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Special issue of the Journal of Social Welfare and Family Law

Transforming children's rights? Dilemmas, challenges and implementation

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Introduction

The UN Convention on the Rights of the Child (UNCRC) has now been in place for over thirty years. Emerging from the United Nations General Assembly in 1989, it has since become the most ratified international human rights treaty ever. But with such widespread ratification has come a host of practical, conceptual and ethical issues as the UNCRC is operationalised (e.g. Holzscheiter 2010, Kilkelly 2019, Stalford and Lundy 2020). For example, questions arise concerning children's capacity and competence to make autonomous decisions in various policy areas (Daly 2017, Sutterlüty 2017). There are debates about children's involvement in dispute resolution and the

extent to which rights must always be associated with redress in order to make them meaningful (Riddell and Weedon 2010). The relationships between the rights of children on the one hand and those of parents on the other continue to cause tensions in such areas as family law and education (e.g. Hunter *et al.* 2018). Particular challenges arise in relation to younger children and those with significant disabilities (Riddell and Weedon 2016, Twomey and Carroll 2018, Riddell 2020). These are issues with particular UK salience, as well as garnering European and international attention (e.g. Collins 2017, European Fundamental Rights Agency 2017)

Contributors to this special issue draw on different disciplines and research traditions (principally disability and childhood studies, education, law and social policy). Most articles were originally presented at a seminar organised at the University of Edinburgh and, following feedback, were refined. All contributors were encouraged to consider the current dilemmas for children's rights in principle and in practice, and to consider potential solutions for the next 30 years. Each article focuses on a particular policy domain in its jurisdiction within the UK, with consideration of its international implications. In light of the policy responses to COVID-19 and their implications for children's human rights, the article by Cuevas-Parra was commissioned in summer 2020 and adopts a global perspective. In total, the articles provide a pointed review of key tension points for children's human rights in practice and looks ahead to possibilities for challenge and change.

Children's Rights: Possibilities, Practicalities and Dilemmas

It is now accepted across different social policy domains that taking account of children's wishes and views will lead to better decision-making (see McMellon and Tisdall 2020 for review).

However, children's autonomy as the over-riding principle in decision-making is contested in diverse areas such as medical and family law (Rutter 1989, Taylor 2005, Freeman 2007). At the heart of the discussion is the extent to which children should be allowed to make independent decisions, irrespective of whether these may turn out to be beneficial or harmful in the long run. Some commentators (e.g. O'Neill 1988) argue that although children should be seen as rights-

bearers, their vulnerability and need of protection makes them inherently different from adults. Whereas adults with capacity are expected to make choices and accept the consequences, O'Neill suggests that some children may be unable to understand the future implications of decisions made at an early stage in their lives. As a result, she suggests, adults must always mediate children's expressed wishes with a view to avoiding life-limiting choices. In addition, responsibility for the institutions and services supporting children lies with adults, not children themselves.

These arguments are broadly in line with Articles 3, 5 and 12 of the UNCRC, which respect a child's evolving capacities while recognising the role of parents and carers to provide direction and guidance and the continuous need to prioritise the child's best interests. Rather than arguing that all children of a particular age should have exactly the same rights, the UNCRC reflects the view that rights should increase in line with the individual child's growing maturity (Lansdown 2005). However, as noted by Archard (2014, 2015), there is an unfair asymmetry in the treatment of children and adults. All adults, other than those who are deemed incapable, are permitted to choose independently irrespective of whether their decisions are objectively wise or not. By way of contrast, children are required to have capacity in order to have their views taken into account and in some areas (for example, voting) are judged as a group to be ineligible. By virtue of their age, adults are making judgements about whether children's views are in accordance with the children's 'best interests', even if the adult's beliefs and judgements may be faulty.

Ideas about children's rights have shifted over time and there is often disagreement with regard to the weight to be attached to children's and adults' perspectives. During the 1970s, for example, those advocating a children's liberation perspective, swimming against a broadly paternalistic tide, maintained that children should be regarded as fully autonomous rights holders with similar status to adults (see, for example, Farson 1974). Holt, in similar vein, argued that:

The rights, privileges, duties, responsibilities of adult citizens [should] be made available to any young person of whatever age who wants to make use of them. (Holt 1974, p. 15).

At the other end of the spectrum, some writers have questioned the utility of autonomy as the over-arching principle in fields such as education, law and health. In the context of medical ethics, Foster (2009) has described autonomy as a ‘tyranny’, which, if applied in an uncritical manner, has the potential to work against service users’ best interests. He suggests that ‘... autonomy flounders when it comes to the question of the treatment of and withdrawal of treatment from children’ (Foster 2009, p. 121). In the use of the best interests test, Foster argues that the law is ‘appropriately paternalistic’. He explains:

The child’s view of where its best interests lie should of course be ascertained, and the older the child is, the greater the weight they will have, but best interests, say the courts, are an objective matter: the child’s views are pertinent but certainly not determinative. (Foster 2009, p. 123).

Others have sought to outline a different understanding of autonomy and particularly one that is relational. Mühlbacher and Sutterlüty (2019) for example argue that both adults and children can only be autonomous with and in relation to others. Freedom depends on social conditions that make it possible in the first place and the prerequisites of freedom are themselves relational. Dependence and vulnerability are not solely the characteristics of children, of which they grow out of, but rather autonomy, dependence and vulnerability are inextricably linked (see also Turner 2006, Fineman 2013).

An ongoing debate across social policies concerns the age at which children and young people should acquire specific rights. The UNCRC itself is tied to certain age limits, such as children being defined up to the age of 18 unless legal majority is obtained earlier (Article 1). Chronological age is still used in many policy areas. For example, in the UK young people normally have the right to vote at the age of 18, but in the Scottish referendum on independence in 2014, the voting age was reduced to 16. In the opposite direction, the age of criminal responsibility in Scotland will change from 8 to 12 once recent legislation is implemented. In other areas, subjective assessments of competence and capacity are used to decide which children can exercise their rights of participation. For example, in England and Wales the concept of ‘Gillick competence’ is used to

decide whether a child under 16 years of age is able to consent to medical treatment without parental consent.

Overall, there is broad agreement on the need to promote children's rights across diverse social policy arenas, but uncertainty about the extent to which autonomy should be the only or the over-riding principle. A major concern of this special issue is to explore the way in which children's rights are reflected in legislation and policy, and subsequently translated into practice on the ground. While the special issue did not set out to concentrate on children's participation rights, they are foregrounded by authors – perhaps because such rights remain some of the most contentious and the most challenging to implement for adults, adult institutions and adult systems (McMellon and Tisdall 2020). Signatories to the UNCRC are required to ensure that children's human rights are reflected in domestic legislation, with the likelihood that debates and dilemmas around children's autonomy will continue. The contentious nature of many aspects of children's rights may be seen on a daily basis with regard, for example, to discussions surrounding children and euthanasia in the Netherlands and children's right to request puberty blockers in the UK.

In the next section, we provide a brief overview of the issues raised in the articles which follow. All authors were encouraged to consider four sets of questions:

1. What rights have been accorded to children in the particular policy domain?
2. What are and should the roles be of the state, parents and children?
3. What challenges arise when translating policy rhetoric on children's rights into meaningful action on the ground?
4. For the next 30 years, what dilemmas may arise in relation to children's rights? What are the potential solutions?

The Articles

Tisdall, Morrison and Warburton consider children's participation rights within family law, where decisions are typically made about child contact and living arrangements. While Scotland's

legislation is at the forefront internationally in children's rights, its implementation has been poor in children's participation rights. Based on recent research involving case law reviews and primary research, the article finds that children were construed as being overly involved in decision-making (the influential child), or insufficiently involved (the influenced child). Both of these constructions restrict children's participation rights. The authors suggest that greater use of advocates, referred to as Super Listeners,¹ could help to reduce the influence of these unhelpful stereotypes, so that concerns with all children's rights are addressed holistically.

Focussing on medical law, Sorbie's article examines tensions between the rights and interests of parents, children and the state. At the time of writing, the Access to Palliative Care and Treatment of Children Bill is under consideration by the House of Lords. Amongst other things, this Private Member's Bill aims to ensure that, in relation to children with a life-limiting illness, the medical treatment proposed by those with parental responsibilities should be assumed to be in the child's best interests, and that mediation between parents and health service providers should be mandatory when disagreements arise. Sorbie argues that this new focus on parental wishes might limit the court's ability to undertake a holistic assessment of the child's best interests and therefore threatens compliance with Article 3 of the UNCRC. In line with comments by the UN Committee on the Rights of the Child, Sorbie argues that if children's interests are not highlighted, they are liable to be overlooked.

Since education is a key public service delivered to all children, it is of central importance in determining the way in which children's rights are reinforced or undermined. The article by Riddell, Harris and Davidge analyses recent developments in English and Scottish legislation aiming to strengthen the rights of children and young people with special and additional support needs (SEN/ASN). In both jurisdictions, progress has been made in creating more inclusive classrooms, particularly in primary schools. However, case studies of children and their families suggest that

¹ See <https://blogs.ed.ac.uk/ijcc/2020/01/young-people-want-adults-to-be-super-listeners/>

very few children participated meaningfully in formal decision making, including dispute resolution and school choice. Children with significant difficulties and those from socially deprived backgrounds were the least likely to be involved. Education practitioners appeared to conflate discourses of well-being and rights, while operating more comfortably within a well-being framework determined by professionals rather than by children (Tisdall 2015a, 2015b). Somewhat paradoxically, stronger children's rights legislation in Scotland has not obviously led to a greater degree of empowerment for children and young people in schools. In England, a more tightly regulated planning system has enhanced the involvement of children and young people in formal processes, while the decentralised Scottish system allowed local authorities to pursue an idiosyncratic approach, limiting access to statutory support plans that play an important role in under-pinning children's rights.

Education legislation has traditionally emphasised the importance of parental rights and, until recently, children's rights have been at best a secondary concern. The article by Cullen and Cullen provides an in-depth analysis of changes brought about in England by the Children and Families Act 2014. Influenced by the UNCRC, the Act sought to shift the balance of power from parents to young people by boosting young people's appeal rights. The article reports on research, funded by the Department for Education, which shows that the new legal rights to mediation and/or appeal for young people with SEN have been taken up. This contrasts with no take up of children's rights of appeal in Wales (Holtom *et al.* 2014) and limited take up in Scotland (Riddell and Carmichael 2019). The new rights of appeal were often used to argue for improved access to education beyond statutory school-leaving age, since the legislation covered children and young people from 0 to 25 years. Barriers encountered by young people in accessing mediation were also highlighted. Most mediation services across England were failing to gain the views of young people independently of their parent representatives, an issue which has not been resolved by recently-implemented professional standards. Young people using their right to appeal found the process stressful and anxiety-inducing. Their experiences of appeal hearings were contingent on the judge's

attitude and awareness of the rights of young people under the 2014 Act. Overall, staff in a wide range of education settings (schools, Further Education colleges, local authorities, information and advice services, mediation providers) appeared to lack knowledge and awareness of young people's rights, highlighting a continuing need for training.

Finally, the article by Cuevas-Parra examines the impact on children's rights of the emergency measures introduced as a result of the COVID-19 pandemic, focussing on freedom of expression (Article 13), freedom of association (Article 15), protection of privacy (Article 16), and access to information (Article 17). He notes that the closure of educational establishments was initially justified with reference to children's right to protection (Article 19) and the highest attainable standard of health (Article 24). However, even in the midst of a global economic and public health crisis, Cuevas-Parra argues that human rights are indivisible, interdependent, and interrelated, and none can be fully realised without the others. Emergencies and disasters, such as COVID-19, represent a crucial test to explore whether children and young people's participation rights are protected and fulfilled as inalienable human rights. The evidence presented in the article demonstrates that children and young people are willing to participate and, when supported by adults, are able to outline response strategies which may differ from adults' perspectives.

Overall, these articles provide insight into the way local policy makers have sought to translate the principles of the UNCRC into enforceable legislation and policy, drawing attention to the successes but also the challenges encountered along the way. The acid test of social commitment to children's rights is what happens during emergencies. The sudden onset of the COVID-19 pandemic, and the major curtailment of individual liberties which swiftly followed, have revealed severe shortcomings with regard to the participation of children and young people (Tisdall *et al.* 2020). At the time of writing (October 2020) not a single person under the age of 15 in Scotland has died; however many aspects of children's lives have been severely disrupted by the emergency measures. In the future, as unemployment increases, children's social rights will continue to be constrained. Hopefully, in the wake of the virus, as governments strive to 'build back

better', adherence to the principles of children's rights will be a central rather than peripheral concern.

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