


CONCLUSIONS

The Care Standards Act 2000 is a wide ranging statute. It establishes a new independent regulatory body for social care and private and voluntary health care in England, the National Care Standards Commission. In Wales, these services are now under the control of the National Assembly for Wales. An independent Council has also been established to register social workers and to set standards in social work. An independent Children's Commissioner has been established in Wales, and it may well be that a similar scheme will be introduced in time in England as well. Childminders and day care providers are now also regulated. There is an expanded statutory list of those unsuitable to work with vulnerable adults. Appeals in these areas are brought before the Care Standards Tribunal.

It is likely, in the light of ongoing reforms of the administrative justice system in England and Wales, that the specialist education and health Tribunals will draw closer together. These early decisions will provide a framework for the developments in the future, maintaining the central policy that the safety and welfare of our

children must be protected, whilst at the same time ensuring that an individual's human rights are not ignored whenever decisions are taken to prohibit people from working with children and young people. The early history of the Care Standards Tribunal makes clear that decisions of Government Ministers are not simply "rubber stamped". Although the decisions of the Tribunal are of course individual decisions on particular facts, the indications are that it has begun to lay down guidance that will help in the formulation of standards in this sensitive area of social policy.

All Care Standards Tribunal decisions are available on the Tribunal website, www.carestandardtribunal.gov.uk 

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The constitutional rights of children

by Geraldine Van Bueren

The significant difference between modernity and past eras is that modernity emphasises choice and autonomy and the past relied upon fate. This is an enquiry both into the effectiveness of constitutions in seeking to protect the autonomous rights of children and whether a global culture of children's constitutional rights is beginning to develop. Children's civil and political constitutional rights are analysed as well as their economic, social and cultural constitutional rights, as it is the poorest children, who many unthinkingly dismiss as being beyond the scope of justiciability and the courts.

My focus is principally, although not exclusively, on the constitutions of states which are in the process of transformation, as the constitutional courts in these countries appear more open to newer approaches and ideas. This is an openness from which we in the more established democracies may have much to learn.

REASONS FOR DEVELOPING A CONSTITUTIONAL CULTURE OF CHILDREN'S RIGHTS

The cultural identity of a compassionate, democratic society is in part assessed by how accessible lawyers and

Constitutions are to the most vulnerable in our community. Because of the limited direct access to international human rights fora, constitutional rights of children are particularly important because a supreme or constitutional court may offer the highest form of remedy. The United Nations Convention on the Rights of the Child, unlike the International Covenant on Civil and Political Rights or the Convention on the Elimination of Discrimination Against Women, still does not have a mechanism through which children may have their complaints against a state adjudicated. An attempt was made during the drafting of the Convention by Amnesty International but this did not

even have the support of all the non-governmental organizations. The general regional human rights treaties, including the European Convention on Human Rights, were never intended to be, nor have they become, child centred treaties. There is only one regional general children's rights treaty, the African Charter on the Rights and Welfare of the Child 1990; the European Convention on the Exercise of Children's Rights 1995 is a much poorer cousin. Hence, without an international right of petition, constitutional remedies remain for many children their last hope of dignity.

Children's constitutional rights are often regarded as marginal but in many states those under the age of 18 constitute the majority of the population.

THE "4 PS"

Prevention and provision

In South Africa the constitutional rights of children remained in the television and newspaper headlines week after week, and in one area of children's constitutional rights, the child's right to life and access to health services, may even have contributed to the downslide of the South African rand trading in international markets. A non-governmental organisation, the Treatment Action Campaign, together with another non governmental Organisation and a doctor, challenged the South African government over its refusal to provide all HIV positive mothers with the drug nevirapine, which was designed to prevent mother to child transmission of HIV/AIDS. The background to the case, although not an issue directly raised in the Constitutional Court, was that senior members of the South African government, including President Mbeki, appeared to be uncertain as to whether there was a link between HIV and AIDS. The government's policy was to make nevirapine only available at 18 pilot sites reaching 10 per cent of the population (this number was later increased but not significantly). Nevirapine however had been licensed in 1998 by the ANC government and in 2001 by the World Health Organisation for the prevention of mother to child HIV transmission. In effect the government's policy made a child's survival dependent on the lottery of geography.

Prevention is vital. It is estimated that over 4.5 million people, or 10% of the population of South Africa, is HIV positive. The agonising reality is that 24% of pregnant women in South Africa are HIV positive and 70,000 children are infected each year through mother to child transmission of HIV. Mother to child transmission in South Africa is one of the most common forms of infection. Nevirapine does not save the life of the mother, but it does reduce significantly the chance of a baby who is not breastfed of becoming HIV positive.

The issue, however, is not simply one of medication. There needs to be counseling both before and after birth, because aside from the momentous impact of learning of

HIV or AIDS, the manufacturers of Nevirapine have warned against breast feeding. This means that breast milk substitutes and clean drinking water need to be made accessible, and this has immense resource implications for South Africa.

HIV/ Aids can be treated with anti-retroviral drugs such as AZT and Nevirapine, but Nevirapine differs from most inhibitors in being cheap and simple to administer. All that is required is for the mother to take a single pill before birth and for the baby to be given a few drops within the first 72 hours. The government argued that it would be a breach of the separation of powers for the courts to order the executive to prescribe a specific drug.

The Constitutional Court saw the issue in a different light (see further *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02, Judgment of 5 July 2002). In a unanimous opinion delivered by Chief Justice Chaskalson the Court ruled that it had the jurisdiction to answer two questions. Firstly, did the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies meet its obligations under the Constitution? Article 27 (1) of the South African constitution guarantees the right of everyone to have access to health care services, including reproductive health care. Secondly, as section 27(2) of the Constitution obliges the state to take reasonable legislative and other measures within available resources to realise the right to health, had the government adopted a comprehensive policy for the prevention of mother to child transmission of HIV. The answer to both questions was in the negative.

The Constitutional Court conceded that courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. However, although the South African Constitution protects economic and social rights, the Constitution contemplates a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Although this judicial process may have budgetary implications, judgments are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.

The Court argued that there were no bright lines separating the roles of the legislature, executive and courts but that did not mean that courts cannot make orders which impact on policy. The Constitutional Court ordered the government to make Nevirapine available free of charge at all public health facilities. The Government was also ordered to make provision, if necessary, for counsellors to be based at all public hospitals and clinics and trained for the necessary counselling for the use of Nevirapine. At the Barcelona AIDS Conference the government announced that it would abide by the decision of the Constitutional Court.

Even before the Constitutional Court's judgment, the case succeeded in raising the profile of children's constitutional rights. Constitutional challenges are being prepared on the quality of children's education – particularly amongst the rural poor – the costs of education, and cases on the child's right to social security. Another case, which is being researched, is arguing that specific arms sales are contrary to the constitution because inter alia they prevent the government honouring its constitutional obligations to health and children's education. There is some legal support for such an approach, as the United Nations Committee on the Rights of the Child, which South Africa as a party to the Convention on the Rights of the Child has to report to, has criticised Egypt and Indonesia on the proportion of their budget spent on defence, as compared to the proportion spent on children's social expenditure (see further Van Bueren, "Alleviating Poverty through the Constitutional Court", 15 *South African Journal of Human Rights* 1999, 52).

South Africa has incorporated a very progressive approach in relation to international human rights law. Under section 39 of the Bill of Rights, judges considering any provision of the Bill of Rights are under a legal duty to consider international law (the wording of the section provides that courts 'must consider international law'). It is the proportions which are of concern to the United Nations Committee not the totals spent. An approach, which focuses on proportions, totally undermines the frequently heard government argument of non-affordability.

The development of a broader test case strategy to protect children's constitutional rights is positive. Children's rights, like women's and the rights of those with disabilities, are inherently inclusive. There is an improvement in the lives of other sections of the community, as it is neither desirable nor possible, to protect children's rights in isolation from their families and communities. However, the South African Constitutional Court appears to have adopted a different perspective. It is genuinely concerned over the implications of a constitution which grants children specific rights, because the Constitutional Court argues, there is a risk that children's rights may trump adult rights.

In the earlier and landmark case of *Grootboom* (*Government of the Republic of South Africa et al v Irene Grootboom and others*, Judgment of the Constitutional Court of South Africa, 4 October 2000), Mrs Irene Grootboom and 899 respondents were homeless because they were evicted from metal self-built shacks, which had been erected on private land earmarked for formal low-cost housing. Many had applied for subsidised low-cost housing from the municipality, but had been on the waiting list for as long as seven years. The respondents were mainly but not exclusively, women and children.

The South African constitution enshrines a specific section, section 28, on the rights of the child. This provides

that the best interests of the child are of paramount importance – a standard which is higher than the Convention on the Rights of the Child, which only provides that the best interests shall be 'a primary consideration.' Significantly, in contrast to other sections of the Constitution on economic and social rights, the rights of the child section, does not incorporate a limitations clause.

In the High Court Judge Davis had ruled that the government, local, provincial and national had been in breach of the child's right to basic shelter and ordered the government to make the necessary resources and materials available to provide for basic shelter and for access to clean drinking water. The best interests of the child clearly played a significant role in his decision.

Two different approaches were taken by the High Court and the Constitutional Court in relation to *Grootboom*. The differences, in part, focused upon the nature of housing and shelter.

The Constitutional Court rejected the High Court's distinction between shelter and housing. The judgment of the High Court interpreted section 28(1)(c) as obliging the state to provide rudimentary shelter to children and their parents "on demand if parents are unable to shelter their children", and such a duty is "irrespective of the availability of resources." This obligation is in addition to the section 26 duty to take reasonable legislative and other measures.

According to the Constitutional Court the High Court's reasoning produced... "An anomalous result: People who have children have a direct and enforceable right to housing under section 28(1)(c) while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme would make little sense if it could be trumped in ever case by the rights of children to get shelter from the state on demand."

The Constitutional Court thought this created the risk of children being exploited "as stepping stones to housing for their parents."

Housing and shelter are "related concepts" – the goal of housing is to provide "physical shelter". Under paragraph 73, housing can be distinguished from home which according to the European Commission on Human Rights is concerned with an existing structure and does not imply the right to be provided with housing accommodation (see Applications No 5727/72, 5744/72 and 5857/72). The clear lack of a qualifier before shelter implies that it is not restricted to basic shelter. "The concept of shelter in section 28(1)(c) embraces shelter in all its manifestations." Both the approach of the Commission on Human Settlements and the Global Strategy for Shelter to the year 2000 appear to support this relatedness, providing a definition which is very close to adequate housing: "Adequate shelter means adequate privacy, adequate space,

adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.”

This, however, begs the question, why did the drafters of the Constitution choose to use different terminologies in the two sections, particularly since Yacoob J “cannot accept that the Constitution draws any real distinction’ between housing and shelter?” (para 73). This leads to one of three conclusions: either the Constitution at the very least unhelpfully muddies the waters by using two different words for two similar concepts; or the Constitution is flawed, using two different words when it only intended only one concept; or the notion of shelter enshrines an additional entitlement for children and therefore for any family members on whom the child is dependant.

The problem is, what is the additional entitlement? Davis J avoided the trap and did not equate shelter with child institutions in which adult family members do not remain. He defined shelter as the “right to be protected from the elements in circumstances where there is no need to remove such children from their parents.” It must also mean something other than institutionalisation, as under the Convention on the Rights of the Child and other international laws institutionalisation is the last resort.

This left the Constitutional Court with a quandary. A constitution which it had certified only five years previously contains a result, which it found unacceptable. The Constitutional Court impressively and deftly performed gold-medal-winning legal gymnastics. If anyone blinks, even for a moment, they miss the shifting of weight (see further Van Bueren, “No Turning Back, The Right to Housing is Justiciable in *Cheadle, Davis and Haysom*”, South African Constitutional Law: Bill of Rights 2002).

Protection

Children’s rights can be divided into the four Ps – prevention, provision, protection and participation (see further Van Bueren, *The International Law on the Rights of the Child*, Kluwer, 1998, at 15). The Treatment Action Campaign and Grootboom focus on issues of prevention and provision– the prevention of HIV/AIDS and the provision of housing and basic shelter. The Canadian case of Sharpe (*R v Sharpe*, Judgment of the Supreme Court of Canada, January 26 2001) raises issues surrounding the third P – protection.

John Sharpe was charged with two counts of possession of child pornography for the purpose of distribution or sale, as well as two counts of simple possession for his own private use. As part of the evidence was a collection of 17 stories written by Sharpe. It was accepted at the trial that the stories were extremely violent, the majority of them, with sexual acts involving very young children and in most cases concerned children under the age of 10 engaged in sadomasochistic and violent sex acts. The theme is often that the child enjoys the beatings and the sexual violence,

and that children are actually seeking out such treatment. Conveniently absolving John Sharpe of any moral responsibility.

Prior to the beginning of his trial in the Supreme Court of British Columbia, Sharpe challenged the constitutionality of a number of provisions of the Criminal Code including, that mere possession of child pornography infringed his right to “freedom of thought, belief, opinion and expression”. The majority of the Canadian Supreme Court, agreeing with Sharpe’s counsel that the restriction on simple possession of child pornography was disproportionate. The majority of the Court held that... “The cost of prohibiting such materials to the right of free expression, outweighs any tenuous benefit it might confer in preventing harm to children.”

The use of the word tenuous is significant. The distinction between the private and the public has always been used to the detriment of children enjoying constitutional rights and with sexual abuse and sexual exploitation, it is precisely in the private, where much of the abuse is perpetrated. Sharpe does nothing to combat such abuses.

In an impassioned minority judgment written by L’Heureux-Dubé the judges found that the constitutional protection of any form of expression which risks undermining Canada’s society’s fundamental values must be carefully scrutinized. The minority found that the very existence of child pornography is inherently harmful to children and to society. According to the minority this harm is independent of any dissemination or any risk of dissemination, and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children.

The minority did concede that the attitudinal harm inherent in child pornography is not empirically measurable, nor susceptible to proof in the traditional manner (see Thomson Newspapers, supra, at para 92, and *R v Mara*, [1997] 2 S.C.R. 630), but argued that the harm of child pornography is inherent, because it is degrading, dehumanising, and objectifying depictions of children, which by their very existence, undermine the Charter rights of children and other members of society. Child pornography, the minority argued, eroticises the inferior social, economic, and sexual status of children. It preys on pre-existing inequalities.

The minority judgment also questioned, whether in the computer age a clear distinction can be drawn between mere possession and possession with intent to distribute. This was a point which did not appear to weigh heavily with the Chief Justice and the majority, even though some of Sharpe’s material was on computer disk and capable of instantaneous distribution.

The *Sharpe* case illustrates the obstacles in protecting children’s rights in constitutions which have no child

specific provisions The Canadian Charter of Rights expresses the right to freedom of expression and thought but does not contain any express rights on children, outside of children's linguistic educational rights. The Canadian Supreme Court interprets legislation on the basis that the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context, in which legislation is enacted and, so far as possible, interpretations which reflect international values and principles are preferred (*Slaight Communications*, supra, at pp 1056–57). Where there is a balancing of competing interests, as there was in the *Sharpe* case, the balance must be informed by Canada's international obligations. The implication is that the prohibition of child sexual exploitation and the principle of best interests of the child, both enshrined in the Convention on the Rights of the Child to which Canada is a party, ought to have been weighed in the balance.

The *Sharpe* case is even more extraordinary because of its timing. The judgment was delivered at the beginning of 2001, at a time when the Canadian government was preparing for a United Nations Congress on Child Sexual Exploitation, preparing its report on how Canada has abided by its international legal obligation to eradicate child pornography. As the minority of judges in *Sharpe* observed, the Canadian Charter ought not to be used to reverse advances made by vulnerable groups or to defeat measures intended to protect the disadvantaged and comparatively powerless members of society (On this point, it is helpful to refer to *R v Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713, Dickson CJ at p 779). Yet this is precisely what happened in *Sharpe*.

Participation

The fourth P is participation, which is seen as the most radical of the 4 P's and for which there still needs to be much progress, particularly in relation to children participating as a group. Like South Africa, Hungary and Estonia, although for very different reasons, are states in transition. In Hungary, the Act of Association requires a judge to refuse registration of an association if the objectives of the association violates the rights and freedoms of others. The statute of a gay rights association allowed for the membership of children under the age of 18 and registration was refused. The question before the Constitutional Court of Hungary was whether there had been a violation of any constitutional rights and the Constitutional Court of Hungary replied in the negative (Judgment 21/1996 in *Magyar Kozlony* 39/96 – the English summary is at www.Codices.coe.int at HUN-1996-2-005).

The Hungarian Constitutional Court stated that it regarded homosexuality as having a controversial standing in Hungarian society. The Constitutional Court regarded membership of the association as akin to taking up a public position on sexuality, which the Constitutional Court

believed could be decisive for the child's moral and physical development in later life. The Hungarian Constitutional Court did not say that being gay would endanger the moral development of children, as this would have been open discrimination rather the Court, argued that because of a child's age, a child may not be sufficiently mature to take such a mature decision (I am grateful to Stephanie Megies for this case).

Yet the concept that children who may not yet have chosen their own sexuality being forced into a homosexual relationship, is one of the classic prejudices against gay men and women. According to the Court being gay was a decisive decision, because of the negative images of gay men and women in Hungarian society. The Court seemed to be unaware that its own ruling would add to the social stigmatisation felt by young gay people.

The Constitutional court did concede that being a member of a gay association would be very helpful for a gay child, but the Court said that membership in a gay association would constitute a public commitment that would preclude children from choosing a different sexuality later on in life. Although the Court sought to emphasise that its decision was not in any way influenced by a moral judgment on homosexuality, the Court appeared singularly unaware of the impact its own subjective belief had on a judgment concerning child sexuality.

The Court could have adopted a very different approach, arguing for the need for a more accepting, diverse society in Hungary but instead it fell back on an age old myth, that older children are unable to make informed decisions about their own sexuality. The duty of the state to protect children was misinterpreted by the Court, as it often has been in history, to limit the right of children to freedom of association. A more positive position on the child's constitutional right to freedom of association has been taken by the Constitutional Court of Estonia. The President had referred a statute, The Non-Profit Associations Act, to the Constitutional Court, as it raised issues in relation to article 48(1) of the Estonian Constitution, which provides that: "Everyone has the right to form non-profit associations."

The Estonian Non-Profit Associations Act prohibited all those under 18 from establishing non-profit associations. The President argued that the words "everyone in the Estonian constitution" meant just that, and that Estonia, as a party to the United Nations Convention on the Rights of the Child, was bound to implement the child's right to freedom of association enshrined in article 15 of the Convention. The Constitutional Court accepted these arguments and declared the Non- Profits Associations Act unconstitutional. This paves the way for child unions and indeed for children's membership of political organisations (Riigi teataj I 35 Article 737. English summary at www.Codices.coe.int EST-1996-2-2001).

HOW HORIZONTAL?

Children's rights are capable of proper protection under national constitutions, but this still leaves the question of whether they can effect how a state regulates relationships between individuals. In essence, horizontality concerns trickle down. How far are the constitutional rights of child citizens protected in their private as distinct from their public relationships? The issue is a particularly critical one for children. Many children spend significant parts of their lives in the private sphere and conduct relationships with private individuals as distinct from public officials. Constitutional courts which only protected the public sphere would offer few effective remedies for most of the constitutional violations endured by children.

The Slovakian Constitutional Court considered the case of a 14-year-old girl who had been assaulted on a number of occasions by two boys in her neighbourhood. On at least two occasions her injuries were such that she required medical attention. The girl's mother applied to the district government which had a legal duty to protect children's welfare and the district government met with the father of the two boys to discuss the boys' behaviour but took no further action.

The mother, on behalf of her daughter, argued before the Constitutional Court of Slovakia that her right to privacy and family life, as guaranteed under article 19(2) of the Slovakian Constitution had been breached and further she argued that two articles of the Convention on the Rights of the Child, article 3(2) and article 16, had been violated due to insufficient protection by the district government (*Zbierka nalezov a uzneseni Ustavneho sud Slovenskejn reubliky*, English summary at www.codices.coe.int at SVK-1997-3-008). Article 16 of the Convention on the Rights of the Child prohibits unlawful interference with privacy and family life, and article 3(2) of the Convention obliges the government take all appropriate legislative and administrative measures to ensure the well being of the child (see further Van Bueren, *The International Law on the Rights of the Child*).


The Constitutional Court ruled that merely because the case concerned a child did not mean that children ought to have a lower expectation of enjoyment and protection of their constitutional rights. The Court held that the constitutional guarantee of rights also bound the state to protect constitutional rights in relationships between private individuals, this the Court ruled was a positive duty placed on the state by the Constitution. The Constitutional Court ruled that the district government did not perform its obligation to take all administrative measures, as laid down by the Convention on the Rights of the Child, and that the constitutional right of the child to privacy and family life had been violated. The Slovakian judgment is a case with much potential as it would also, by implication, place children's protection from domestic abuse firmly within the core of constitutional protection. It is a

constructive intertwining of international and constitutional law.

CONCLUSION

The cases demonstrate that it is more difficult to develop a culture of child-centred jurisprudence under constitutions which omit child specific provisions. General constitutions which apply only to everyone, without incorporating specific child-centred rights, run the risk of creating a low priority and even invisibility of children as has happened with treaties such as the International Covenant on Civil and Political Rights. This has implications for the United Kingdom. The UK has incorporated a part of the European Convention on Human Rights into the Human Rights Act, but the Convention lacks an article similar to section 28 of the South African constitution protecting children's rights.

The *Sharpe* case also shows us, that where states such as Canada have to weigh competing rights in the balance, the heavier weight is more likely to be accorded to the expressly enshrined constitutional rights. It has to be asked whether a different weight would have been given by the majority of the Supreme Court if the Canadian Charter protected children expressly from sexual exploitation, or expressly provided for the guiding principle of the best interests of the child? For lawyers it is far easier to argue under a comprehensive constitution than have to bring in, almost as a secondary argument, points of international law.

It is precisely where serious consideration is able to be given by the judiciary to the international right of the child that there is a corresponding improvement in the constitutional rights of children. It is no coincidence that the unacceptable levels of child poverty in industrialised states has happened in countries such as the United Kingdom, Canada and the United States where children do not have specific constitutional rights and where children are also disenfranchised. This lack of effective means of legal challenge simply means that governments are free to pass legislation, which draws from the children's share of national resources. The growing corpus of constitutional jurisprudence on children's rights demonstrates that not only are constitutions an appropriate practical vehicle for protecting the fundamental rights of all children, but they are also essential. 

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