

Inserting Children's Rights in the Constitution

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International Context for Children's Rights

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Introduction

In the 15 minutes I have I will

- describe very briefly some of the developments in the field of human rights relevant for the international context for children;
- I will link that to efforts in some States Parties to include children's rights in the constitution;
- and finally I will link my observation to the recent recommendations the Committee issued for Ireland after the examination of Ireland's second report on the implementation of the CRC.

2. Specifying of Human Rights

Since the concept of Human Rights emerged after World War II many interesting developments can be identified such as the growing number of special rapporteurs or other mandate holders, either appointed by the HR Commission (now the Council on HR) or by the S.G. of the UN. But from the perspective of the rights holders I consider the development of specificity the most important in the field of Human Rights over the last 40 à 30 years. After WW II the international Community (the UN) adopted the Universal Declaration of Human Rights in 1948, a document that was not legally binding but was the basis for the drafting of the two main/core international human rights treaties binding for all States that ratified it: the International Covenant on Civil Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR) (1). In the light of the theory that the rights contained in these covenant are applicable to everyone regardless age, race, nationality etc. etc. there should not be much need for more HR treaties.

But the international community (UN members, States + others) apparently felt that this principle (applicability for all) did not sufficiently take into account specific aspects of the field of HR (racial discrimination) or the vulnerability and specific needs of groups such as

women, children and migrant workers (2). If we look back at the last 30 years it is - in my opinion - crystal clear that this development of specificity has in a crucial manner contributed to the protection of e.g. victims of racial discrimination and to strengthen the human rights of specific (vulnerable) groups of citizens: women children, women and migrant workers. This specification of Human Rights is in fact confirmed and strengthened by the many thematic rapporteurs I mentioned before.

This development is ongoing: recently UN working groups agreed on draft conventions for the protection of victims of forced disappearances and on the Rights of persons with disabilities. It is likely that these Conventions will be approved by the GA next year or in 2008. This proliferation of Human Rights Treaties and the related growing number of monitoring committees has increased concerns about the efficiency of this growing monitoring system (overlap and perhaps even contradictions between treaty bodies) and the related growing burden of reporting for States Parties. The kind of ongoing discussion on the need for reform has recently put into a higher gear. Within the context of efforts to reform the system of monitoring Human Rights, proposals have been made which, in my opinion, seriously endanger the specificity of Human Rights treaties and thereby the respect for and the protection of Human Rights of special (vulnerable) groups of citizens.

The proposal to allow States to submit one report on the implementation of all the Human Rights treaties it has ratified was the first one and was rejected thanks to strong opposition of States Parties themselves, UN agencies (e.g. UNICEF), NGO's and the Human Rights treaty bodies including the CRC Committee.

The second proposal is the establishment of one single treaty body (about 25 elected full time employed experts) with the mandate to monitor the implementation of all the Human Rights Treaties (3). During a meeting in Liechtenstein in July 2006 it became clear that there is little support for this proposal among States Parties (4). NGO, UN agencies such as UNICEF and the WHO and the Human Rights treaty bodies had already voiced strong opposition and/or deep concerns. The CRC Committee presented an alternative to the HCHR that could address most of the problems she identified in the current practice of monitoring the implementation of Human Rights.

As far as the international context for children's rights is concerned, the specificity cannot only be found in the CRC as such, but also in other relevant child rights specific documents such as the two Optional protocols, the Beijing Rules, The Havana Rules and the Riyadh Guidelines (5) and most recently the Guidelines on Justice for Child

Victims and Witnesses of Crime (adopted by ECOSOC in 2005, Resolution 2995/20), There is much more that can be said about the specificity of human rights, in this case of children. I just suggest that you compare e.g. art. 12 ICESCR on the right of everyone to the enjoyment of the highest attainable standard of health with art. 24 CRC and art. 23 on the rights of children with disabilities (the person with disabilities is not at all mentioned in the ICESCR) and art. 13 ICESCR on the right to education with art. 28 and 29 CRC, or art. 14, 15 ICCPR on justice with art. 40 CRC on juvenile justice.

The point I want to make is the acknowledgement in the international context of the importance of specificity for the protection of human rights of specific groups of rights holders because this acknowledgement should be reflected in legislative measures and policies and programmes directly or indirectly relevant for children.

3. Specificity at the national level

The development briefly described in par. 2 had and continues to have its impact on the activities of States Parties to the CRC. The (simple) statement or provision in the national law that all human rights are equally applicable to children is not enough.

All States Parties have implemented or are in the process of developing legislative measures to reflect the specificity of human rights for children e.g. and in particular in the area of juvenile justice and the different forms of child protection (art. 19-21; 32-38 CRC).

But in very few States the specificity of human rights has been incorporated in the Basic Law or Constitution. One of the best examples of how that can be done is art. 28 of the South African Constitution. However, in case a State has a Charter on human rights and responsibilities, specific attention for children (or for women or migrant workers) is very limited or absent (6).

In my opinion inclusion of specific human rights for children in the Constitution or a similar Basic Law, is in line with the international development of specificity. The challenge is of course how to do that in such a way that the core specific human rights of children are incorporated. Again, art. 28 of the South African Constitution can be used as an example. But States Parties may prefer not to have one single article but integrate specific human rights throughout the text of the Constitution/Basic law.

Given the well established importance of the articles 2, 3, 6 and 12 CRC, labelled by the CRC Committee as the general principles of the CRC, it is recommended to include them in the Constitution. In addition, possible other provisions may be e.g. the right of the child to

be cared for by his parents and the right of a child without parental care to adequate alternative care as much as possible in a family setting, the right of the child to be protected from all forms of violence including corporal punishment and economic, sexual or other forms of exploitation and the right of juvenile offenders to be treated in full compliance with the CRC and in particular par. 1 of art. 40 CRC. In this regard I also like to refer to the recommendation of the CRC Committee made last September (CO's on Ireland 2nd report, UN Doc. CRC/C/IEL/CO2) in par. 25:

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

Other recommendations can be read as also including the possibility of constitutional changes e.g. par. 9 “to take further action to incorporate the Convention into domestic law” and par. 23 recommending that the principle of the best interest of the child (.....) is fully integrated into all legislation relevant to children”.

These Concluding Observations show the many actions Ireland has taken to implement the CRC, but are at the same time an (not unique) example of further measures that have to be taken to integrate and reflect the specificity of the human rights of children in various areas of the domestic law and in policy and programmes.

In this regard and back to the international context for children's right I like to urge the State Party Ireland to play an active part in the follow-up to the recommendations presented in the report of the UN Study of Violence against children, submitted to the GA of the UN on October 11, 2006. This follow-up is necessary at the national level, but also at the international UN level. In that regard it is very disappointing that many States do not support the recommendation to the Secretary General to appoint a Special Representative on Violence against Children (comparable to the Special Rep. on Children in armed conflicts). If the Special Representative is not appointed in the course of 2007 the UN will have confirmed the very low expectations of children expressed during regional consultation on Violence against children (see also my oral report to the General Assembly October 13, 2006).

It also shows that it is not always easy to create a conducive and supportive international context for children's rights.

But don't give up hope and continue to fight because the history of the last 17 years has also shown how much can be achieved (see in addition to OP's/Standards/Guidelines also the World Fit for Children). The

major and crucial challenges for the next decade will be implementation, implementation and implementation.

NOTES

1. The ICCPR was adopted by the General Assembly (GA) of the UN by resolution 2200 A (XXI) of 16 December 1966 and the ICESCR was adopted by the same GA resolution of 16 December 1966. The first one entered into force on 23 March 1976 and is now ratified by 155 States. The second one entered into force on 3 January 1976 and is now ratified by 155 States .

2. The International Convention on the Elimination of Racial Discrimination was already adopted by the GA in 1965 (21 December, Resolution 2106 A (XX) and entered into force on 4 January 1969 and is now ratified by 173 States.

The other specific HR treaties are: on Torture ((CAT) adopted by the GA on 10 December 1984 (Resolution 39/40), entered into force on 26 June 1987 and is now ratified by 142 States; on the Elimination of all forms of discrimination against Women (CEDAW) adopted by the GA on 28 December 1979 (resolution 34/180) and entered into force on 3 September 1981 and is now ratified by 185 States; the CRC adopted by the GA on 20 November 1989 (resolution 44/25) which entered into force on 2 September 1990 and is now ratified by 192 States (and signed by the remaining two: USA and Somalia); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the GA on 18 December 1990 (Resolution 45/158, entered into force on 1 July 2003 and is ratified by 34 States.

3. See the concept Paper of the High Commissioner on Human Rights (UN Doc.HRI/MC2006/2, 22 March 2006).

4. See the Report of this brainstorming meeting on Reform of the Human Rights Treaty Body Reform UN Doc. HRI/MC/2007/2, 8 August 2006.

5. UN Standard minimum rules for the administration of Juvenile Justice (Beijing Rules, adopted by the GA resolution 40/33 on 29 Nov. 1985); the UN Rules for the protection of juveniles deprived of their liberty (Havana Rules, adopted by the GA resolution 45/113 on 14

December 1990) and the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines adopted by GA resolution 45/112 on 14 December 1990).

6. See e.g. a proposal of Attorney-General of the State Government of Victoria (Australia)