THE CONVENTION ON THE RIGHTS OF THE CHILDREN

A case study of how legal anthropology, a critical legal approach and legal sociology bring to light different aspects of the CRC

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Content

1. The CRC from an legal anthropological approach

I have chosen two articles in which the authors throw light on how culture enters the horizon of law and creates dilemmas for states of how to deal with their responsibilities to protect the integrity of the state, on the one hand, and the protection of the rights of children, on the other hand.

In both articles the authors are underlying the fact that managing cultural diversity in full respect of the principles of democracy and the protection of children's rights and the rule of law, is a common challenge for all societies in the international community. According to the authors, both, the U.S (by not ratifying the CRC) and Nepal (ignoring to obliged to the CRC) are trying to get away from their 'responsibility to protect children' by appealing to cultural diversity. Is that a good thing or a bad thing?

The main criticism given by, among others, anthropologists at the CRC is that the CRC was drawn up by western countries, so that little consideration was given to the practices and traditions of non-western countries. A specific example that the anthropologists mention is a shortcoming of the text of the convention that childhood is defined in a consistent manner (age 18 and younger), despite the cultural variation in definitions of childhood.[1] Both articles reflect on this problem. In countries that have ratified the treaty, such as Nepal, we see that they use jurisdiction or political means to limit their scope. This essentially makes some of the rights outlined in the texts meaningless.[2]

To some extent I partly agree with U.S and Nepal by being critical whether nor not to ratify or implement the CRC within their legal order, knowing that the CRC lacks the consideration of non-western culture diversity which can negatively affect the culture in their community. On the other hand, I find it a disturbing argument because the problem of cultural diversity can be easily solved by the doctrine known as the

[1] CICH, 'The Rights of Children' (2007) 21 Medical Anthropology Quarterly <https://anthrosource-onlinelibrary-wiley com.eur.idm.oclc.org/doi/epdf/10.1525/maq.2007.21.2.234> accessed 2 July 2019

[2] Anjana Shakya, 'Experiences of children in armed conflict in Nepal' (2010) 33 Children and Youth Services Review <https://www.sciencedirect.com/science/article/pii/S0190740910002586> accessed 2 July 2019

margin of appreciation.[3] This means, even when the breadth, complexity and sensitivity of the concept of culture diversity are crucial challenges in its transformation into legal human rights norms, it should not be a simple excuse for states like the U.S and Nepal not to ratify the CRC or not to oblige to the CRC.

I also believe that we are dealing here with another dilemma, namely that cultural diversity clashes with the sovereignty principle of states. Appealing to cultural diversity as grounds to avoid their responsibility to protect the rights of children are usually made by states who want to strengthen their own positions and shield themselves against criticism from other social organizations and states. In this case, the sovereignty principle forms a great hinder for ratifying the CRC (U.S) and implementing children's right (Nepal) because sovereign states are not only creating the international norms for the protection of children's right, but are also determining the process of their implementation according to their sovereign will. Such a view challenges "legal centralism", which sees states as the only source of law. In a time of globalization,[4] where the more recent focus lies on transnational legislation, non-governmental networks, legal influence and cross-border cooperation, recognizing that not only the state but also a number of groups within the state influence our understanding of the law, is an important step in the right direction to deal with this dilemma.

[3] The margin of appreciation is the leeway that the Court grants to states in recognition of the cultural and political differences between them. It allows for a degree of divergence between the states and recognises that the individual states are better placed to make decisions with regard to public morals, for example.
Alice Haynes, 'Proportionality, the Margin of Appreciation and our Human Rights – in Plain English' (Human Rights News, Views & Info, 7 December 2017) <https://rightsinfo.org/proportionality-margin-appreciation-human-rights-plain-english/> accessed 2 July 2019

[4] Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=700668> accessed 2 July 2019

2. The CRC from an critical legal approach

In both articles the authors have taken a critical approach to discuss the serious socioeconomic impact that Child Maltreatment (CM) has on a society in high- and low income countries around the world. They elaborate on available analyses that show the steep costs associated with CM during childhood can be a great economic burden for states, whose impact is expanded on a long term scale by involving the many areas of health care and the social system, including costs associated with; hospitalization, mental health services, education, child welfare, justice, child marriages and more.[5] They also highlighted the complexity of preventing CM because the behavior of a caregiver is determined by multiple factors, for example, how they themselves were raised, level of parenting skills, even the amount stress in work and life they encounter, and housing conditions matter. Because of this intricacy, it is essential to devise an effective strategy spanning all sectors of society.[6]

I concur with the findings of both authors, they know exactly where the challenges concerning the difficulties and complexity of the eradication of CM lie, and the economic repercussion CM has on an economical level.

The problem is in my opinion twofold. Firstly it's near impossible for a country or state to make reliable estimates about the total costs of CM, especially in low income countries just the collection of data is considered too great a challenge. This absence of reliable data makes the effect of CM on the economy opaque, which in turn leads to underestimating the issue and ignoring it. Secondly, I believe CM can only truly be combatted if countries start making a better effort in implementing the CRC in their national system. Because implementation can be a costly affair for many countries (especially low income ones) that becomes an argument to not put as much time and effort in the implementation process as needed, reducing the CRC to a symbolic status.

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[5] Pietro Ferrara et al., 'The Economic Burden of Child Maltreatment in High Income Countries' (2015) 167 JPEDS <https://www.jpeds.com/article/S0022-3476(15)01057-4/fulltext> accessed 2 July 2019

[6] Jennifer Parsons et al., 'Economic impacts of child marriage: A review of the literature' (2015) 3 The Review of Faith & International Affairs <https://www.tandfonline.com/doi/full/10.1080/15570274.2015.1075757> accessed 2 July 2019

Since acting on, or ignoring the problem will cost a state money either way, I believe in the long term it would economically be a better gambit to start investing on implementing the CRC.

3. The CRC from a sociological approach

For the final approach I have chosen two articles in which the authors throw light on how sociology of law impacts everyday life of ordinary citizens.[7] In both articles, the authors states that advancements in technology has had great impact on society. But when technology is being related to the CRC, children are being left behind, because they are not part of the discussion. In the first article the principle 'children have a right to be heard' is discussed. Children should be granted a greater role in the evaluation of new information technologies that are being used in schools.[8] The second article talks about the advancement in technology for disabled children, not having a say whether (for example) to settle for a wheelchair knowing a better alternative, like an (electronic) prosthetics is available. Not having access to technology to cope with a disability, makes the gap between rich and poor bigger. Denying children the access to proper care is also a violation of the CRC.[9]

The main criticism given by the authors is that children often are positioned as subordinates. Children often find, that as a subordinate, and marginalized group, they have a dubious moral status. Adult-child relations are built from the long history of developmentalism, and these intersect with ideologies and policies. Combined, this fosters adult suspicion of children, making adults disbelieving, blame and suspecting children of their moral competence which in its turn assign moral responsibility to adults instead of children. This makes it hard for children to take initiative and/or participate in social affairs. For adults it's hard to permit them to, which makes it harder for children and adults to work together on anything on equal terms. This is even more the case when a child is disabled as they are not even included in any form of discussion or negotiation. The authors believe that – with the principles stated by the CRC – children should be given a (formal) role as stakeholders.

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[7] John Griffiths, 'What is sociology of law? (On law, rules, social control and sociology) (2017) 49(2) The Journal of Legal Pluralism and Unofficial Law <https://www.tandfonline.com/doi/full/10.1080/07329113.2017.1340057> accessed 2 July 2019

[8] Toni Downes, 'Children's Participation in Evaluating the Role of New Information and Communication Technologies in Schools' (1999) 4(3) Education and Information Technologies <https://link-springer-com.eur.idm.oclc.org/article/10.1023%2FA%3A1009648411334> accessed 2 July 2019

[9] Gregor Wolbring & Anita Ghai, 'Interrogating the impact of scientific and technological development on disabled children in India and beyond' (2015) 2(2) Disability and the Global South <https://disabilityglobalsouth.files.wordpress.com/2012/06/dgs-02-02-07.pdf> accessed 2 July 2019

I agree with the authors that children should be given a (formal) role as stakeholders because a child has a right to be heard, especially concerning its own (future) life and education. However making children a stakeholder in research and policy making is only a first step. All other stakeholders must be able to put aside their own assumptions of superiority based on (cognitive) maturity and on age. Not just age plays a role, differences based on class, race and/or gender all have their part in these discussions. I expect that educators will have a sizeable role to play in this as they have direct contact with children, but they can't do all of it themselves. For instance children are prohibited from entering legal contracts, de facto they cannot choose to take control, or conclude an agreement, possible future legislation will have an important role in this as well. Furthermore children should no longer see themselves as a group that must be socialized, step out of the "complainant role", (they identify problems but conclude that a solution will have to come from an adult) and move to a role were they take mutual responsibility for devising a solution following the negotiations of the perceived problem or issue. Perhaps contrary to the past, new information and communication technologies have changed the classroom, often children are more adept at learning and using them then the educator and often act as decision makers and teacher themselves. I believe we shouldn't just leave it there, the way we currently handle children in society and from a legal point of view is stifling their ability to add to discussion and improve our world.

Bibliography

Legal anthropology

Anjana Shakya, 'Experiences of children in armed conflict in Nepal' (2010) 33 Children and Youth Services Review <https://www.sciencedirect.com/science/article/pii/S0190740910002586> accessed 2 July 2019

CICH, 'The Rights of Children' (2007) 21 Medical Anthropology Quarterly <https://anthrosource-onlinelibrary-wiley-com.eur.idm.oclc.org/doi/epdf/10.1525/maq.2007.21.2.234> accessed 2 July 2019

Critical Legal approach

Jennifer Parsons et al., 'Economic impacts of child marriage: A review of the literature' (2015) 3 The Review of Faith & International Affairs <https://www.tandfonline.com/doi/full/10.1080/15570274.2015.1075757> accessed 2 July 2019

Pietro Ferrara et al., 'The Economic Burden of Child Maltreatment in High Income Countries' (2015) 167 JPEDS <https://www.jpeds.com/article/S0022-3476(15)01057-4/fulltext> accessed 2 July 2019

Legal sociology

Toni Downes, 'Children's Participation in Evaluating the Role of New Information and Communication Technologies in Schools' (1999) 4(3) Education and Information Technologies <https://link-springer-com.eur.idm.oclc.org/article/10.1023%2FA%3A1009648411334> accessed 2 July 2019

Gregor Wolbring & Anita Ghai, 'Interrogating the impact of scientific and technological development on disabled children in India and beyond' (2015) 2(2) Disability and the Global South <https://disabilityglobalsouth.files.wordpress.com/2012/06/dgs-02-02-07.pdf> accessed 2 July 2019