

The Child's Right to be Heard in Northern Ireland: Human Right or Token Gesture?

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Abstract

Should children be seen and not heard? Or, should their voice be placed at the centre of the decision making process? Article 12 of the United Nations Convention on the Rights of the Child and numerous instruments at the regional and national levels have clearly and consistently articulated that the child has a right to express his or her view in all matters of direct effect. As a result, procedures have increasingly been implemented to ensure that the voice of the child is given due weight in judicial decisions, particularly within the sphere of family law. However, debate has ensued as to whether this right should be extended to the spheres of policy and politics. This article, through analysis of this debate, offers a new approach to putting the child's right to be heard into practice. In considering the case of Northern Ireland, a society in the process of reconstruction following decades of social, religious and generational conflict, the benefits and the difficulties of empowering children soon become clear.

1. Introduction

For centuries, the adage that 'children should be seen and not heard' was left unchallenged. Children have long been ignored as the largest voiceless minority: they have been abused, exploited and habitually denied the opportunity to articulate their personal needs. Crucially, whilst government policy invariably impacts upon children to some degree, they have historically been unable to directly influence political and administrative decisions that concern them. The dawn of the 21st century, however, has seen the 'voice of the child' emerge as a live issue that demands our utmost attention.

Nowadays, children's rights seem to have become sacrosanct. One commentator has even suggested that to question them amounts to 'modern-day heresy'.¹ Codification in binding international legislation is evidence of the fact that governments have taken heed of the international clarion call to elevate the treatment of children from the mere rung of domestic concern to a matter of universal importance.² Indeed, the United Nations Convention on the Rights of the Child (hereafter the 'UNCRC') entered into force in September 1990,³ in the same month that world leaders at the World Summit for Children made a 'solemn commitment' to accord high priority to the rights enshrined within.⁴

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¹ King, *A Better World for Children* (London: Routledge, 1998) at 173.

² Van Beuren, *International Law on the Rights of the Child* (Netherlands: Martinus Nijhoff, 1995) at 25.

³ Adopted by GA Res. 44/25, 20 November 1989, A/RES/44/25. Entered into force 2 September 1990.

⁴ For further information see: <http://www.unicef.org/crc/convention>.

Of these rights, arguably the most significant and the most controversial, has been the child's right to be heard, as codified in Article 12 of the UNCRC.⁵ For the first time, this right recognises the child as a full human being who possesses the ability to participate fully in society.⁶ In many ways, it is the foundation from which other rights are derived.⁷ However, accepting the child as an autonomous rights-holder has encountered fierce opposition from parents, schools and churches, to name but a few. In contrast, others have argued that whether such a right is good for children is beside the point: children should be granted rights for the same reason that adults are.⁸ The intensity of this debate has meant that the implementation of this most fundamental of rights is still in its earliest stages.⁹

The following discussion offers a critical examination of how the child's right to be heard can be transformed from rhetoric to reality, focussing upon the case of Northern Ireland. With the youngest population in the UK and a history of violent conflict and rights repression, Northern Ireland offers an instructive case study in children's rights protection. A large body of academic literature already exists on the child's right to be heard in family and criminal law proceedings. This article argues, however, for a more expansive reading of the right, one that takes the child's views out of the courtroom and into the realm of public decision-making, demonstrating that such an interpretation not only corrects any misreading of the UNHCR, but is also essential for ensuring a participatory democracy for all.

The discussion opens with an overview of the theoretical underpinnings of a rights-based approach to children before considering the codification of the child's right to be heard in international human rights instruments, and its consequent implementation at the national level. The focus will then turn to the case of Northern Ireland, considering the role of the child in its vision of a participatory democracy and the initiatives proposed to protect this vision. Subsequently, an analysis of the legitimate protection of the right to be heard that children and young people in Northern Ireland should expect allows us to gauge how well this expectation is being fulfilled. Finally, this discussion closes with an interpretative proposal and recommendations as to how to better fulfil the child's expectation to be heard.

2. Understanding a Rights-Based Approach to Children: the Complex Relationship between the Child, the Family and the State.

A. Applying a Rights-Based Approach to Children

Mary Robinson defines a rights-based approach to be one 'describing situations not in terms of human needs, or areas of development, but in terms of the obligation to respond to the rights of individuals. This empowers people to demand justice as a right, not as charity.'¹⁰ This approach is underpinned by three fundamental concepts, namely, that all rights are equal and universal, that all people are the subject of their own rights and, finally, that states are obliged to work towards

⁵ Van Beuren, *supra* n. 2 at 15.

⁶ Freeman, *Children's Rights: A Comparative Perspective* (Dartmouth Aldershot: University College London, 1996) at 3.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See: <http://www.unicef.org/crc/specialcase.html>.

¹⁰ Robinson, 'Introduction,' in Santos Pais (ed.), *A Human Rights Conceptual Framework for UNICEF* (Italy: UNICEF, 1999) at iv.

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ensuring that all rights are realised.¹¹ Thus, at the core of the rights-thesis, and indeed most liberal political theories,¹² lie the concepts of equality and autonomy. Moreover, the supposition that all people are not only autonomous rights-holders, but are in a position of direct relationship with the state, forms the basis of many human rights instruments.¹³ The difficulty with applying a rights-based approach to children, however, is that not everyone is in agreement that children are legitimate, equal and autonomous rights-holders.¹⁴

The very fact that the UNCRC has received a more positive response and higher ratification levels than any other human rights instrument indicates that few would now contest that children have internationally guaranteed rights that merit recognition and protection equivalent to that of their adult counterparts.¹⁵ However, beneath the veneer of legitimacy that the UNCRC provides lies a sociological schism between those who wish to uphold a traditional, or paternalistic, approach to children, and those who view children as autonomous individuals in their own right.¹⁶

For many years, the notion of the family unit as a closed, private system, free from public scrutiny, was unchallenged, and consequently perpetuated in many cultures.¹⁷ Within that unit, children were rarely considered to be the subject of their own rights, but rather as objects of social concern within the family and wider community.¹⁸ However, the development of the doctrine of 'best interests of the child'¹⁹ has changed the boundaries of this debate. Nowadays, this schism exhibits itself in the form of a contretemps between the 'liberationists' and the 'protectionists'. Whilst the former, commonly labelled the 'child savers' emphasise the ever-increasing need to provide for and protect the child from the exigent entry into adulthood, they are opposed by the 'kiddy libbers' who argue for the increased autonomy of the child, as enabled by diminishing paternalistic and familial restrictions.²⁰

This tension between the two opposing schools of thought exemplifies the complex nature of enshrining rights of the child in international instruments.²¹ Indeed, as Henaghan asks, 'where does family responsibility end and state responsibility begin?'²² Moreover, can the full enjoyment of any right be based upon satisfying certain conditions? In brief, there appears to be no concise answer, but merely further academic debate. Whilst Van Beuren argues against any 'conditionality of rights and duties whereby the enjoyment of rights is either conditional upon the fulfilment of duties or derived from and limited by those duties,'²³ Eekelaar and Dingwell have

¹¹ Personal Representative of the Prime Minister to the UN Special Session on Children, *A Rights Based Approach*, available at: www.sen.parl.gc.ca/lpearson/.

¹² See for example, Kant on liberalism, '...persons are equal and autonomous in the kingdom of ends,' in Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (London: Hutchinson's University Library, 1947) at 93.

¹³ Van Beuren, *supra* n. 2.

¹⁴ Fortin, *Children's Rights and the Developing Law* (Butterworths King & Piper, 1998) at 13.

¹⁵ Information regarding Ratifications and Reservations is available at: <http://www.ohchr.org/english/ratifications/>.

¹⁶ Van Beuren, *supra* n. 2.

¹⁷ Toope, 'The Convention on the Rights of the Child: Implications for Canada', in Freeman (ed.), *Children's Rights: A Comparative Perspective* (Dartmouth Aldershot: University College London, 1996) 47.

¹⁸ *Ibid.* at 49.

¹⁹ 'Best Interests' is the doctrine used by most courts to determine a wide range of issues relating to the well being of children. For further discussion, see, for example, Hasday, 'The Canon of Family Law', (2004) 57 *Stanford Law Review* 825.

²⁰ Van Beuren, *supra* n. 2 at 3-5, for further discussion.

²¹ *Ibid.*

²² Henaghan, 'New Zealand and the United Nations Convention on the Rights of the Child: A Lack of Balance,' in Freeman (ed.), *supra* n. 17, 166.

²³ Van Beuren, *supra* n. 2 at 4.

called for a necessary delineation of the boundaries between parental powers and children's rights before any realistic progress can be made.²⁴ Thus, it has become increasingly evident that there is no single manner in which to categorically delineate the relationship between the child, parents and the state.²⁵

B. The Child's Right to Be Heard – Further Theoretical Problems

Empowering the child with a right to be heard distends the confines of this debate yet further, given that a necessary consequence is the inclusion of the child in the 'adult world' of law, politics and policy. At an elementary level, it explicitly recognises children as independent beings, from which a series of problems may ensue. How, for instance, are we to reconcile a parent's right to direct and guide their child in line with their own cultural and religious convictions²⁶ with provisions such as Article 12 which 'promote a child's capacity for independence'?²⁷ Hence, the difficulties inherent in deciding when a child is entitled to claim human rights are mirrored in deciding when a child is psychologically fit to be heard as regards long-term, and often life-changing, private and public decisions.

If the international law on the rights of the child is to be effective it necessitates the capacity to respond to these debates and difficulties.²⁸ Thus, a set of universally applicable standards is necessary to establish an international benchmark that reflects the modern vision of the child in all of these political realities. They are seen as neither the property of their parents nor objects of charity. However, the experience of those drafting human rights provisions has confirmed that no authoritative list of the rights that children may or may not enjoy could ever be free from controversy.²⁹

3. Resounding Rhetoric: Promoting and Protecting the Child's Right to be Heard from the National to the International Level

A. Codification at the International Level

Today, a large body of international human rights law recognises and promotes the assertion that children and young people, as human beings, are entitled to the full range of human rights protections. These rights are primarily laid down in the UNCRC, but they are not confined to the UNHCR and to its Optional Protocols. Indeed, international human rights documents, for the most part, tend to incorporate at least one section or provision dedicated to the protection of

²⁴ Fortin, *supra* n. 14 at 52.

²⁵ Toope, *supra* n. 17 at 47.

²⁶ See Article 5 UNHCR.

²⁷ Fortin, *supra* n. 14 at 42.

²⁸ Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff, 1999) at 224.

²⁹ Fortin, *supra* n. 14 at 19.

children's rights.³⁰ Thus, while the UNCRC constitutes the only child-specific convention, many others apply equally to children and young people.³¹

Broadly speaking, the UNCRC reflects the assumption that it is appropriate to require states not only to protect children and promote their fundamental freedoms, but also to devote resources to ensuring that they realise their potential for maturing into a healthy and happy adulthood.³² Establishing a standard set of basic legal protections for all children to enjoy involves attaining a fine balance between the competing needs of protection and care.³³ Those drafting the Convention overcame this problem by providing the child with rights, underpinned by the principles of the child's evolving capacities and best interests, on one hand, and freedom on the other.³⁴ UNICEF states that '[t]he Convention offers a vision of the child as an individual *and* a member of a family and a community, with rights and responsibilities appropriate to his or her age and stage of development.'³⁵ Hence, the drafters of the Convention balanced both sides of the debate detailed in Section I to offer a vision that embraces childhood as a dynamic, transient experience which, at different stages, demands differing degrees of protection, provision, prevention and participation.³⁶

The UNCRC was the first international treaty to confirm the relevance of participation rights to the child which are enshrined in Articles 12 to 15.³⁷ These rights are consistent with the ideological basis of the UNCRC in that they 'transcend those of the family of which they are part.'³⁸ Article 12, in particular, promotes and provides for the recognition of children and young people as active subjects with rights as well as recipients of adult care and concern.³⁹ Article 12 does not simply hand decision-making over to children, it recognises that the child has a viewpoint which, should he or she chose to communicate it, is to be given 'due weight' in accordance with the age and maturity of the child, and ensures that those working with children should engage in consultation with them regarding their own future. As a result, this Article stands in confrontation with more paternalistic theories, with the powerful effect of requiring decision-makers to listen to, and understand, a particular child's world.⁴⁰

B. Codification at the Regional Level

In recent years, international human rights treaties have been supplemented by regional human rights instruments adopted by the Council of Europe (COE), the Organisation of American States

³⁰ See, for example, Article 24, International Covenant on Civil and Political Rights 1966, 999 UNTS 171, and Article 7, EU Social Charter. For further discussion see Boyce, *International Human Rights Standards; Their Relevance For the Development of a Children's Strategy for Northern Ireland* (Children's Law Centre Publication).

³¹ *Ibid.* at 2.

³² Barsh, 'The Draft Convention on the Rights of the Child: A Case of Eurocentrism in Standard-Setting', (1989) 58 *Nordic Journal of International Law* 24

³³ Van Beuren, *supra* n. 2 at 45.

³⁴ Petrén and Hart, 'The Child's Right to Development,' in Save the Children, *Children's Rights: Turning Principles into Practice* (Children's Law Centre Publication) at 44.

³⁵ UNICEF, *The Convention on the Rights of the Child*, available at: <http://www.unicef.org/crc/index.html>

³⁶ Van Beuren, *supra* n. 2 at 50.

³⁷ Kilkelly, *The Child and the European Convention on Human Rights* (London: Dartmouth, 1999) at 118.

³⁸ *Ibid.* at 137.

³⁹ Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (The Hague, the Netherlands: Martinus Nijhoff Publishers, 1997) at 40.

⁴⁰ Henaghan, *supra* n. 22 at 173

(OAS) and the Organisation of African Unity (OAU).⁴¹ Of particular note within the context of this paper, however, is codification at the European level. The European Convention on Human Rights, 1950 (ECHR),⁴² with its elaborate complaints system, is widely considered to be the most effective of regional human rights instruments.⁴³ It is surprising, therefore, to note the distinct absence of either a dedicated section or specific provisions for children's rights enshrined within.⁴⁴ Kilkelly highlights that this lack of child-specific protection has resulted in the Court habitually looking towards external sources for guidance in cases involving children.⁴⁵ For example, in *Marckx v Belgium*⁴⁶ the court relied on the Council of Europe's Convention on the Legal Status of Children born outside Wedlock 1975.⁴⁷

Article 1, however, which guarantees ECHR rights and freedoms to 'everyone', has a central role in the way in which the Convention is interpreted and applied.⁴⁸ In addition, the child's equal entitlement is further enforced by Article 14, which prohibits discrimination in the enjoyment of ECHR rights on numerous grounds, including that of age.⁴⁹ Kilkelly argues, then, that in theory, 'Convention rights are guaranteed to all, and there is little, other than the obvious practical difficulties, to prevent their application to children.'⁵⁰

It is worthy to note when considering the child's right to be heard at the European level that several developments have located children at the heart of the decision-making process in recent years. For example, the European Charter on the Participation of Children and Young People in Municipal and Regional Life⁵¹ embodies the principle that local authorities should adopt policies which encourage the increased participation of children and young people in community life. In addition, the European White Paper on Youth, an initiative that provided for the submission of recommendations from thousands of young people to the European Commission and national governments, established a high watermark for youth participation in European policy.⁵²

C. Implementation at the National Level

Despite progress at both the international and regional level in placing children's rights at the core of the decision-making process, the transition from rhetoric to reality at the national level has presented an elusive challenge for those countries which have ratified the UNCRC. Not only does the UNCRC lack explicit guidance regarding incorporation of children's rights into national legislation or constitutional documents, but there is also an absence of any system of enforcement

⁴¹ Van Beuren, *supra* n. 2 at 23. The author notes that: 'Neither Asia, in which the highest proportion of the world's children live, nor the Pacific Region have similar human or child rights instruments'.

⁴² Entered into force 4 November 1950.

⁴³ See, for example, *Relevant European Legal Standards*, available at: http://www.coe.int/T/E/human_rights.

⁴⁴ Van Beuren, *supra* n. 2 at 22. The author notes, however, that the European Social Charter 1961 contains specific references to children which were intended to complement the social and economic provisions of the ECHR.

⁴⁵ Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the ECHR in Light of the UN Convention on the Rights of the Child', (2001) 23(2) *Human Rights Quarterly* 314.

⁴⁶ *Marckx v Belgium* A 31(1979); (1979-80) 2 EHRR 330.

⁴⁷ European Convention on the Legal Status of Children Born Outside Wedlock (entered into force 13 August, 1978).

⁴⁸ Van Beuren, *supra* n. 2, at 22.

⁴⁹ *Supra* n. 46.

⁵⁰ *Ibid.*

⁵¹ Resolution 237 (1992); for further details see: http://www.coe.int/t/e/integrated_Projects.

⁵² McAuley, *Hearing Young Voices: Consulting Children and Young People (Open Your Eyes to Child Poverty Initiative*, 2001) at 14.

to allow for the adjudication of complaints of individual children.⁵³ Instead, international implementation of the principles and provisions is monitored by a panel of experts: the Committee on the Rights of the Child ('Committee'). Whilst the Committee strongly advises that a basic minimum of the rights enshrined in the UNCRC should be given effect in the domestic legal system, accompanied where possible by effective remedies,⁵⁴ the success of the body depends largely upon the willingness of national governments to take its non-binding recommendations seriously.⁵⁵ The approach taken by governments across the world has differed in style and degree, ranging from a bill of rights, which provides nationals with a tangible framework of justiciable rights which can be enforced in the national court system, to the appointment of an Ombudsman or Minister for children whose principal roles are to persuade policy makers and practitioners to take account of children's views and to highlight the shortcomings in current laws and policy regarding children's rights and interests.

4. The Particular Circumstances of Northern Ireland⁵⁶

A. *The Vision and Promise of the Belfast Agreement*

For over thirty years, human rights abuses in Northern Ireland, by both state and non-state actors, fuelled a period of violent conflict that is commonly referred to as the 'Troubles'.⁵⁷ While this paper does not examine the complex historical and political context of the conflict,⁵⁸ even a cursory glance of key statistics demonstrates an outright lack of respect for children's rights in Northern Ireland.

At last count, there were 450,714 children in the province, which, at 26.65% of the population, is a higher percentage than anywhere else in the UK.⁵⁹ Unquestionably, throughout the decades of conflict children in Northern Ireland have suffered immeasurably: 557 children and young people under 20 years of age have been killed in the conflict.⁶⁰ Furthermore, while the statistic of 'one in three children living in poverty' in the UK is well known, the Government's own research indicates that every second child in Northern Ireland is living in, or at risk of, poverty.⁶¹

⁵³ See, generally, Baltoom, 'The Convention on the Rights of the Child: Prospects for International Enforcement', (1990) 12 *Human Rights Quarterly* 120.

⁵⁴ Kilkelly, 'An Evaluation of the Extent to which the Northern Ireland Proposals for a Bill of Rights comply with international children's rights standards', available at: <http://www.childrenslawcentre.org/BillofRightsAdultVersion.htm> at 8.

⁵⁵ *Ibid.*

⁵⁶ Strand 6 of the Belfast Agreement, Rights, 'Safeguards and Equality of Opportunity,' articulates the need to define rights to 'reflect the particular circumstances of Northern Ireland.'

⁵⁷ Amnesty International, *Political Killings in Northern Ireland* (London: Amnesty International, 1994) at 4.

⁵⁸ For further information see, for example, Dunn, *Facets of the Conflict in Northern Ireland*, (London, MacMillan Press, 1995).

⁵⁹ NISRA, Northern Ireland Census 2001, available at:

<http://www.nisra.gov.uk/publications/default.asp?cmsid=1&cms=publications&pagesize=10&searchterm=&pageoffset=1&release=&pubtype=0>.

⁶⁰ Smyth, *Half the Battle – Understanding the Impact of the Troubles on Children and Young People*, (Londonderry: INCORE, 1998) at 5. See also McKiltrick et al., *Lost Lives: The Stories of the Men, Women and Children Who Died As a Result of the Troubles* (Edinburgh and London: Mainstream Publishing, 1998).

⁶¹ OFMDFM, 'New TSN Research: Poverty in Northern Ireland' at 7 available at: <http://www.childpolicy.org.uk>.

In short, children in Northern Ireland are in a situation of particular need and, consequently, adhering to the fundamental standards enshrined in the UNCRC is not an option, but a necessity. However, whilst the methods of implementation outlined in Section II illustrate means of reaching these standards, the Government of Northern Ireland has made concerted efforts to tailor its response to the particular circumstances of the region. Indeed, given that prior to the Belfast (Good Friday) Agreement in 1998,⁶² it was felt that ‘...insufficient attention was paid to the severe problems of the local context and the potential dangers of placing the grid of Westminster-style government on Northern Ireland’,⁶³ the Agreement has been welcomed as a revolutionary development which, aside from its ambitious political vision,⁶⁴ represents an accord sculpted by people on all sides of the conflict to reflect the realities of a local problem and the potential of a shared future.

Strand One of the Agreement, Democratic Institutions in Northern Ireland, provided for the creation of institutions in Northern Ireland⁶⁵ which, in fostering inclusion, would be subject to the safeguards of the rights and interests of all sections of the community.⁶⁶ The purpose of the safeguards was to guarantee that each individual would be granted his or her right to participate in a new political community.⁶⁷ This vision of a participatory democracy was translated, in the Programme for Government of the devolved administration, into a clear commitment to future generations: ‘...Central to our vision for the future must be a focus on our young people. On their development lies our future and we need to ensure that our policies and programmes take account of their needs.’⁶⁸

In the post-Agreement era, it is understood that, if the government is to honour its commitment to young people, the particular situation of those impacted by the ‘Troubles’, especially those living in interface areas, must be highlighted.⁶⁹ However, although young people have, in recent years, been at the forefront of the peace-building discourse of political and community leaders, there are still few mechanisms in place to allow them to have their input into political structures. At a local level, some mechanisms have indeed been introduced. For instance, Fermanagh District Council has established a Young People’s Shadow Council.⁷⁰ Yet, to date, such initiatives have been isolated and the extent of their influence remains to be seen.⁷¹

⁶² Agreement reached April 10 1998. For further details see: <http://www.nio.gov.uk/the-agreement>.

⁶³ Harvey, ‘Building Bridges? Protecting Human Rights in Northern Ireland’, (2001) 1 *Human Rights Law Review* 247.

⁶⁴ *Ibid.* at 263.

⁶⁵ Belfast Agreement, *supra* n. 62, ‘Democratic Institutions in Northern Ireland’ at para. 34. Provision was made, for example, for a Civic Forum to act as a consultative mechanism on social, economic and cultural issues.

⁶⁶ Harvey, The Politics of Rights and Deliberative Democracy: The Process of Drafting a Northern Irish Bill of Rights. [2001] *European Human Rights Law Review* 48.

⁶⁷ McCrudden, ‘Not the Way Forward: Some Comments on the NIHRC’s Consultation Document on A Bill of Rights for Northern Ireland’, [2001] *European Human Rights Law Review* 48.

⁶⁸ *Programme for Government*, section 1.5, available at: cain.ulst.ac.uk/issues/politics/programme/pfg2000/ch1.htm

⁶⁹ An interface area is a common boundary line between a predominantly Protestant area and a predominantly catholic area. (*Belfast Interface Project, 1998*).

⁷⁰ For further details, see *A Shared Future*, available at: <http://www.asharedfutureni.gov.uk/responses.htm>.

⁷¹ *Save the Children, Getting it Right? The State of Children’s Rights in NI at the end of the 20th Century (Children’s Law Centre Publication)* at 21.

B. Protecting the Child's Right to Be Heard in Northern Ireland

The commitment of the Agreement to children in Northern Ireland has, however, been visible in a number of both implemented and proposed initiatives. Perhaps most importantly, the government has established the Office of a Commissioner for Children and Young People which is statutorily charged⁷² with giving advice to and monitoring the government on matters concerning the rights or best interests of children.⁷³ The Commissioner acts as an independent watchdog, having due regard, in the exercise of his functions, to the provisions of the UNCRC.⁷⁴ Unfortunately, as elsewhere, the Commissioner's work has been hampered from the outset by a lack of both adequate resources and a comprehensive code of children's rights in Northern Ireland.⁷⁵

The Government envisaged remedying some of these problems through its 'Children's Strategy', a comprehensive 10-year action plan that has since been endorsed by all eleven Northern Ireland government departments, the Northern Ireland Office and the Court service.⁷⁶ In brief, actions are proposed to guarantee that the rights and best interests of children and young people, as enshrined in the UNCRC, are explicitly recognised in law, policy, planning and service delivery. The drafting of this strategy, in itself, set an important precedent for the child's right to be heard in Northern Ireland: more than 3,000 children, young people and adults worked directly with the Office of the First Minister and Deputy First Minister in the preparation stages in 2002.⁷⁷

A further initiative of note is the proposed Bill of Rights for Northern Ireland. As detailed in Section 2, enacting a Bill of Rights would constitute a unique opportunity to establish a comprehensive constitutional framework in relation to children's rights. In 2001, the Northern Ireland Human Rights Commission (NIHRC), the body created to advise the government on the creation of a Bill of Rights, published its original proposals in a consultation document upon which submissions would be accepted from all sectors of society.⁷⁸ The Commission adopted a combined approach to the protection of children's rights, proposing a general clause requiring state authorities to follow the UNCRC as a matter of principle, in addition to introducing supplementary provisions in order to ensure that the unique situation of Northern Ireland was reflected.⁷⁹ Indeed, given that the UNCRC establishes minimum standards which are designed to

⁷² See Sections 68 and 69 of the Northern Ireland Act 1998.

⁷³ Boyce, *Protecting Children and Young People's Rights in the Bill of Rights for Northern Ireland: A Briefing Paper for the Children and Young People's Sector 2003* (Children's Law Centre Publication) at 10.

⁷⁴ See Commissioner for Children and Young People (Northern Ireland) Order 2003, Article 7, available at: <http://www.opsi.gov.uk/si/si2003/20030439.htm>.

⁷⁵ Boyce, *supra* n. 73 at 10.

⁷⁶ Office of the First Minister and Deputy First Minister, *Making It R WRLD 2* strategy available at: www.allchildrenni.gov.uk/strategy.pdf.

⁷⁷ CYPU, *Creating a Vision for all Our Children*, available at: <http://www.allchildrenni.gov.uk/framework%20-%20english.htm>.

⁷⁸ NIHRC, *Making a Bill of Rights for Northern Ireland, A Consultation*, at 14, available at: www.nihrc.org/documents/BoR_consultation.pdf.

⁷⁹ *Ibid.*

be universally applicable,⁸⁰ it was felt to be necessary for the Bill of Rights to adapt and strengthen these standards where possible.⁸¹

Thus, the introduction to Clause 10 (the dedicated Children's provision) in the 2001 proposals states that:

...there are a number of grounds on which special protections...should be included... to reflect the particular circumstances of Northern Ireland: 1) the vulnerability of children to abuse and exploitation of all kinds, 2) children's traditional lack of influence on decision-making, 3) the growing international recognition of the need to guarantee the rights of all children, as evidenced by the almost universal ratification of the UNCRC, 4) the fact that the ECHR contains only the minimal express recognition of the special needs of children.⁸²

The Commission, therefore, in acknowledgement of the importance of the child's right to be heard within society, decided to strengthen the child's right to consultation and participation in decisions that affect his or her life,⁸³ by including a supplementary provision which built upon the foundational paragraphs of Article 12 of the UNCRC: 'Every child has the right to participate and play a constructive role in society and in the future of Northern Ireland. Without prejudice to duties imposed by domestic law, the State shall promote and encourage all those working with and for children to collaborate, co-operate to further the protection of their rights.'⁸⁴

In sum, in the immediate post-Agreement era, government initiatives in Northern Ireland alluded to a bright future for the delivery of children's rights. Not only was the new post of Children's Commissioner created to ensure that children's views would be championed in decision-making at all levels, but measures recognising the importance of the child's right to be heard have been included in the government's proposed 10-year strategy and the draft recommendations for a codified Bill of Rights.

5. Understanding the Legal Framework in Northern Ireland: Does the Child have a Legitimate Expectation to be Heard?

The Belfast Agreement was not only significant in terms of the institutions and strategies it inspired for the promotion and protection of children's rights, it also symbolised the development of a distinct legal system which is reflective of the political position of Northern Ireland.⁸⁵ Indeed, although law and politics are 'still shaped by broader UK processes',⁸⁶ Northern Ireland's

⁸⁰ Standards were set by consensus to achieve universality and are generally considered to be too low. They have been raised by the Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

⁸¹ Kilkelly, *An Evaluation of the Extent to which the Northern Ireland Proposals for a Bill of Rights Comply with International Children's Rights Standards*, at 4, available at:

<http://www.childrenslawcentre.org/BillofRightsAdultVersion.htm>.

⁸² Supra n. 78 at 62.

⁸³ Supra n.78 at 65.

⁸⁴ Ibid.

⁸⁵ Supra n. 71 at 115.

⁸⁶ Harvey, 'The Implementation of a Bill of Rights in Northern Ireland', (2001) 52 *Northern Ireland Legal Quarterly*, 342.

legal provisions are subtly different from those in Great Britain. Thus, the extent to which the existing framework actually protects the child's right to be heard must be measured.

A. The Impact of the UNCRC

The UK ratified the UNCRC in 1991.⁸⁷ However, it is currently not part of domestic law and, given that its principles and provisions are not directly enforceable, it is not binding upon the courts or public authorities.⁸⁸ Nonetheless, significant precedents offer guidance as to the importance which should be placed on the UNCRC at the national level. In 1991, when the ECHR was on the same footing as the UNCRC presently occupies, a series of cases informed how a non-binding regional or international convention should be interpreted in national law. As Lord Bridge explained in the *Brind* case, '...although the ECHR is not part of domestic law, the UK is obliged to secure to everyone within its jurisdiction the rights which the convention defines, and...where there is an ambiguity the courts will presume that Parliament intended to legislate in conformity with the convention.'⁸⁹

The words of Lord Bridge reiterated those of Lord Denning in *R v Secretary of State for Home Affairs, ex p Bhajan Singh*: '...when anyone is considering a problem concerning human rights, we should seek to solve it in the light of the convention.'⁹⁰ Furthermore, Lord Sedley articulated in *R v SOS for the Home Dept, ex p McQuillan* that, 'Once it is accepted that standards articulated in the Convention are standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them.'⁹¹

These judgements are demonstrative of the onus which the Court system places on taking account of international obligations when deciding individual cases. Thus, although the UNCRC is presently not directly binding on national Courts, the UK government's ratification alone dictates a commitment to adhere to the standards enshrined within. With this in mind, it would be a detrimental step for children's rights if any national court were to dismiss the UNCRC out of hand.

B. The Impact of the ECHR

Whilst the UK does not possess a separate constitution for the protection of human rights, constitutional change has occurred in the form of the Human Rights Act 1998⁹² which fully incorporated the ECHR into domestic law.⁹³ In the context of Northern Ireland, the ECHR was reasonably well known long before the Human Rights Act 1998, due largely to the number of cases taken to the Strasbourg Court.⁹⁴ Nonetheless, the lack of any dedicated children's rights

⁸⁷ UNCRC Ratifications and Reservations, available at <http://www.ohchr.org/english/law/crc.htm>

⁸⁸ Harvey, *supra* n. 86 at 342.

⁸⁹ *R v Secretary of State for the Home Department, ex parte Brind* [1991] All ER 720 at para. 722.

⁹⁰ *R v Secretary of State for Home Affairs ex parte Bhajan Singh* [1975] All ER 1081 at para.1082j.

⁹¹ *R v SOS for the Home Department 'ex parte' McQuillan* [1995] 4 All ER 400 at para. 422d-j.

⁹² Entered into Force 9 November 200.

⁹³ Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *Legal Studies* 165.

⁹⁴ See, for example, *McCann and Others v UK* (1996) 21 EHRR 97; and *Brogan v UK* (1989) 11 EHRR 117.

provision has meant that the importance in international law of the child's right to be consulted is not reflected in the text of the ECHR.⁹⁵

Recent ECtHR case law, however, is indicative of that court's growing awareness of the need to produce decisions in conformity with the provisions of the UNCRC, in order to ensure that the ECHR is interpreted as a living instrument.⁹⁶ Indeed, the Strasbourg judiciary has demonstrated greater willingness to consider international instruments in determining the children's rights standards to be attained in domestic law.⁹⁷ For instance, in the case of *V v UK*,⁹⁸ the ECtHR considered the UNCRC as a 'relevant international text' for the purposes of setting standards to be applied for Article 3 of the ECHR. This has even been recognised by the House of Lords in the UK, who have concluded as a result that the UNCRC, 'must be taken into account in the interpretation and application of (European Convention) rights in our national law.'⁹⁹ Hence, the ECtHR can prove successful in remedying deficiencies in the national laws of states parties, by ensuring that rights granted by the UNCRC are considered when reaching individual decisions.

C. The Impact of Legislation Particular to Northern Ireland

Northern Irish legislation has, at times, exceeded international legal documents in providing for a response to problems of a more localised nature. The equality provisions of the Northern Ireland Act 1998 are an important example of this, particularly in the context of securing participation in public decision-making.¹⁰⁰ Section 75 of the Northern Ireland Act, in a bid to better reflect the particular circumstances of the region in all matters of policy and legislation, dictates that public authorities must carry out their functions in a manner which promotes equality of opportunity between all sectors of society, including between 'persons of different age'.¹⁰¹ Given that policy-makers are, therefore, obliged to anchor any new decisions in terms of how they will impact on all sections of society,¹⁰² the required consultation process has been interpreted as a revolutionary tool which imposes a responsibility on decision-makers to take, *inter alia*, the views of children and young people directly into consideration. As O'Cinneide has argued, 'the process represents the main way in which a public authority can be challenged in its decisions and conclusions.'¹⁰³

Aside from Section 75, the Children (Northern Ireland) Order 1995¹⁰⁴ is also of relevance. In theory, this brought legislation relating to children and young people in Northern Ireland into line with that in England and Wales and it has been referred to as 'the most comprehensive piece

⁹⁵ Fortin, *supra* n. 14 at 55.

⁹⁶ In *Tyrer v UK* A 26 (1978); (1979-80) 2 EHRR 1 at para. 31 the Court held that '...the Convention is a living instrument which...must be interpreted in the light of present-day conditions.'

⁹⁷ Freeman, *supra* n. 6 at 55.

⁹⁸ *V v United Kingdom* 1999-IX III; (2000) 30 EHRR 131, para I (Decision of the Court)

⁹⁹ *Regina v Durham Constabulary and another* [2005] UKHL 21 at para. 26.

¹⁰⁰ McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland', (1999) 22 *Fordham International Law Review* 1696.

¹⁰¹ Section 75 available at: <http://www.opsi.gov.uk/ACTS/acts1998/80047--j.htm>.

¹⁰² Public authorities are required to draw up an equality scheme which must state the arrangements made for assessing and consulting on the likely impact of existing and proposed policies on the promotion of equality of opportunity. See *NIO Failed to Comply with the Equality Scheme*, 10 May 2005.

¹⁰³ O'Cinneide, 'Taking Equal Opportunities Seriously: the Extension of Positive Duties to Promote Equality' (London: Equality and Diversity Forum/Equal Opportunities Commission, December 2003) at 349, available at: <http://www.edf.org.uk/publications>.

¹⁰⁴ Children (Northern Ireland) Order 1995 (SI 1995/755) (NI 2).

of legislation ever enacted in Northern Ireland in relation to Children.¹⁰⁵ However, it appears that this Order has not had its intended revolutionary effect. Whilst it does require that statutory agencies and the courts take account of the child's views when making decisions affecting them, implementation has focussed principally upon the areas of health and social care rather than being applied consistently throughout government departments.¹⁰⁶

6. Meeting the Child's Expectation to be Heard: One Step Forward, Two Steps Back

The institutional and legal initiatives detailed in Sections 3 and 4 seemed to demonstrate a genuine realisation, on the part of the government and the wider community, of the need to embrace the notion that children have rights and that they should be promoted. Indeed, in December 2001, the Special Representative for Children and Armed Conflict, at the conclusion of a visit to Northern Ireland, made several recommendations to the Government and actors from both communities which, *inter alia*, called for the continuing participation of young people across segregated communities and for the maintenance of children's issues at the 'forefront of public attention'.¹⁰⁷

By 2002, however, the outlook was less than optimistic. In that year, the Committee on the Rights of the Child expressed concern that the obligations of Article 12 had not been consistently incorporated into legislation throughout the U.K.,¹⁰⁸ and recommended that further steps be taken to reflect the obligations of both paragraphs of the article.¹⁰⁹ Yet, it was 2004 which was to mark the *annus horibilis* for such recommendations, and for children's rights in general.

A. A Revised Bill of Rights

In April 2004 the NIHRC published, 'Progressing a Bill of Rights for Northern Ireland – An Update'.¹¹⁰ From the outset, this report fuelled considerable trepidation among the children's sector in Northern Ireland.¹¹¹ Whilst a commitment to wide consultation with both the children's sector and young people themselves was reflected in the initial consultation document, 'Making a Bill of Rights for Northern Ireland', any commitment to a meaningful provision of children's rights, not least the right to be heard, was called into question in the 2004 report. In one of the Commission's own publications, 'What You Said',¹¹² children and young people unanimously held that 'the most important thing was to consult a child or young person on any decision being made' and that this right was 'linked to almost every other right discussed'.¹¹³

¹⁰⁵ Boyce, *supra* n.73 at 9.

¹⁰⁶ *Ibid.*

¹⁰⁷ Report of the Office of the Special Representative for Children and Armed Conflict, available at <http://www.un.org/special-rep/children-armed-conflict/English/NorthernIreland.html>, para.3.

¹⁰⁸ Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188 at para. 29.

¹⁰⁹ *Ibid.* para.30.

¹¹⁰ Available at: <http://www.nihrc.org/index.htm>

¹¹¹ *Supra* n. 81 at 1.

¹¹² Available at: www.nihrc.org/publications.htm.

¹¹³ NIHRC, 'What You Said: Young People's Views on a Bill of Rights for Northern Ireland' at 16, available at <http://www.nihrc.org/index.htm>.

However, rather than strengthen the provisions in the original draft by underlining the importance of this principle, the latest proposals have seen the outright removal of the third paragraph proposed in clause 10(b) of the 2001 Bill of Rights proposals,¹¹⁴ that is, the right to participate and play a constructive role in society and the requirement to promote the formation of partnerships with children.¹¹⁵ This paragraph had originally been inserted to supplement the provisions in Article 12 of the UNCRC, in direct response to the particular circumstances of Northern Ireland. Now, it has been removed.

Such a move may have been justified if the child's right to be heard had been underlined in the interpretative section of clause 10, which would have reinforced 'the applicability of the right to all areas of the child's life, including education, care, justice and health.'¹¹⁶ However, in the latest draft, the child's right to be heard is only included in a stand-alone section entitled 'participation rights.' The inclusion of an interpretation clause, which is based on Section 39 of the South African Constitution 1996, was to help to ensure that the interpretation of the entire Bill of Rights was informed by current developments in human rights law.¹¹⁷ According to the UN Committee on the Rights of the Child, the child's right to be heard is one of three central guiding principles that should apply to all aspects of the child's life – along with the principles of non-discrimination and the best interests of the child.¹¹⁸ The absence of the interpretive provision of Clause 10 of the fundamental principle of the child's right to be heard, therefore, does not meet the international standard set by the UNCRC as interpreted by the Committee on the Rights of the Child.¹¹⁹

Thus, the overall impression when reading the revised proposals is that the NIHRC has failed to listen to the views of the 1,350 young people involved in the original consultation. Indeed, the weakening of provisions identified to be fundamental by these individuals, such as the right to be heard, is demonstrative of a merely token consultation process.

According to the NIHRC, its decision to radically alter its proposals on children's rights protections was in response to widespread criticism that the original children's rights section was, in comparison to others, too big.¹²⁰ In contrast, the Summary of Submissions demonstrates continuing support for a comprehensive separate section on children's rights.¹²¹ Hence, Kilkelly has described gaps in the latest draft bill to be not only 'unexplained and illogical', but also 'paternalistic'.¹²² Indeed, while the drafting process is yet to be completed, the latest proposals reflect a standard of children's rights protection which falls starkly short of the minimum standards and guiding principles of the UNCRC.

B. Direct Rule Difficulties

The breakdown of the peace process, which followed the suspension of the local Northern Ireland Assembly in October 2002, resulted in a corresponding decline of local input into decision-

¹¹⁴ Ibid. at 11.

¹¹⁵ Supra n. 81 at 23.

¹¹⁶ Kilkelly, 'Children's Rights in the Bill of Rights: Meeting or Exceeding International Standards?' (2001) 52 *Northern Ireland Legal Quarterly* 286.

¹¹⁷ Harvey, supra n. 86 at 261.

¹¹⁸ Supra n. 81 at 6.

¹¹⁹ Supra n. 54 at 286.

¹²⁰ Supra n. 81 at 23.

¹²¹ NIHRC, Summary of Submissions, available at: <http://www.nihrc.org/index>.

¹²² Supra n. 81 at 23

making. In particular, the Civic Forum, the body established to ensure that all sections of society could play a consultative role in decision-making, was dissolved early in 2004. Furthermore, Ministers of State from mainland Britain were brought in to replace the local Executive, ensuring that decision-making was brought one step further away from local people.

The situation of political stalemate also appears to have permeated the realm of government activity. Subsequent drafts of the Government Children's Strategy have brought about a dilution of its apparent focus. Indeed, whilst the 'Working Paper for the Strategy' proposed that the strategy would be 'Northern Ireland's implementation plan for the Convention on the Rights of the Child,'¹²³ the latest draft decrees simply that it will 'help Northern Ireland move closer in line with the principles and aspirations laid down in the Convention'.¹²⁴ By 'shifting the goalposts' of the strategy in such a fashion, the Government risks missing an invaluable opportunity to finally offer a full framework for the implementation of the UNCRC.

However, perhaps the biggest test as to whether the child's right to be heard is to be considered a full right or a token gesture was to come in the form of a judicial review taken by the Children's Commissioner.

7. The 'ASBO's Case': Tokenism on Trial

To date, the Northern Ireland Commissioner for Children and Young People has taken only one case in his own name. The case in question was a judicial review challenge to the decision announced by the Direct Rule Minister with responsibility for criminal justice, on 19 May 2004, to put before Parliament proposed legislation to introduce Anti-Social Behaviour Orders (ASBO). Although the legislation proved controversial in terms of children's rights breaches, the government had introduced ASBOs in England and Wales under the Crime and Disorder Act in 1998.¹²⁵ However, the only apparent justification for its introduction in Northern Ireland was the fact that anti-social behaviour, particularly amongst young people, was a problem of popular concern.¹²⁶ Indeed, the Government appeared to take little notice of regional particularities, such as the progress made in developing restorative justice and youth conferencing approaches to fighting crime, which could be damaged by the 'introduction of a more directly punitive and criminal justice orientated mechanism.'¹²⁷

The Minister of State published a consultation paper in relation to the introduction of ASBOs in January 2004 indicating that the Northern Ireland Office did not intend to conduct an equality impact assessment, under Section 75 of the Northern Ireland Act 1998, on the new proposals. Before the closing date for submissions, on 10 March 2004, the Minister pre-empted the response, stating in the House of Commons that communities across Northern Ireland had resoundingly said 'yes' to the introduction of ASBOs,¹²⁸ thus shortening the consultation period so that the government could introduce the measures as soon as possible.¹²⁹ Considerable

¹²³ Kilkelly et al., *Children's Rights in Northern Ireland*, at 2, available at www.niccy.org.

¹²⁴ OFMDFM, *Making it R Wrld 2*, supra n.76 at 7.

¹²⁵ [2004] NIQB 40 at para. 3 'On the current state of the law (unless the European Court of Human Rights holds otherwise) the legislation appears to be perfectly lawful in England and Wales.'

¹²⁶ Scraton, 'Regulating Antisocial Behaviour: A Critical Perspective', Paper Presented to the IASD Annual Conference, 5 November 2004 at 6.

¹²⁷ *Ibid.* at 6.

¹²⁸ Commons Debate Relating to NI (2003-2004), available at: http://www.ci-ni.org/index.php/index_no_link_rss/child_policy_info_home.

¹²⁹ [2004] NIQB 40, at para. 5.

controversy surrounded the consultation and the children's sector was united in its opposition to the introduction of ASBOs, with Include Youth, and NGO, submitting that they have 'the potential to demonise and further exclude vulnerable children who already find themselves on the margins of society and the communities in which they live.'¹³⁰

Yet more worrying, within the context of Northern Ireland, is the relationship between ASBOs and paramilitary punishments. Indeed, the NIHRC noted that, as information concerning the identity and location of those subject to an order would be in the public domain, 'there was widespread concern that people would be 'punished twice', first by the making of the order and thereafter by the paramilitaries.'¹³¹

By failing to place anti-social behaviour in the wider context of economic deprivation and political violence, ASBOs have the potential to exacerbate, rather than solve, local difficulties. Indeed, recent research indicates that the public process of naming and shaming only serves to intensify individual problems and alienate vulnerable and afflicted families.¹³² Thus, in many ways, 'the measures have echoes of being a more sanitised version of the tactics employed by armed groups.'¹³³

The Children's Commissioner, with support from leading children's NGOs, including the Children's Law Centre, Save the Children and NSPCC, challenged the proposed legislation based on concerns that the proposals may contravene the rights of children and young people as codified in international legislation such as the ECHR and the UNCRC.¹³⁴ Of most concern was the fact that they were not engaged in the consultation process as required by Article 12 of the UNCRC,¹³⁵ that the consultation process did not comply with the requirements of Section 75 of the Northern Ireland Act 1998 and that there was a failure to give appropriate weight to the views of the Commissioner.¹³⁶

The response of Justice Girvan to the arguments of the Commissioner was not only very disappointing for the children's sector and advocates of the child's right to be heard, but also illustrative of the perceived standing of both the UNCRC and the Children's Commissioner's Office in Northern Ireland. Rather than interpreting the Article 12 of the UNHCR as a definite duty to consult children, he stated that it only requires 'taking into account children's views in respect of decisions immediately impacting on them'.¹³⁷ However, such an interpretive argument was unnecessary, because, as he frankly stated, 'the Convention is not part of the domestic law'.¹³⁸ It therefore followed that 'the Executive is under no obligation to have regard to enforce international provisions which have not been introduced into domestic legislation'.¹³⁹ In the absence of any statutory provision, therefore, 'there is a shorter answer to the Commissioner's consultation point, namely that there is no right to be heard or consulted before the making of primary or delegated legislation'.¹⁴⁰

¹³⁰ See ASBO'S Watch, available at: www.peermediation.org/.

¹³¹ NIHRC, 'Anti-Social Behaviour in Northern Ireland' at 8, available at: <http://www.nihrc.org/>.

¹³² *Ibid.* at 6.

¹³³ McKee, Auld & McConville, 'Anti-Social Behaviour Orders Will Scapegoat Young', available at: <http://www.monitoring-group.co.uk/News20and20Campaigns/news-stories/2004>.

¹³⁴ Commissioner is denied Judicial Review 23/6/04, available at <http://www.childpolicy.org.uk/dir/index.cfm>.

¹³⁵ [2004] NIQB 40 at para. 8.

¹³⁶ Caul, *Children's Rights as Human Rights, The Human Rights Act & Incorporation of the European Convention on Human Rights*, (Children's Law Centre Publication, 2004) at 6.

¹³⁷ Scraton, *supra* n. 126 at para.12.

¹³⁸ *Ibid.*

¹³⁹ See *Re Adams*, Application for Judicial Review [2001] NI 1

¹⁴⁰ See Wade & Forsythe, *Administrative Law*, 8th edn. at 544.

The Commissioner claimed that the consultation process breached Section 75 of the Northern Ireland Act 1998 since ASBOs would create a disproportionate impact on children and young people.¹⁴¹ Justice Girvan dismissed this argument out of hand, stating that there was no arguable case that the proposal to introduce the legislation in any way infringed the Minister's obligations under Section 75: 'In relation to the alleged breach of Section 75 of the Northern Ireland Act 1998, in the present case no question of religious or sexual discrimination arises.'¹⁴² He further commented that 'All criminal or quasi-criminal legislation will impact on persons breaking the law as determined by the legislature.'¹⁴³

Justice Girvan rejected the proposition that the Minister had failed to give adequate weight to the views expressed by the Commissioner for Children and Young People, stressing, 'that the Commissioner's View could not be seen to carry more weight than the other consultation respondents.'¹⁴⁴ He also failed to comment upon the alleged breach of Article 8 of the ECHR, whereby 'naming and shaming' children could infringe their right to privacy. However, perhaps the most informative remarks of Justice Girvan were in response to the Commissioner's complaint that children were not consulted in any way.¹⁴⁵ Justice Girvan held:

Consultation, to be a meaningful exercise, involves consulting with interested parties who are in a position to put forward measured and meaningful responses. It is argued that there are mechanisms in place for consulting children, although one wonders in practical and realistic terms what meaningful response could be obtained from children unless they were in a position to understand the legal and social issues relating to anti-social behaviour... Token consultation would achieve nothing.¹⁴⁶

The implications of such a statement are clear – children, in the learned Judge's opinion, are incapable of 'measured and meaningful responses' or of understanding complex 'legal and social issues.' Any attempt to consult with them could only ever be a 'token' gesture. Listening to children would, therefore, be a favour granted by the adult when convenient, not a right to which the child is individually entitled.

In short, the ruling of Justice Girvan set a dangerous precedent for children's rights in Northern Ireland. The immediate result of the ruling was the introduction in August 2004 of a commencement order for ASBOs. Considered together with the disappointment of the latest Bill of Rights proposals on children's rights, the decay of the participatory structures ushered in by the Belfast Agreement and the dilution of the pending Government Children's Strategy, this ruling is a serious step in the wrong direction for children's rights standards in Northern Ireland.

8. Reading Between the Lines: Strengthening the Child's Right to Be Heard at the National Level

Following the ASBO's judgement, and other recent events, there exists a palpable air of insecurity in Northern Ireland as to the legitimacy of the expectation of children and young

¹⁴¹ Scraton *supra* n. 126 at para.9.

¹⁴² *Ibid.* at 13.

¹⁴³ *Ibid.*

¹⁴⁴ 'Commissioner is denied Judicial Review 23/6/04,' available at: <http://www.childpolicy.org.uk/dir/index.cfm>.

¹⁴⁵ Scraton, *supra* n. 126 at para.12.

¹⁴⁶ *Ibid.*

people that they will be consulted in relation to decision-making at the highest level. Although Justice Girvan's decision has not been appealed, it is submitted that the recent slide in standards of children's participation in Government decision-making is based on a fundamental misreading of the current legal framework. Indeed, considered in greater depth, further theoretical and legal arguments exist to allow for a revival of the momentum that has been lost in transforming this right into a reality.

A. Understanding the UNCRC

It is submitted that Justice Girvan's most fundamental error in dismissing the Commissioner's application for judicial review was his misinterpretation of the central principle of Article 12 of the UNCRC. As noted in Section 3, these requirements of Article 12 are much more complex than a mere requirement upon adults to consider children's views when convenient. Instead, as recent comments by the UN Committee on the Rights of the Child have clarified, Article 12 should be strengthened to imply an obligation to consult with children. In 2003 the Committee suggested that '... greater priority be given to incorporating the general principles of the convention, especially the provisions of its Article 3, relating to the best interests of the child and Article 12 concerning the child's right to make their views known and to have these views given due weight, in legislative and administrative measures.'¹⁴⁷ Crucially, this should be a well-structured and meaningful process: 'Involvement of and consultation with children must avoid being tokenistic and aim to ascertain representative views.'¹⁴⁸ This is more than a general duty; it is a moral imperative:

Given that few States as yet have reduced the voting age below 18, there is all the more reason to ensure respect for the views of disenfranchised children in Government and parliament... But appearing to 'listen' to children is relatively unchallenging; giving due weight to their views requires real change.¹⁴⁹

Although these comments are not legally binding, as the central interpretative authority on the UNCRC, the Committee's recommendations must not be ignored. Moreover, and of particular relevance to legal proceedings in the UK, this is the interpretation of Article 12 which has been favoured in the ECtHR.

B. European Enlightenment – Strengthening the UNCRC Through the ECHR

As detailed above, the passing of the Human Rights Act in 1998 incorporated the ECHR into domestic law. Parliament has, therefore, provided, in Section 6 of the Act, that all public authorities in the UK must act in a way compatible with the Convention rights.¹⁵⁰ Moreover, Section 2 states that, in reaching their decisions, UK courts and public authorities are bound by

¹⁴⁷ General Comment No. 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 at para.12.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Livingstone, 'The Need for A Bill of Rights for Northern Ireland', (2001) 52 *Northern Ireland Legal Quarterly* at 273.

the decisions of the ECtHR. With this in mind, it is submitted that an analysis of recent Article 6 and Article 8 case law not only demonstrates an infringement of the child's right to privacy in the ASBOs case, but also provides a strong argument for the strengthening of Article 12 of the UNCRC.

In an article published for the Children's Law Centre in Northern Ireland, Tara Caul considers the participation rights of children and young people in the context of juvenile criminal proceedings. Of particular relevance to this paper is the following statement: 'It is suggested from a review of recent case law from the ECHR that the twin concepts of understanding and participation as essential factors in the guarantee of a fair hearing for children should be read across into all judicial and administrative proceedings relating to children and young people.'¹⁵¹ She locates her argument within the context of the procedural rights to a fair hearing contained in Article 6 of the ECHR.¹⁵²

Turning to the right to privacy enshrined in Article 8, however, recent jurisprudence provides for the construction of an even stronger case in support of the child's right to be heard. In *Botta v Italy*, the court held that 'private life, in the court's view, includes a person's physical and psychological integrity. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.'¹⁵³ This point has been returned to in later cases, where it has been that elaborated that 'Article 8 protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.'¹⁵⁴

In a lecture entitled 'Making the Child Heard', again dealing largely with ensuring adequate representation for the child in family law proceedings, Justice Munby remarks:

The Strasbourg Jurisprudence recognises that the ability to lead one's own personal life as one chooses, the ability to develop one's personality, indeed one's very psychological and moral integrity, are dependent upon being able to interact and develop relationships with other human beings and with the world at large.¹⁵⁵

It follows, then, that 'included in the private life respect for which is guaranteed by Article 8, and embraced in the physical and psychological integrity protected by Article 8, is the right to participate in the life of the community.'¹⁵⁶ Hence, if we are to adopt the interpretation that such experts advocate, Articles 6 and 8 of the ECHR can be directly linked to the child's right to participate.

Crucially, the Article 8 positive obligation on the State not to interfere in the child's right to privacy may also be understood as a positive obligation to ensure participation in the life of the community.¹⁵⁷ Of fundamental importance to these decisions is the fact that the ECtHR has

¹⁵¹ Caul, *supra* n.137 at 12.

¹⁵² *Ibid.*

¹⁵³ *Botta v Italy* 1998-I 412; (1998) 26 EHRR 241 at para. 32.

¹⁵⁴ *Bensaid v United Kingdom* 2001-I; (2001) 33 EHRR 205 at para. 47, and *Pretty v United Kingdom* (2002) 35 EHRR 1 at para. 61.

¹⁵⁵ Munby, 'Making Sure the Child is Heard', A lecture for the National Youth Advocacy Service (2004) at 3.

¹⁵⁶ *Ibid.*

¹⁵⁷ It is well established that positive obligations are inherent in the concept of the right to respect for private life under Article 8, *Sheffield and Horsham v UK* 1998-V 2011; (1999) 27 EHRR 163 at para. 52.

increasingly looked towards expanding human rights arguments for children by using some of the provisions in the UNCRC.¹⁵⁸

Put simply, as the ECtHR has taken account of Article 12 of the UNCRC, in addition to the views of the UN Committee on the Rights of the Child, in developing its jurisprudence, there surely exists an obligation for the UK courts to follow suit. The High Court has already accepted this logic, giving weight to other Articles of the UNCRC in *R (on the application of P and Q) v Secretary of State for the Home Department*, where Lord Woolf held that ‘The UNCRC is not part of our domestic law. Nonetheless, it is submitted that the obligations under the UNCRC are relevant because (a) they can inform our decision and (b) they are taken into account by the European Court of Justice when applying Article 8 and, therefore, in accordance with Section 2(1) of the Human Rights Act, have a place in the interpretation of Convention rights in the courts in this jurisdiction...We accept these submissions.’¹⁵⁹

C. Strengthening Section 75 – A New Interpretation

Particular concern has arisen in recent years in terms of the application of Section. 75 of the Northern Ireland Act 1998 to children and young people, with one NGO representative articulating that ‘...the ASBOs judgement has really questioned the whole relevance of Section 75 and whether it has any clout at all.’¹⁶⁰ Indeed, given that consultation has been described by many as ‘the most important and innovative element of Section 75’,¹⁶¹ in theory providing the basis of the participatory democracy vision of the Belfast Agreement, the fact that Justice Girvan has questioned the validity of the consultation process in his judgment stands in stark contrast to the very essence of the legislation.¹⁶²

As explained in Section 3, all public authorities are required by Section 75 to have due regard to the need to promote equality of opportunity between persons of different religious beliefs, political opinions, ages and between men and women generally. However, this principle has been interpreted in several different ways. In the recent ‘Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998’, McCrudden considers a variety of interpretations of S. 75.¹⁶³ Firstly, interpreted broadly, Section 75 can be taken to imply a positive obligation on public authorities to be concerned with achieving fair procedures and securing fair representation of under-represented groups. As McCrudden emphasises, viewed in this light, the principal defining concept of Section 75 is promoting ‘equality of opportunity’.¹⁶⁴

However, he also acknowledges that, for many, the view of S. 75 is as essentially another piece of anti-discrimination legislation¹⁶⁵ and, in particular, that ‘There is also some limited

¹⁵⁸ As detailed in Sections 2 and 4.

¹⁵⁹ *R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWHC Admin 357 at para 33.

¹⁶⁰ Kilkelly et al., *Research Commissioned by the NI Commissioner for Children and Young People*, available at: http://www.niccy.org/uploaded_docs/22323%20Final.pdf at 2.

¹⁶¹ McLaughlin & Faris, *The Section 75 Equality Duty – An Operational Review*, Volume 1 at 44, available at: www.nio.gov.uk/sect_75_equality_duty_an_operational_review_volume_2.pdf.

¹⁶² McCrudden, *Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998*, in Annex B, *Section 75 Review* at 71.

¹⁶³ *Ibid.* at 13.

¹⁶⁴ *Ibid.* at 11.

¹⁶⁵ See, for example, *Re Byers* [2004] NIQB 23 in which Weatherup J. characterises the applicant as having relied on section 75 as ancillary to the discrimination issue.

evidence that the anti-discrimination view of Section 75 (and a rather narrow one at that) is the default position of some current senior members of the Northern Ireland judiciary.¹⁶⁶ Justice Girvan's rejection of the ASBOs judicial review, in which he favours the 'outlawing of discrimination' interpretation over that of 'promotion of equality of opportunity'¹⁶⁷, can therefore be placed in the context of this narrow interpretation of Section 75.

Nonetheless, advocates of a broader reading of Section 75 could argue that if an opportunity is available to one section of society, the same opportunity should be available to all. Thus, Section 75 should have impacted upon the ASBO's ruling in two separate ways. Firstly, as no agreement was reached as to the likelihood that the introduction of ASBO's would have an adverse differential impact on any of the Section 75 groups, an equality impact assessment should have been carried out. Indeed, Professor McCrudden advises that the benefit of such an impact assessment approach is to emphasise 'the effect of policies on equality and what the public body can do about it, rather than one that narrowly concentrates on the direct responsibility of the public authority for any breach of equality.'¹⁶⁸ Secondly, given that the opportunity for consultation was open to everyone, Section 75 would apply if consultation was denied to any individual falling within the categories mentioned in the Act. In failing to consult with children and rejecting the complaints of the Children's Commissioner, the Minister of State could, therefore, be considered to have breached Section 75. However, as McCrudden indicated, it is unlikely that such a liberal reading of this legislation would find favour amongst the more conservative members of the Northern Ireland judiciary.

Yet, a small breakthrough seemed to dawn on 10 May 2005 when the Equality Commission issued findings from an investigation into alleged failures by the Northern Ireland government to comply with its own Equality Scheme. It stated that:

'The Commission has found that the Northern Ireland Office (NIO) failed to take account of evidence that the policy might have an adverse impact on young people and children and failed to carry out a full Equality Impact Assessment. The investigation also indicated that the NIO did not adequately consult on the decision not to carry out such an Equality Impact Assessment.'¹⁶⁹

Based on these allegations, a High Court Judge has set a September 2005 date for a full court hearing regarding ASBO's in which the Children's Commissioner, the Equality Commission and the Children's Law Centre will participate.¹⁷⁰ At the time of writing, the findings of this are not yet in the public domain.

D. Closing the Legal Loophole - Strengthening the Statutes

In essence, the fact that the provisions and principles of the UNCRC have not been directly incorporated into national law theoretically implies that the judiciary is not strictly obliged to have regard to what is enshrined within. It is submitted, however, that the use of such a 'get-out clause', particularly considering the existing provisions and good examples of institutional

¹⁶⁶ McCrudden, *supra* n. 162 at 12.

¹⁶⁷ Scraton, *supra* n. 126 at 12.

¹⁶⁸ McCrudden, *supra* n.162 at 7.

¹⁶⁹ Equality Commission News Release, *NIO Failed to Comply with Equality Scheme*, 10 May 2005.

¹⁷⁰ 'September Court Hearing for ASBOs', available at: <http://www.childpolicy.org.uk/news/>.

consultation considered above, would run contrary to good practice. Indeed, aside from the fact that public authorities in Northern Ireland already have a policy of taking the UNCRC into account, pursuant to S. 26 of the Northern Ireland Act 1998,¹⁷¹ as an internationally agreed document it should be used as a persuasive guide for the interpretation of domestic law and policy.

However, in the absence of clear statutory provisions guaranteeing these rights, advocates of the child's right to be heard in policy decisions are forced to rely on the strength of subtle legal interpretation. Thus, the most efficient way to close the legal loopholes relied upon by conservative members of the judiciary and 'under-pressure' policy-makers would be to give further effect to the UNCRC rights by setting them down in clear statutory provisions. As with the Human Rights Act 1998, this would mean that the Courts and all public authorities would be under a strict legal duty to act in accordance with the UNCRC and to secure the rights which it defines.

9. Conclusion and Recommendations

On 21 June 2005, the Secretary of State for Northern Ireland announced the creation of the post of Children's Minister for Northern Ireland.¹⁷² Following a period of apparent stagnation in the implementation of the child's right to be heard in Northern Ireland, this announcement seemed long overdue. Yet, the result is that recent years have witnessed the creation of a Children's Commissioner, whose views have been dismissed by the courts. Attempts have been made to codify the child's right to be heard into domestic law as part of the Bill of Rights, but progress has been slow and the draft articles for upholding this right have been diluted to the point of disappearance. In addition, institutional progress made by the Government, in the form of a Children's Strategy and the promotion of good practice, has been similarly watered down. Finally, and perhaps of greatest concern, while courts elsewhere have showed innovation in promoting and guaranteeing the rights of the child, the Northern Ireland judiciary has missed an important opportunity to follow their lead. Each of these developments once represented a glimmer of hope for advocates of the child's right to be heard, but each one appears to have run out of steam.

Perhaps the creation of a Children's Minister is representative of a Government which is finally prepared to challenge a more conservative, paternalistic approach to children's rights and honour the fundamental importance of children's rights with the institutional safeguards they deserve. However, having such structures in place, such as a codified Bill of Rights, is no guarantee that rights will be properly protected.¹⁷³ As Freeman has highlighted, the true recognition of children's rights requires implementation not just in law, but also in practice, and 'un-implemented, partially implemented or badly implemented laws may actually do children more harm than good.'¹⁷⁴

Therefore, there are two major challenges ahead for advocates of the child's right to be heard in Northern Ireland. Firstly, as discussed above, the legal loophole that allows judges to dismiss the UNCRC as not binding in domestic law must be closed. In other words, the UNCRC must finally be incorporated into domestic law, in the same way as the ECHR was given further

¹⁷¹ For full details see: <http://www.opsi.gov.uk/acts/acts1998/19980047.htm>.

¹⁷² 'Hain Welcomes Vetting Review Report', available at: <http://www.nio.gov.uk/index/media-centre.htm>.

¹⁷³ Amnesty International, *Amnesty International Report 2001* (2001).

¹⁷⁴ Freeman, *supra* n.6 at 28.

effect by the Human Rights Act 1998. Such a move would guarantee that each child would be entitled to rely upon his or her right to be heard in court. The second and perhaps more complex challenge lying ahead is to overcome the practical difficulties that stand in the way of full implementation of the child's right to be heard. For policy-makers in the public sector, this means engaging effectively with young people, in order to listen and take their views on board via a consultation process that is delivered through appropriate, representative channels. To date, this has proved problematic, with '...community and voluntary sector groups often feeling more abused and overwhelmed by consultation than empowered.'¹⁷⁵

Overcoming such difficulties will not be easy. However, children have consistently demonstrated their ability and desire to be heard. Incontrovertible evidence exists to prove that even children in the pre-school category can make a meaningful contribution to policy debates¹⁷⁶ and, moreover, surveys of young people in Northern Ireland have identified a strong desire for inclusion within decision-making.¹⁷⁷

For this reason, governments across the world have taken positive steps to ensure that the child is heard: from Europe-wide consultation on the EU Youth Policy to youth parliaments in Lebanon, policy-makers have adopted a variety of creative responses to this complex problem. Yet policy-makers in Northern Ireland have an additional interest in making sure that the child is heard. In a conflict-ridden and young population, any tightening of the crucial link between government and civil society would encourage greater participation in decision-making, thus lessening the democratic deficit and encouraging community cohesion.¹⁷⁸ In short, ensuring that the child's right to be heard is a realisable human right and not just a token gesture is not just in the interests of the child, but also in the interests of society as a whole.

¹⁷⁵ McCrudden, *supra* n. 162 at 45.

¹⁷⁶ *Supra* n.160 at 31.

¹⁷⁷ Green (2001) in report *Promoting Young People's Involvement in Public Decision Making* (*Published by Save the Children, Youth Council for NI*).

¹⁷⁸ McCrudden, *supra* n.162 at 9.