

8.30 – 10.15 Panel 3: Safeguarding the Integrity of the Child

Kirsten Sandberg Dr.juris, Professor, Department of Public and International Law, Oslo: *Children's Rights in the Constitution?*

The Norwegian constitution only contains a general reference to the human rights and thus, as opposed to a number of other countries' constitutions, has no provision on children's rights. As part of the preparations for the 200 years anniversary of our constitution in 2014, the Norwegian Parliament has set up a committee to consider and propose a limited revision of the Norwegian Constitution with the purpose of strengthening the position of the human rights in the constitution. This provides an opportunity to consider whether children's rights should be included specifically. The paper will discuss the need for that and the contents of such a provision. It might be argued that the need is not so great since the CRC is incorporated into Norwegian law through the Human Rights Act. However, there are at least three good reasons why children's rights should be included specifically; first, the visibility of children, secondly, as a response to adults' human rights, and thirdly, the need to strengthen children's participation in society. As for the contents of such a provision, the paper will discuss i.a. whether there should be a reference to all the three p's (protection, provision and participation) and whether some of the general principles should be included explicitly. Provisions on children's rights in the constitutions of other countries will be used as examples.

Raju Prasad Chapagai, Human rights lawyer, UN Office of the High Commissioner for Human Rights, Nepal: *Judicial Application of Child Rights Convention in Nepal: an Analysis*

Nepal is a party to a significant number of international human rights treaties including the Child Rights Convention (CRC). As provisions of treaties which Nepal has ratified do not automatically form part of Nepalese law unless and until those provisions have been validly incorporated into domestic law by statute, Nepal's legal system remains essentially dualist. However, the Nepal Treaty Act 1990 has the effect of making some treaty provisions applicable in particular circumstances: namely where there is a conflict between those provisions of treaties and Nepali law. Most importantly, several decisions of the Supreme Court also demonstrate a growing use of international human rights treaties including the CRC to influence and shape Nepali law.

Against the stated backdrop, the paper provides an overview of the constitutional framework governing the application of international law in Nepal and discusses how Nepali Supreme Court has utilized the CRC in terms of interpretation of law illustrating a number Nepali Supreme Court decisions.

For instance, in *Tilotam Paudel v. Ministry of Home Affairs and others*,¹ the Supreme Court invalidated a decision of the Ministry of Home Affairs that denied the registration of a children's club under the Institution Registration Act on grounds that minors were not eligible to form such clubs. The court issued an order of mandamus for registration of the club with a view to enable children to exercise their right to form an organization. In doing so, the Court relied on children's right to form an organization guaranteed under article 15 of the Convention on the Rights of the Child (CRC)² together with reasoning that the Children's Act did not impose any restriction upon children to form an organization.

¹ Nepal Law Journal (NLJ) 2001, number 7, page 423. Note: NLJ is the Supreme Court's publication of its decisions.

² Article 15 reads: 1) States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2) No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Carl Lebeck, Doctoral candidate (public law), Faculty of Law, Stockholm University, Sweden: *Protection of Children under the ECHR: Some Lines of Development*

In recent decades it is clear that the protection of children under the ECHR has increased. From a formal perspective, children have always been included among persons protected under the ECHR. However in recent decades it is clear that the protection of children (defined as person below 18 years of age) has increased and that it has also changed the way in which the ECHR is applied more generally. The increasing protection of children includes both the creation of protection of rights of children equal to that of adults (e.g. protection against corporal punishment), when it comes to protection in private law (e.g. equal legal status of adopted children and children born out of wedlock) in relation to governments (e.g. rights for children within the care of child protection authorities and social services) as well as the increasing protection of children under the ECHR has also led to greater protection of children also against non-state actors and private individuals, including parents, legal guardians, private educational institutions, and various non-governmental organizations.

The extension of protection of rights of children is thus a matter of expansion of human rights protection, effectively if not formally to a new group of persons, but also an expansion of the kinds of legal subjects against which human rights protection protects. That expansion of protection of rights is also a change from the view that children were mainly protected through their family, to that children become protected by the ECHR as a legal framework of human rights in and of itself. The expansion of protection of human rights means also that the ECHR does not just impose restrictions but also duties on governments to protect children, which in turn has also changed the framework under which protection of human rights more generally operates. It can also be seen as a part of a development towards a role of human rights protection, not just as a bulwark against the return of totalitarianism, but as an instrument of protecting individuals in less extreme contexts primarily in relation to public authorities but indirectly also in relation to private actors. It seems hence as if the increasing protection of children under the ECHR has been part of a general tendency of expansion of scope of human rights protection, which also leads to a greater degree of balancing between different rights. In that sense, it seems as if the expanding protection of children under the ECHR is part of a greater tendency towards greater sensitivity to an increasing number of fundamental interests in human rights law. The protection of children through human rights law also points to the tendency of broader protection of human rights, also under traditional human rights instruments that mainly further civil rights such as the ECHR.

Jim Reid, Senior Lecturer in Childhood Studies, University of Huddersfield, School of Education and Professional Development, Huddersfield, United Kingdom: *Children, Nonresident Father's and the Public Law: Dilemmas and Challenges*

In the UK the public discourse on separated families has been rich with the stereotypes of 'deadbeat dads' and 'obstructive mums'. It is the author's view that these stereotypes have also been common in public service social work and concomitant legal practice with families, in part encouraged by uncritical approaches to assessment perpetuated by mandated tools such as the *Framework for Assessment of Children in Need and their Families* (DH, 2000), the *Common Assessment Framework* (2005) and the *Integrated Children's System* (2005). There are continuing concerns about the quality of assessments and that good practice in this regard is inhibited by managerialist and bureaucratic approaches and imbalance between social work practitioners and their legal representatives.

One negative outcome of this, particularly for children in contested contact proceedings, is denied familial and cultural experiences and lost identity. The myth of the 'deadbeat' and 'obstructive' parent means that many non-resident parents are anonymous in practitioner's minds and records, not helped as many children's stories are reduced to a 'cut and paste' approach to assessment. Such anonymity means that possibilities offered by the non-resident parent's family, culture and community are denied and unavailable to the child. Practitioners worry about accountability both within and out with the courtroom and practice in an atmosphere of increased public hostility and scrutiny. Utility is determined not just by statute but by working practices and culture, by knowledge and skills, and the prevailing social and political priorities of the day and this does not necessarily favour positive outcomes for children and nonresident fathers.