constitutes an obstacle to the treatment of child offenders by a specialized juvenile court.
Moreover, the Committee is concerned at the notably increasing number of juveniles referred to adult criminal courts and regrets that procedural guarantees due to children in conflict with the law, including the right of access to legal counsel, are not systematically implemented, resulting, inter alia, in coerced confessions and unlawful investigative practices. The Committee is also concerned at the levels of violence against detainees in juvenile correctional facilities and at the possibility of keeping juveniles in pretrial detention with adults’
(United Nations Committee on the Rights of the Child, 2010: paras. 83-84)

The persistent recurrence of human rights violations – over time and across

space⁴ - is compounded by a manifest racialisation of juvenile justice practice (Goldson, 2009a). Muncie (2008) reported that of 18 Western European jurisdictions studied, 15 were explicitly exposed to critique by the United Nations Committee for negatively discriminating against children from minority ethnic communities and migrant children seeking asylum. The overrepresentation of such children is particularly conspicuous at the polar ends of the system – arrest and penal detention. This especially appears to be the case for the Roma and traveller communities in England and Wales, Finland, France, Germany, Greece, Ireland, Italy, Northern Ireland, Portugal, Scotland, Spain and Switzerland, for Moroccan and Surinamese children in the Netherlands and for other North African children in Belgium and Denmark (Muncie, 2008).

Indeed, trends across Europe appear to indicate that the regulation and governance of ‘urban marginality’ and poverty is being increasingly prised away from the social welfare apparatus and redefined as ‘crime problems’ within burgeoning ‘penal states’ (Wacquant, 2009a). Moreover, within such shifts minority ethnic communities and immigrant groups are bearing the brunt of a ‘punitive upsurge’ (ibid). In particular, 8 million Roma - the largest minority ethnic group in the European Union - are widely reported as enduring systematic discrimination, harassment, ghettoisation, forced eviction, expulsion and detention. By collating data drawn from 22 country-specific reports, Gauci (2009: 6) notes: ‘most... reports identify the Roma... as being particularly vulnerable to racism and discrimination... in virtually all areas of life’. Increased ghettoisation of ‘foreigner’ and Roma communities in various European countries, whether as a result of institutional decisions or practical realities such as chronic unemployment, is serving to consolidate structural exclusion and systematic marginalisation: ‘the creation of spatial segregation and socially excluded localities where communities are effectively denied access to basic services such as water and electricity’ (ibid: 10). Welfare safety nets have all but dissolved whilst, at the same time, the ‘justice’ apparatus offers no relief. On the one hand, criminal justice agencies appear impotent to offer any meaningful protection for minoritised communities enduring a pan-European upsurge

⁴ See Defence for Children International (2007) for a composite comparative analysis of Albania, Argentina, Belgium, Bolivia, Canada, Chile, Costa Rica, France, Ghana, Italy, The Netherlands, Niger, Palestine, Sierra Leone and Uganda.

of hate crime and racist violence:

‘Developments within the criminal justice sector were limited over the course of 2008 as the recommendations of European and international bodies, including the European Commission Against Racism and Intolerance, were not taken on by the relevant national authorities. Whilst a number of countries noted an increase in racist violence... the legal and policy framework remained largely unchanged’ (ibid: 28-9)

On the other hand, the very same agencies are themselves purveyors of violence:

‘Ethnic minorities are also disproportionately subject to excessive use of force and violence by the police... A dramatic and emblematic episode took place in Bussolengo, near Verona, Italy where three Roma Italian families were taken away from a parking lot where they were temporarily stopped, and forced to go to the police station, and were subjected to violence for over six hours. In addition to beating and offending the adults, the Carabinieri (Italian Police) also used force with the children. A child was beaten losing three teeth whilst another was kept with his head under the water for a long time’ (ibid: 17)

In fact, an insidious process of double-victimisation is apparent whereby the very people most vulnerable to structural exclusion, systematic discrimination, hate crime and racist violence are also most likely to be criminalised and punished. In identifiable jurisdictions including Austria, Belgium, Italy and Switzerland, over a third of the total prison populations comprise foreign nationals. Meanwhile, 100,000 prisoners in European Union nation states have no claim to citizenship within the countries in which they are incarcerated (Muncie, 2008), and the most punitive elements of juvenile justice appear to be increasingly reserved for, and applied to, children from minority ethnic and/or immigrant populations.

Beyond European borders, the concept of ‘unwantedness’ and human rights violation chimes globally within both the child ‘care’ and juvenile ‘justice’ spheres. Institutional and institutionalised abuse is historically and spatially embedded in both ‘welfare’ and ‘justice’ settings that ultimately comprise ‘repositories for managing the unwanted’ (Goldson, 2009a: 88). In February 2003, Paulo Sergio Pinheiro was appointed, at Assistant Secretary-General level, to direct the ‘United Nations Secretary-General’s Study on Violence Against Children’ (the Study). The Study was undertaken in collaboration with the Office of the High Commissioner for Human Rights, the United Nations Children’s Fund and the World Health Organisation. It

comprises the most wide-ranging and detailed analysis of its type in history. The final report - published and presented to the United Nations General Assembly in November 2006 (Pineiro, 2006) - makes for depressing, even if salutary, reading:

‘Millions of children, particularly boys, spend substantial periods of their lives under the control and supervision of care authorities or justice systems, and in institutions such as orphanages, children’s homes, care homes, police lock-ups, prisons, juvenile detention facilities and reform schools. These children are at risk of violence from staff and officials responsible for their well-being. Corporal punishment in institutions is not explicitly prohibited in a majority of countries. Overcrowding and squalid conditions, societal stigmatization and discrimination, and poorly trained staff heighten the risk of violence. Effective complaints, monitoring and inspection mechanisms, and adequate government regulation and oversight are frequently absent. Not all perpetrators are held accountable, creating a culture of impunity and tolerance of violence against children’ (Pineiro, 2006: 16)

More specifically, throughout the course of the United Nations Study, a series of ‘thematic consultations’ - involving leading international experts - convened in order to provide periodic subject-specific reports. In the ‘Violence Against Children in Conflict with the Law’ report, the Director of the Study observed that: ‘children in conflict with the law ... are one of the *most vulnerable* groups to the *worst forms of violence*’ (Pineiro 2005: 17-18, emphases added). The juxtaposition of universal human rights discourse and international recognition of state responsibilities to safeguard children - including those in conflict with the law - on the one hand, and the pervasive violation of children on the other hand is, to say the least, anomalous. Such anomaly echoes Abramson’s (2000) earlier analysis of the implementation of the UNCRC within juvenile justice systems in 141 countries that revealed widespread absence of ‘sympathetic understanding’. He argued that a complete overhaul of juvenile justice is required in many countries where a range of violations are evident including: inadequate or non-existent training of judges, police and prison authorities; no (or limited) access to legal assistance, advocacy and/or representation; delayed trials; disproportionate sentences; insufficient respect for the rule of law; incidence of police brutality and improper use of the juvenile justice system to address other social problems. Particular concerns centre around penal detention including: failure to develop alternatives to incarceration; overcrowding and poor conditions in custodial facilities; limited prospects of rehabilitation; infrequent contact between child

prisoners and their families; lack of separation between child and adult prisoners; inhumane treatment and, at the extremes, torture.

Rather than recognizing rights in full, many 'States Parties' have tended to address the concerns of the United Nations Committee on the Rights of the Child through partial reforms, often by bolting professedly 'child friendly' responses - informal and/or restorative approaches - onto otherwise retributive and punitive juvenile/youth justice systems.

Informalism, restorative justice and human rights

Attempts have long been made to introduce degrees of *informalism* into juvenile justice regimes. Such initiatives were especially evident throughout the decades of the 1970s and 1980s. During this period, many juvenile justice researchers, policy analysts and practitioners - particularly across North America, Europe and Australia - advocated radical alternatives to, or departures from, 'formal justice'. Diversion, decriminalisation, decarceration, deprofessionalisation, decentralisation, delegalisation and, ultimately, decarceration, formed the conceptual foundations for a movement towards less criminalising, more child-centred and more human-rights compliant responses to children in conflict with the law. Such movement was embedded, more generally, within a 'destructuring impulse' relating to 'all parts of the machine' which challenged orthodox 'justice' and the concomitant omnipotence of state, bureaucratic and professional power (Cohen, 1985: 36).

More recently, variants of informalism have been encapsulated within a significantly broader *restorative justice* movement. Indeed, it is no exaggeration to claim that 'restorative justice' - in all its heterogeneity - has induced a paradigm shift in global criminal justice (in general) and transnational juvenile justice (in particular). As Cunneen (2010: 103) has observed, restorative justice has become an 'international business' that has, in turn, spawned widespread and multi-faceted policy and practice experimentation, massive research interest and a monumental literature. In particular, supporters of restorative justice contend that techniques of 'reintegrative shaming', various forms of conferencing (particularly 'family group conferencing'), sentencing circles, victim-offender mediation, reparation and

restitution, provide greater potential to restore the ‘deliberative control of justice by citizens’ and establish ‘harmony based on a feeling that justice has been done’ (Braithwaite, 2003, p. 57). Both the Council of Europe and the United Nations have offered support for restorative justice and, in the juvenile justice sphere, located it within the context of ‘best interests’ principles and human rights discourses.

The Council of Europe has recommended that restorative approaches should be made more available within territorial jurisdictions to cover all stages of the juvenile justice process. Perhaps more significantly, it further recommends that such approaches should form autonomous mechanisms for conflict resolution and operate independently from conventionally formal means of judicial processing. The Committee of Ministers has recently stated that:

‘Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the *child’s best interests*. The preliminary use of such alternatives should not be used as an obstacle to the child’s access to justice.’ (Council of Europe, 2010: para. 24, our emphasis)

Similarly, in 2002, the United Nation’s Economic and Social Council (ECOSOC) formulated a number of foundational universal principles relating to restorative justice, including non-coercive ‘offender’ and ‘victim’ participation, voluntarism and confidentiality. Again, the same principles were integrated within human rights-based procedural safeguards:

‘6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.

10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.

11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community' (United Nations, 2002: paras 6-11).

Three years later, the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (United Nations, 2005: 3) undertook to 'enhance restorative justice' and urged Member States to recognize the importance of further developing restorative justice policies, procedures and programmes. It follows that restorative justice has proliferated globally. Although such proliferation has inevitably given rise to multiple and competing definitions - alongside a diverse breadth of operational practices - the concepts of 'informalism' and 'restoration' remain the primary legitimising logics.

Indeed, advocates of restorative justice, in whatever form, point to its fluid, flexible, non-bureaucratic and deprofessionalised nature as evidence of its most progressive possibilities, its human rights sensitivity and its capacity to rectify the failings of formal juvenile/youth justice. In reality, however, the free-ranging and discretionary nature of restorative justice might just as readily be deemed to be at odds with human rights imperatives in the juvenile/youth justice sphere, including principles of proportionality, due process, 'best interests' and the protection of children in conflict with the law from excessive incursion and unaccountable intervention. More specifically, the transformative, progressive and human-rights claims made on behalf of restorative justice are flawed in at least three interrelated ways.

First, both conventional juvenile/youth justice and restorative justice are each predicated on assumptions that children and young people should ultimately accept responsibility and atone for their deviant transgressions and/or 'crimes'. This is particularly problematic in jurisdictions where unmitigated criminal responsibility is imputed on children at a young age. In such cases tangible incoherence is evident

regarding the manner in which the legal personality of the child is constructed and social rights and responsibilities are statutorily assigned. Rightly or wrongly, the law serves to mediate the transition from 'childhood' to 'adulthood' whereby rights and responsibilities tend to accumulate incrementally with age. The legitimacy of such legal regulation is open to debate, but if its defence rests with notions of maturational process then it is difficult to claim legitimacy for statutorily responsabilising children in criminal proceedings when, in many other areas of civil law, social responsibilities (and rights) are reserved exclusively for adults (Goldson, 2009b). Related to this, advocates of restorative justice appear to imagine inclusive, benign, mutually engaged and balanced processes; a coming together of remorseful child 'offenders' and receptive (often adult) 'victims', each keenly engaged in a discourse of moral pedagogy and idealised 'repair'. The defining imaginary not only negates the prospect of inter-generational and inter-personal tensions between 'victims' and offenders' but, more fundamentally, it air-brushes out questions of power, antagonistic structural divisions and profound contradictions in the social order. In other words, it privileges a largely unrealised 'nirvana story' (Daly, 2002: 70) and:

'simulates something which never really existed – a kind of hyper-reality of the justice system which is fair and equitable and offering redemption for all; where offenders are free agents who are now contrite; where victims are engaged civic personalities who forgive and forget' (Cunneen, 2010: 187).

Second, restorative justice narratives tend to rely on over-simplified and reductionist conceptualisations of 'victims' and 'offenders'; they essentially construct subjectivity as a binary field with minimal attention to the profound difficulties that underpin such mutually exclusive classifications. The reality is that most children in conflict with the law are themselves 'victims' (of 'crime' and/or multiple social injustices) (Muncie, 2009: 161-186). The child's 'offender self' and 'victim self' are intrinsically intertwined in complex forms that hardly avail themselves to neat compartmentalisation. If the 'offender' in one situation is a 'victim' in another, the very concept of responsabilisation becomes blurred, posing, in turn, formidable questions with regard to human rights and natural justice. To what extent, for example, might it be considered 'just' to require a child to assume an 'offender' identity in a formal 'restorative' process whilst harbouring knowledge of the same child's 'victim' status (often chronic) in their wider milieu? And, if the 'offender-

victim' child is subjected to 'shaming' rituals how certain can we be that such processes will produce 'reintegrative' as distinct from 'disintegrative' (overtly harmful) 'outcomes' (Goldson, 2011)?

Third, rarely, if ever, do restorative justice approaches replace the conventional apparatus of formal adversarial 'justice'; rather they co-exist to form two sides of the same coin, what Daly (2002: 64) has termed 'spliced justice'. In this way it is not uncommon for 'restorative' interventions to be reserved for low-level child 'offenders' and/or the readily compliant, whilst more retributive punitivity is visited upon the 'heavy-enders' and/or the recalcitrant. Rather than serving to replace conventional retributive applications of juvenile justice with 'child friendly' and human-rights compliant variants, restorative justice can just as readily serve to facilitate net-widening, system expansion, disproportionality and diversified (but interdependent) technologies of criminalisation. Reflecting upon the otherwise much vaunted restorative justice experiment in New South Wales, Australia, Cunneen (2010: 184) observes:

'... there is much talk about restorative justice, and a very well developed system of justice conferencing for young people. It is established in legislation. It has a dedicated team of conference managers and local conference convenors. There are clearly articulated legislative and administrative procedures for the use of conferences. The system has been in place since the later 1990s, developed after various trials of restorative justice for young people which date back to the early 1990s... So after nearly 20 years what has been the net outcome?... For every one young person who appears in a restorative justice conference, about 15 appear in court, and the great growth area in court has been an expanding use of incarceration... And this is the jurisdiction viewed as one of the pioneers in the 1990s in developing restorative justice practice for young people'.

In these ways, ostensibly 'informal' and 'restorative' processes might do more to re-legitimise rather than challenge formal adversarial systems of juvenile justice. The 'inclusionary' mechanisms of restoration may simply allow 'States Parties' to claim adherence to 'best interests' principles and compliance with the UNCRC, while simultaneously accommodating coercive, responsabilising and unaccountable

interventions on the one hand *and* failing to disturb the hegemony of retribution and punishment, on the other.

Cultural relativity, contingency and conditionality: Universal human rights and global ‘child friendly’ juvenile justice as mirages?

As noted, despite the burgeoning development of United Nations human rights instruments and Council of Europe ‘child friendly’ justice frameworks, there is a clear disjuncture between the *rhetoric* of children’s human rights and the *reality* of children’s circumstances. Such dissonance is often characterised, as the United Nations Secretary-General’s Study on Violence Against Children (Pinheiro, 2006) revealed, by violations and violence. Indeed, the extent to which it is even possible to attain *universal* human rights is questionable, given that rights are inevitably inflected through a prism of cultural, social, economic and political filters. Such filters, it might be argued, serve to undermine both the normative value and the practical utility of universal human rights instruments (Goldson and Muncie, 2009).

This applies, albeit in different forms, both to the rich ‘minority world’ and to the poor ‘majority world’ where ‘cultural difference’ and the absence of localised human rights cultures preclude meaningful adoption of global agreements. Within identifiable ‘advanced’ industrial democracies, respect for the human rights of child ‘offenders’ barely appears to extend much beyond polite lip-service. For other nations, particularly poor nations, Harris-Short (2003) notes that a number of theoretical problems - deriving from notions of cultural relativism - are invoked by the concept of universal human rights. On one level ‘universalism’ might be conceived as an expression of western liberal ascendancy, whereby ‘rights’ obligations are imposed within cultural and/or socio-economic contexts that are unable or unready to meet them, thus recalling vestiges of ‘civilising’ imperialism. Conversely, constructions of ‘cultural difference’ might be deliberately mobilised in order to rationalise non-compliance with human rights obligations and, at the extremes, even to justify or excuse gross human rights violations. By exploring the complex intra-national relations between governments, central state agencies and localities, Harris-Short directs attention to the means by which universal human rights play out (or not) at a practical level. Entrenched patterns of cultural difference *within*

nation states can serve to confound the equitable application of human rights principles. This particularly applies in instances where there is a lack of vital local or 'grassroots' support for the standards willingly accepted by state leaders and government officials.

In essence, the inherent limitations of universal human rights instruments - founded on a 'society of states' - are exposed when the voices of the local and the perspectives of the particular are effectively silenced and/or ignored. This also raises fundamental questions of accountability and state responsibility. In cases where nation states are seen to negate the very human rights obligations they have willingly endorsed, the matter of accountability is relatively clear. But, within contexts of diverse cultural traditions where human rights standards might be compromised at the local and/or the private level, the processes of implementation, enforceability and, ultimately, accountability become significantly more complex.

If the practical translation of universal children's human rights standards and principles is, at least in part, culturally relative, it is also contingent upon social and economic materiality. It is difficult to imagine how human rights might be *equally* distributed within a world that is profoundly divided and polarised by social and economic *inequalities*. UNICEF (2010) has revealed the means by which identifiable groups of children are unnecessarily 'left behind', subjected to poverty, denied access to 'well-being' and exposed to inequality in rich nations within the Organisation for Economic Co-operation and Development (OECD). Meanwhile, at the global level, more than 1 billion children suffer from a lack of proper nutrition, safe drinking water, decent sanitation, health-care services, shelter and/or education and every day, 28,000 children die from poverty-related causes (Goldson and Muncie, 2009). According to Save the Children UK (2007) children are treated as commodities across all continents and in myriad ways including: child trafficking; child prostitution; bonded child labour; child slavery and child soldiers. In this way, economic globalisation can be seen both to intensify and diversify 'unequal childhoods' and, paradoxically, to undermine the globalisation of children's human rights. By analysing the contours and impact of globalisation, Penn (2009: 121) concludes that, despite resistance, it creates a 'wake of poor and victimised people'. In such circumstances it might be argued that universal human rights for children and young

people, particularly for those in conflict with the law, are little more than illusory.

Conclusion: The limitations of totalising narratives

At the most rudimentary level, two quite different conceptual typologies, or totalising narratives, characterise analytical commentaries of global trends in juvenile justice. The first, and most dominant, is essentially pessimistic. It conceives a process whereby ‘hegemonic neo-liberalism’ (Wacquant, 2009b: 5) is steadily giving rise to diversifying and intensifying ‘cultures of control’ (Garland, 2001) within which: the special status of childhood is diminishing; welfare protectionism is retreating; children are increasingly ‘responsibilised’ through processes of ‘adulteration’ and ‘adultification’; children’s human rights are systemically violated and the global population of child prisoners continues to grow. The second, and significantly less developed narrative, is inherently optimistic. It emphasises the unifying potential of international human rights standards, treaties, rules and conventions and the promise of progressive juvenile justice reform based on ‘best interest’ principles and ‘last resort’ rationales. Paradoxically given their incongruity, both narratives are plausible but each is ultimately inadequate (Muncie and Goldson, 2006).

Miller (1998: 3) argues that throughout its history juvenile justice has ‘always been, and continues to be, neglectful, demeaning, frequently violent, and largely ineffective’. Equally, over time and across space, juvenile justice systems have persistently been deployed to manage, regulate, control and, ultimately, punish the children of the poor. Whereas, upper and middle class ‘delinquents’ are siphoned off and directed towards private counselling and therapy, private military academies and preparatory schools, their working class counterparts are pathologised, criminalised and routinely exposed to correctional sanction. Moreover, in the late modern period a ‘new punitive common sense’ appears to have consolidated, incubated in the USA before being ‘exported to Western Europe and the rest of the world’ (Wacquant, 2009b: 1). For Wacquant, such punitivity is the product of a series of intersecting ‘dimensions’ including: ‘vertical expansion’ (swelling penal populations); ‘horizontal expansion’ (the proliferation of technologies of regulation, control and surveillance); simultaneous yet contradictory modes of system expansion and contraction (penal and welfare respectively) and a policy of ‘carceral affirmative action’ (the manifest

racialisation of punishment and confinement). Such dimensions appear to apply equally to criminal ‘justice’ in general and juvenile ‘justice’ in particular.

Set against this, United Nations and Council of Europe human right instruments provide a strong basis for counter movement. Whilst it is important to acknowledge some of the limitations of rights discourses, it is equally important to appreciate their continuing potential as the only existing benchmark for a common global language (Kilkelly, 2008; Goldson and Hughes, 2010; Muncie, 2010). In this respect, the UNCRC and related international directives provide one basis for *rethinking* juvenile justice (Goldson and Muncie, 2006).

Despite the respective seductions of the contrasting narratives, neither provides an adequate totalising account of the complexity, contradictory nature and profound incoherence of global juvenile justice. On the one hand, as Wacquant (2009b: 173) observes, whilst processes of diffusion and policy transfer are evident globally, ‘neoliberalism is from its inception a multi-sited, polycentric, and geographically uneven formation’. In other words, there are sites of resistance where ‘neoliberalism has been thwarted... and the push towards penalization has been blunted or diverted’ (ibid: 172-3) (see also Pratt, 2008a; 2008b). On the other hand, despite the near universal adoption of the UNCRC, it appears that its capacity to drive and sustain progressive juvenile justice reform is severely limited. In particular, lawbreaking and transgression seemingly serve to undermine eligibility and diminish ‘States Parties’ obligations to promote and protect the human rights of *all* of their youngest citizens (Muncie, 2010).

In sum, juvenile justice systems assume multitudinous and widely varying forms and it is simply not possible to identify a globally unifying thrust or international norm. Rather, comparative analysis, theorisation and empirical investigation must engage at international, national and sub-national levels in order to comprehend the means by which juvenile justice laws, policies and practices are formed, applied, fragmented and differentially inflected through a complex of political, socio-economic, cultural, judicial, organisational and individual filters.

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