

CHILDREN'S LAW CENTRE
ANNUAL LECTURE
2010

*“The Protection of Children’s Rights
in European Justice Systems”*

Maud de Boer-Buquicchio,
Deputy Secretary General of the Council of Europe

Chair
The Right Honourable Sir Declan Morgan
Lord Chief Justice of Northern Ireland

Belfast, Friday 5th March 2010







CHILDREN'S LAW CENTRE
ANNUAL LECTURE
2010

*“The Protection of Children’s Rights
in European Justice Systems”*



**Maud de Boer-Buquicchio,
Deputy Secretary General of the Council of Europe**

Belfast, Friday 5th March 2010





ANNUAL LECTURE WELCOME

Paddy Kelly

Director, Children's Law Centre

Deputy Secretary General, may I, on behalf of everyone in the Children's Law Centre and our friends and colleagues here today welcome you to Belfast and to the Children's Law Centre's 5th Annual Lecture. We are extremely honoured that you have taken time out of your busy schedule to deliver our 2010 Annual Lecture and I am conscious of the fact that you cut short an important and high profile visit to Madrid to be with us today. I and my colleagues in the Children's Law Centre were even more flattered when we heard that the meeting was with Real Madrid Football Club who were handing over the players' signatures in support of the Council of Europe campaign "Raise your hand against smacking!" There may be some in the Children's Law Centre, and in this room, who might have wavered for a minute re staying with Raul and his fellow Galacticos! So we are really delighted that you are with us on this your first visit to Belfast.

We are particularly happy to continue our relationship with the Council of Europe. As you are aware, your colleague, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, who over many years has been a good friend to those working to promote and protect children's rights in this jurisdiction, delivered the Children's Law Centre's 2007 Annual Lecture. Given that the protection of children's rights within the Council of Europe rests in your and Commissioner Hammarberg's wise, safe and caring hands, it is not surprising that the Council of Europe has focused so strongly in recent years on children's rights most publicly, with its focus on "Building a Europe for and with children" and its "Raise your hand against smacking!" campaign; a focus we very much welcome and embrace in the work of the Children's Law Centre, which seeks to promote children's rights through the implementation of domestic and international children's rights standards.

I was struck when I read your words on the Council of Europe website:

"I joined the Council of Europe because, as a lawyer, I believed that human rights could only be enforced through judicial procedures, including international ones. I have since learned that respect for human rights is not just about the relationship between the state and the individual. Our society has a collective responsibility to ensure respect for human rights in all its components, in particular the more vulnerable groups of society."





For me your statement encompasses the essence of the focus of the Children's Law Centre. The need for the marrying of the collective responsibility for the rights of the most vulnerable members of our society, children and young people, with the safeguards of human rights law, policy and practice enforced through judicial procedures.

One of the other many entries on the Council of Europe website which I felt had resonance for our work here was when in your address to the 3rd Forum on the Rights of the Child in Brussels in December 2008, you said that while working in the European Court of Human Rights you were struck in cases involving children "that the approach of many adults was based on the concept of the rights to the child and not the rights of the child". You also noted that "thanks to the case-law of the European Court of Human Rights, things have certainly changed." That is, I think, something all in this room will recognise and welcome and many of us will also recognise your view that while things have changed "they have not changed enough."

Deputy Secretary General, I could spend all afternoon highlighting many of the powerful and compelling children's rights arguments you have made as Deputy Secretary General of the Council of Europe but colleagues would much prefer to hear directly from you on the "The Protection of Children in European Justice Systems."

I would however like to say that given all I have read, I am really delighted that you forfeited an afternoon and evening with Real Madrid to honour the Children's Law Centre by delivering our 2010 Annual Lecture.

Before I finish I would like to take this opportunity to thank the Bar Council for sponsoring this afternoon's Lecture. As a charity we are very grateful for the support of the Bar Council.

As I hand over to The Right Honourable Sir Declan Morgan, Lord Chief Justice, who has kindly agreed to chair today's lecture I would like to thank the Lord Chief Justice for taking time out of his busy schedule to chair today's lecture. He had agreed to chair this afternoon's event prior to his recent appointment and I am very grateful that, despite his even greater workload, he retained this date in his diary.

Thank you.

Paddy Kelly (DIRECTOR)







“The Protection of Children’s Rights in European Justice Systems”

**Maud de Boer-Buquicchio,
Deputy Secretary General of the Council of Europe**

When I reflect on the issue of children’s rights and justice, I cannot help thinking of the old causality dilemma we all learn at school: which came first, the chicken or the egg? Can the egg exist without the chicken and can the chicken come to life without the egg? How meaningful are children’s rights without an effective access to justice and how can justice exist without proper respect of children’s rights?

The Universal Declaration of Human Rights refers to the link between rights and justice in its very first sentence. It states that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Just because children are small, their rights are not (or should not be considered as) small - quite the opposite. As I frequently say, children are not mini human beings with mini rights.

Somebody once said “We worry about what a child will become tomorrow, yet we forget that he is someone today.”

Every child is a person who, like every other human being, is born free and equal in dignity and rights. While children have long been considered as objects of rights, they have only been recently recognised also as subjects of rights. Twenty years after the adoption of the UN Convention on the Rights of the Child, 189 governments around the world are bound by this treaty which clearly identifies children’s political, economic, social and protection rights as well as the principles which should help guarantee the fulfillment of these rights.

The extent of children’s rights violations and the lack of adequate protection and prevention measures as well as the absence of effective remedies for child victims of violations of their





rights show the long way we still have to go before the new legal paradigm displays all its consequences.

This is particularly true when it comes to our justice systems which constantly fail to take children's rights, interests and specific needs into account. Essential notions such as "effective remedy", "fair trial", "legal capacity", "legal responsibility", "consent" need to be checked against the background of the child's vulnerability, dependent status, age and evolving capacity. Failing to do so means weakening the very pillars of our justice system and may result in blunt violations of children's rights.

As the Committee on the Rights of the Child points out, "For rights to have meaning, effective remedies must be available to redress violations... Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives".

In this context, it is particularly important to remind ourselves that babies are rights holders too. Just as some adult rights holders (such as elderly confused or severely disabled adults) lack capacity, the fact that babies may lack legal capacity must not result in denial of effective remedies for breaches of their rights.

The Council of Europe was founded 60 years ago to achieve a greater unity amongst its members (today 47) on the basis of common values: human rights, democracy and the rule of law. Since 1949, children's rights have gradually grown in importance within the Council of Europe's work, sometimes reflecting the evolution of legal systems and, very often, prompting such an evolution.

There is no footnote in **the European Convention on Human Rights** which says it is "for adults only". Article 1 provides that states "shall secure" – not simply "undertake to secure" as in most international treaties- the rights and freedoms defined in the Convention to "everyone" within their jurisdictions, which necessarily includes children. The obvious consequence is that children, or others acting on their behalf can bring their cases to the European Court of Human Rights. The very small number of cases brought by children to the Court is just an indicator of the obstacles children and their representatives face to access national and international justice. In addition, cases which are brought to court often are brought by adults who do not necessarily have the child's best interests in mind.





The Court's case-law – and on a global scale the reporting process under the CRC - provides nevertheless multiple examples of violations of children's rights, many related to the way children have been treated by the national civil, criminal or administrative justice systems.

When looking at the case-law, **the first conclusion** is that the rights and interests of children may be violated in many different contexts, such as within the family and family relations, criminal proceedings, custody or contact proceedings, migration control measures or measures taken by social services and within education facilities.

The **second conclusion** is that the violation can be the result of existing legislation, of conflicting laws or provoked by the absence of an adequate legislation. The principle of positive obligations developed by the Court deserves a special mention, as it has greatly improved the protection of human rights of vulnerable individuals, including children.

The **third conclusion** is that violations can result from the lack of due regard by the authorities for the special vulnerability of the child or for the child's best interests. This of course applies to violations generated by actions or omissions. The particular impact of time in the life of a child has also been highlighted, notably in relation to the duration of a situation of abuse, of a proceeding or a measure. The execution of decisions taken by the European Court of Human Rights also faces such challenges. When the Court concludes that access or custody was granted in violation of the child's rights, it is often too late to redress the situation, as the child's best interests may have evolved.

The European Convention on Human Rights provides for an individual complaints mechanism which, unfortunately, is still lacking in the UN Convention on the Rights of the Child. I am hopeful that in the next weeks in Geneva the Human Rights Council will agree on the drafting of a new Optional Protocol to the Convention on the Rights of the Child providing for a communications procedure. In the meantime, the Strasbourg Court's more and more frequent references to the UN Convention are a very positive evolution.

Another human rights treaty, the **European Social Charter**, is of particular interest for the protection of children's social and economic rights. Its optional protocol on collective complaints can, to a certain extent, compensate for children's lack of direct and effective access to national and international justice. The European Social Rights Committee has been particularly active in denouncing the violation of children's rights to protection from





violence and has, for instance, consistently confirmed member states' obligation to ban all corporal punishment of children.

The Council of Europe's action in the field of children's rights was considerably reinforced following the Warsaw Summit of its Heads of Government and State of the Council of Europe member states in 2005. The summit asked the Council of Europe to assist its member States in the implementation of the UN Convention on the Rights of the Child, to mainstream children's rights in all Council of Europe policies, coordinate all its actions concerning children and to launch an ambitious plan of action for the elimination of violence against children.

The answer to this mandate was the launching of the Council of Europe programme "Building a Europe for and with Children" in 2006. I would like to emphasise the conjunction "with" as it is important to involve children in all policies affecting them.

The programme has attached much importance to the promotion of access to justice at both national and international level. The following are examples of concrete ways of promoting children's access to justice through our work:

1. First, we are **introducing specific provisions in our treaties** that take into account the need to improve children's contact with the justice system, particularly on procedural rights. This was done for instance in the Convention on action against trafficking in human beings and the Convention on the protection of children against sexual exploitation and sexual abuse contain provisions aiming at guaranteeing a child-sensitive approach in courts to avoid the secondary victimisation and unnecessary trauma. This also sometimes means revising existing treaties. This is the case of the Convention on adoption which was revised inter alia to introduce the right of the child to be heard in adoption procedures.
2. Second, we are **developing new standards** to ensure that the rights and specific needs of children are duly taken into account in a series of concrete situations. For instance:
 - a. promoting the deinstitutionalisation and community-living of children with disabilities;
 - b. promoting measures to ensure respect for the rights of children living in residential institutions, notably through children's access to oversight mechanisms;
 - c. requesting safeguards in the case of juvenile offenders subject to sanctions or measures; detention should only affect the freedom of movement, but all other





- rights should be maintained. For children and young people, this encompasses in particular the right to education and healthcare;
- d. promoting measures to protect and empower unaccompanied migrant minors;
 - e. protecting and empowering children in the new media environment;
 - f. combating discrimination as regards the legal status of children and parental responsibilities.
3. Third, we are placing **child-friendly justice as one of the main pillars of any national strategy** on children's rights. The Council of Europe adopted last year its European policy guidelines for integrated national strategies on the protection of children from **violence**. The promotion of child-friendly justice is one of its key policy objectives.
 4. Fourth, we are providing **guidance for the development of child-friendly justice**. The Council of Europe is currently drafting a set of guidelines on child-friendly justice aiming to preserve children's rights and the child's best interests in the many different situations in which a child enters into contact with the justice system. This includes administrative, civil and criminal justice.
 5. Fifth, we are promoting **mainstreaming of children's rights into other policy areas**, for instance through a reflection on the meaning of child-friendly social services and child-friendly health care.
 6. Sixth, we are seeking to improve **access to information concerning children's rights** and international monitoring mechanisms, for instance through the development of Theseus, the data base on the Court's case-law related to children.
 7. And last, we are deploying considerable efforts to **raise awareness on children's rights** through **training** programmes, education material and campaigns targeting the professionals, parents, as well any other person in position to affect child development. We are targeting the community as a whole since, as a widespread African proverb says, "it takes a whole village to raise a child." It is clear that the media have a crucial responsibility in conveying the right messages, and in ensuring the protection of children's best interests, in particular the enjoyment of their right to privacy. In this context, I would like to mention our campaign "Raise your hand against smacking!." Indeed, some people have questioned the choice of this topic for our first campaign for children's rights. The choice was motivated by three elements:





- a. First, corporal punishment is the most frequent form of violence affecting children;
- b. Second, persisting legal and social tolerance for corporal punishment is an indicator of the lower status which society grants to children;
- c. Third, if we manage to change social attitudes towards children, this will have a very positive effect on the promotion of children's rights in general and the elimination of other forms of violence.

I believe that the TV spot prepared for this campaign is an excellent example of the way a message against violence can be conveyed to the wider public and I would like to show it to you. (TV spot)

Ladies and Gentlemen,

The debate following the launch of the campaign in many European countries has proved we were right. Today, 20 European countries have introduced a ban and at least 7 other countries have committed to do the same. Prohibiting all corporal punishment is a legal imperative and I really hope that the whole of the United Kingdom will take that essential step urgently. While the law in some countries is silent on this issue, the United Kingdom and the Republic of Ireland are in a sense unique, having laws that actually formally justify "reasonable" violence against children. In my opinion, this conveys a wrong message to children, adults and to society as a whole.

As the current debates around the drafting of our guidelines on child-friendly justice show, the vast majority of countries in Europe have difficulties in integrating the principles of the child's best interests and child participation. The analysis of the situation shows an evident lack of effective remedies for breaches of the full range of children's rights.

The current draft of the guidelines defines child-friendly justice as referring to systems which guarantee the effective implementation of all children's rights in the best possible manner, bearing in mind the principles of participation, best interests of the child, dignity, protection from discrimination and the rule of law. Such systems give due consideration to the child's level of maturity and understanding of the case. It is, in particular, justice which is accessible, age appropriate, efficient, adapted to and focused on children's needs, which respects their rights, including the rights to due process, to participation and to understanding the proceedings, to privacy and to integrity and dignity.





The guidelines should apply to all ways in which children are likely to be, for whichever reason and in whichever capacity, brought into contact with all the competent bodies and services involved in implementing criminal, civil or administrative law, be it as a party or otherwise. The guidelines cover measures and situations before, during and after judicial proceedings.

I would be tempted to describe the contents of the draft guidelines, however, as law professionals and others working for and with children, you are very well equipped to analyse this text and assess its added value on your own. I encourage you to do so. The draft is available in our web site and submitted to extensive consultations, including with children.

But before I conclude, I should like to refer to the specific challenges of juvenile justice and, in particular to the question of the minimum age of criminal responsibility and the measures applied to juvenile offenders.

In a recent statement, the Council of Europe Commissioner for Human Rights, Mr Thomas Hammarberg advocated for separating the concepts of “responsibility” and “criminalisation”. “It is essential to establish responsibility for conduct which contravenes the law” - he says “Where responsibility is disputed, there has to be a formal process to determine responsibility in a manner which respects the age and the capacity of the child. However, this does not have to be a criminal process nor involve the criminalisation of children.”

I fully agree with this approach and I am confident that the natural consequence of the implementation of the children’s best interests’ principle will be the development of a child-friendly system for children up to 18 in conflict with the law. We should get ready to move towards a system that does not criminalise children. A system which takes into account the specific needs of each individual child and benefits each child with a seamless web of professional support and therapy. A system which is part of a wider social project focused on the realisation of children’s rights, their protection from violence and extra attention to the most vulnerable.

I would like to dwell for a moment on the issue of detention of children. Detention is harsh for everyone. It is even harsher for children who are not armed to understand the grounds and overall objective of their detention. For this reason alternatives should be given priority over imprisonment which should only be decided as a last resort, for a





limited period of time and in adequate detention premises. Children need an individualised treatment, they need to be adequately accompanied and guided by adults who should explain to them in a language that they can understand what they have done and why this is wrong. The high rates of re-offending of juvenile offenders in the United Kingdom only demonstrate that educational measures are of paramount importance in order to achieve rehabilitation. They should thus underpin every activity of detained children and this, not only for their own good but also to serve the interests of the community as a whole.

In Northern Ireland, children as young as ten can be held criminally responsible. This has to be challenged as a matter of urgency. I know that on this front, as in many others concerning children's rights, the Children's Law Centre is fighting hard to improve the lot of many children in this country. I know that the economic crisis and the legacy of the conflict make it certainly more difficult to obtain the necessary progress. In such contexts, it is even more important to monitor the impact on children of measures taken, as well as the image of children in society. It becomes essential to react to any indicator of intolerance towards children or any use of data likely to turn victims of social and political crisis into potential criminals.

Ladies and Gentlemen,

"Children first" is a common place based on children's vulnerability and which requests, in front of an imminent danger, that children be the first to be rescued. This is of course important. However, most of the problems which children face are generated by the fact that, instead of being considered first of all as children, they are treated according to a series of labels: juvenile offenders, people with anti-social behaviour, refugees, illegal migrants, witnesses, victims of crimes, objects of parental rights, etc. The principle of the child's best interests is left behind by adults "more important" interests. It is only if we challenge this way of approaching things that we shall give its full meaning to the "children first" imperative.

So: if I may come back to the dilemma of which came first, the chicken or the egg, children's rights or justice for children? My answer is clear: children come always first.







Children's Law Centre
3rd Floor Philip House
123 - 137 York Street
Belfast BT15 1AB

Tel: 028 9024 5704

Fax: 028 9024 5679

Email: info@childrenslawcentre.org

www.childrenslawcentre.org