INTRODUCTION

In this paper I consider briefly the current debates surrounding children’s rights before embarking on an assessment of the impact of the jurisprudence of the ECHR on children. I review this jurisprudence and argue that while the text of the ECHR is seemingly inclusive of children and their interests, the interpretation of the ECHR by the courts reveals a number of assumptions regarding children and adult-child relations which operate to undermine children’s human rights; in particular I ask whether it is only adults who belong fully within the law’s human rights discourse. Finally I consider the different politics of children’s rights associated with the UNCRC, whether it can speak to the shortcomings of the ECHR and assess the possibilities and limitations of the language of the UNCRC for advancing children’s rights and citizenship.

The Politics of Children’s Rights

Historically the children’s rights debate has been dominated by the tension between on the one hand concern for the welfare of children and on the other anxieties over family privacy and encroaching on parental rights. The idea that children should have the right to decide for themselves matters that directly concern them is a much more radical proposition and though it was advanced by children liberationists in the 1970s (Firestone, 1970; Farson, 1974; Holt, 1975) it did not enter the imagery of law until the mid-1980s: the Gillick decision gave qualified support to the decision-making autonomy of the ‘mature minor’. The Gillick case was concerned with whether the Department of Health and Social Security could lawfully issue a notice to the effect that while it was desirable to consult the parents of a person under 16 years of age who sought contraceptive advice and treatment, in some circumstances the doctor, exercising his or her clinical judgement, retained the right to provide such advice and treatment without informing the parents. Mrs Gillick sought a declaration from the High Court that this notice was unlawful. The case reached the House of Lords and in his oft-quoted judgment Lord Scarman held that:

The underlying principle of the law…is that parental right yields to the child’s right to make his own decision when he reaches a sufficient understanding and intelligence to be capable of making his own mind up on the matter in question.

However it is important that we remind ourselves that Lord Scarman’s competency test was quite onerous:

It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions…(Gillick v W.Norfolk and Wisbech A.H.A. [1986] A.C. 112 at pp189).

As we will see later this image of the competent child is central to current debates on children’s rights. Yet though a modern image it has to co-exist with other powerful images of the child: in particular the ‘innocent child’, an image which operates so as to deny the child’s capacities – innocence becomes emptiness, the child is emptied of resilience, of “strength, knowledge and agency” (Stasilius, 2002:512). The innocent child in turn commands ‘special rights’ to protection and reinforcement of adult authority.

Thus the language of children’s rights is used in multiple ways. The conventional and least disruptive is the child’s right to welfare. The child’s right to welfare, to be protected, was highly controversial in the early and mid nineteenth century – regularly anxiety would surface around encroaching on parental rights and family privacy. Yet in the late nineteenth century and first half of the twentieth century a range of social initiatives were undertaken in order to promote the well-being of children (Foley, 2001). These can be seen as fundamental to the modern welfare state – e.g. compulsory school attendance and public health promotion (including free school meals). However, alongside such public initiatives which benefited children and the communities within which they lived there was concern about child abuse and neglect. This concern was concentrated at first on the children of the “dangerous and perishing classes” (Behlmer, 1982; Pinchbeck and Hewitt, 1973) but with the re-emergence of child abuse as a major social issue...
in the late twentieth century it has taken a new form – the physical and sexual abuse of children is not the exclusive 'property' of a particular social group, the threat is everywhere and ever-present and those charged with promoting and safeguarding the welfare of children need the education and training and legislative powers and resources to do this job effectively. Today there is not much space in public discourse to resist calls made in the name of child protection. The large number of enquiries into the physical and sexual abuse of children, at home or in care, and their findings have rendered problematic (past) professional practice with children and thrust issues of child safety to the top of the policy agenda.

Children now have 'special rights' to protection, which in certain circumstances some might see as directly undermining their autonomy rights, for example it is in the name of protecting children that the Sexual Offences Act 2003 criminalises consensual sexual activity between young people aged under the age of 16 years (see Harvey, 2003). In contrast to rights based on a direct and immediate concern for the welfare of children the autonomy rights of children is, as noted above, a more threatening vision of children's rights. The liberty rights of children espoused by Holt (1975) and Farson (1974) signalled for some the end of childhood, the collapse of all distinctions between children and adults, a threat to familial authority and a paradoxical rendering of the child as especially vulnerable. Yet one key theme within the child liberationist position was the idea that the adult–child distinction had been overdrawn by traditionalists and that children were more sophisticated and competent than many commentators were prepared to allow.

This is one aspect of the children's rights debate that the new sociology of childhood has focussed on; indeed much of the new sociology of childhood endorses the emphasis of the current children's rights literature, at both a theoretical and empirical level (Mayall, 2002; Wyness, 2000). For example Mayall (2002) argues that children's agency has been ignored by mainstream social science and is concerned to explore the position of children in the social division of labour, children as agents in the intermediate domain and the idea of a child standpoint. For Mayall these are the key building blocks of her sociology of childhood, a sociology which will of necessity advance children's rights. This sociology increasingly engages with and takes account of how children themselves experience and understand their lives and social relationships and recognise that children's experiential knowledge 'is a vital ingredient in any effort towards the recognition of children's rights' (see also Qvortrup et al., 1994).

There is also a growing body of research which reveals and explores the complexity of children's lives, which catches the many ways in which children, of necessity, negotiate the relationships and dangers of the environments in which they live (e.g. Neale, 2002). What emerges from these studies is an image of a competent and rational child (Alderson, 2000), a child with clear preferences and a voice – if only adults and adult society could hear (see also Hutchby and Moran-Ellis, 1998). So is this image of children as competent, rational and able to deal with complexity reflected in the provisions and jurisprudence of the ECHR?

**The Human Rights Act 1998 and ECHR**

The Human Rights Act (HRA) 1998, which came into force on 2nd October 2000, incorporated most of the provisions of the ECHR into UK domestic law. The HRA 1998 brought rights back home by ensuring that public authorities' policies and decision-making practices respected human rights and where they failed to do so, to allow complainants to raise directly before domestic courts and tribunals claims that their human rights had been breached.

Article 1 of the ECHR states that the parties to the ECHR must “secure to everyone within their jurisdiction the rights and freedoms” contained in the Convention and article 14 provides that the enjoyment of these rights and freedoms must be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (emphasis added). The ECHR however only specifically mentions children or minors three times: in article 5(1)(d) where it provides while under article 5(1) everyone has the right to liberty the detention of a minor for educational purposes is lawful; in article 6(1) where it is provided that the press and public may be excluded from a trial if the interests of a juvenile so require; and Article 2 of the First protocol which deals with the right to education – though as we will see below this is really about the rights of parents and not their children.
The question that now arises is: Would children recognise themselves as bearers of human rights when faced with the language of the ECHR and the decisions in cases involving children? In order to address this question this article considers the jurisprudence of the ECHR under three broad headings: schooling; family privacy and parental authority; and vulnerability.

**Schooling**

Article 2 of the First Protocol to the ECHR provides that:

No person shall be denied the right to education...the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Here there is no reference to children’s rights in relation to education – it is the child’s parents who have rights. It is assumed that parents are motivated solely by a concern for the wellbeing of their children and that they are the best champions of children’s rights, including their human rights. There have been cases brought under Article 2 of the First Protocol which have established however that the right to education is a right of access to education rather than a right to a particular kind of education.

Other convention rights are also relevant to children’s human rights in the context of educational settings. There have been cases brought concerning schooling under article 3 of the ECHR. In *Campbell and Cosans v United Kingdom* the applicants were the parents of children at state schools in Scotland. Mrs Campbell asked for an assurance that her son would not be subject to corporal punishment: this was refused. Mrs Cosans’ son was asked to report for corporal punishment for breaking the school rules, he refused and was suspended. His parents were informed he could only return to school if he submitted to the school’s disciplinary requirements, they refused and were threatened with prosecution for failing to ensure their son’s attendance at school. Both applicants claimed that the corporal punishment used in their sons’ schools was contrary to article 3 and that the refusal to respect their objection to such punishment contravened Article 2 of the First Protocol. Here the European Court of Human Rights (ECHR) did not find a violation of article 3 but did decide there had been a breach of Article 2 of the First Protocol to the ECHR because the government did not respect the parents’ objections to corporal punishment. The court’s conclusion that there had been no breach of article 3 was based on the argument that while the threat of corporal punishment could amount to ‘inhuman treatment’, in this instance this was not the case.

It was not until the decision of the European Commission of Human Rights in the case of Karen Warwick in 1987 that it was held that a school caning breached article 3; i.e. breached the child’s right not to be exposed to inhuman and degrading treatment and punishment, as opposed to the rights of parents to have their religious and philosophical convictions respected. However article 3 still required that a severity threshold be crossed before corporal punishment could come within its wording. Thus in *Costello-Roberts v UK* which concerned a seven year old boy who was beaten for breaking school rules, the ECHR decided that Article 3 had not been breached because the punishment inflicted was not ‘degrading’. In order for punishment to come within the wording of article 3, the “humiliation and debasement involved must attain a particular level of severity over and above the usual element of humiliation involved in any kind of punishment”. Thus in *Y v UK* where the headmaster’s caning of the 15 year old applicant had left weals across the boys buttocks the ECHR did decide there had been a breach of the boy’s rights under article 3.

So in the context of schooling and school discipline we can see a shift in which it is no longer a matter of the human rights of parents that is at issue but that of the child. As a result of campaigning, which included supporting parents and children to bring cases before the ECHR, corporal punishment in state schools was abolished by the Education Act 1986; however it was not until 1999 with the coming into force of the School Standards and Framework Act 1998 that corporal punishment was brought to an end in independent schools.

These developments are not uncontested however. In *R (Williamson) v Secretary of State for Education and Employment* the headmaster of an independent school along with other applicants (all teachers or parents of children at private schools) claimed that the prohibition of corporal punishment in schools breached the parents’ human rights under article 9 (freedom of conscience) of the ECHR. The High Court had already ruled that a belief in the biblical authority
for corporal punishment did not constitute a manifestation of a religion for the purposes of the freedom of conscience provisions of article 9 of the ECHR; nor was it a religious and philosophical conviction for the purposes of the right to education provisions of article 2 to the First Protocol to the Convention: the appeal was dismissed.

As we can see the jurisprudence of the ECHR has provided a platform for the abolition of corporal punishment in schools but should it now also help secure a growing consensus that all forms of child assault are unacceptable? This is central to any conception of citizenship yet some would argue that as long as any punishment is reasonable this is a matter of parental right; we thus come to a consideration of children’s rights and parental rights within the family.

Family Privacy and Parental Authority

Here I look at the relevance of Article 3 to family life, the significance of the idea of parental rights and responsibilities in the jurisprudence of the ECHR and the rights of children in adoption cases. These illustrate the subordination of the well-being and interests of children to that of the adults involved; not perhaps as the result of a conscious articulated view of children’s place but as a result of the deeper taken-for-granted-ness of privileging certain kinds of approaches and relationships.

Parents still have the right to reasonably chastise their children. In A v UK the ECtHR decided that a nine year old boy, who had been beaten with a garden cane by his stepfather, had been subjected to ‘inhuman and degrading treatment or punishment’ contrary to Article 3 of the ECHR. The ECtHR stated that “children and other vulnerable individuals …are entitled to State protection, in the form of effective deterrence, against serious breaches of personal integrity”. In the course of its deliberations and judgment the ECtHR referred to the UNCRC, in particular article 19, which states that signatories to the UNCRC must “take all appropriate, legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse”. In this case the stepfather had been prosecuted for causing actual bodily harm, but was acquitted by the jury. The government conceded that domestic law failed to protect children against violation of their rights under article 3 and stated that it would consult and change the law in order to better protect children. In March 1998 the ‘Children Are Unbeatable’ alliance was formed to influence the outcome of the consultation process. The UK government’s promised response comprised a consultation document which among other things asked such questions as whether punishment ‘which causes or is likely to cause injury to the head (including damage to the brain, eyes and ears)’ can ever be reasonable. There was a similarly distressing question regarding the use of ‘implements’. The consultation document did not even consider the option of abolishing ‘reasonable chastisement’ on the grounds that such an option was ‘quite unacceptable’. The government believed such a move would not command widespread public support and in any event ignored the educative role of physical chastisement (Barton, 2002). It is important to note that in this document the Department of Health is quite prescriptive on some matters e.g. ruling out abolition, while on others it adopts a bizarre ‘detachment’; e.g. deciding not to comment on the idea that a blow to a child’s head might be acceptable as reasonable chastisement.

The jurisprudence of the ECHR reveals the difficulty the ECtHR has with dealing with socially sanctioned ideas and practices concerned family privacy and parental authority – especially when faced with the discordant voice of the child. In the now infamous case of Nielsen v Denmark the applicant, whose parents were not married, was 12 years of age and was caught up in the protracted custody dispute between his parents during which he and his father went underground. He complained that his rights under article 5(1) of the ECHR had been breached when he was committed for five and a half months to a child psychiatric ward of a state hospital at the request of his mother who at the time was the sole holder of parental rights. He claimed that his mother’s intention in having him committed to the psychiatric ward was to prevent him from going to live with his father. In its judgment the ECtHR stated that family life “encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child’s liberty” (para.61). The ECtHR accepted that the rights
Regarding the weight which should be given to the applicant’s views as to his hospitalisation, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. (para. 72).

Thus the hospitalisation of the claimant by his mother did not constitute a deprivation of liberty within the meaning of Article 5(1) of the ECHR - even though the provision applies to ‘everyone’. In a joint dissenting opinion (the Court split nine seven in deciding that Article 5(1) was inapplicable) Judges Pettiti and De Meyer argued that the committal was an abuse of parental authority and psychiatric practice. They quoted the finding of the Eastern Denmark Court of Appeal that “there has been no question of admittance for treatment of a mental illness”, that the committal occurred in the context of a custody dispute and “it was clear that (the applicant) did not want to stay with her (his mother)”

Irrespective of whether the mother’s motive in committing her son to a psychiatric hospital was concern for his welfare or a desire to thwart his wish to be with his father the ECtHR was concerned to emphasise the ‘rightness’ of parental authority and in doing so was merely giving voice to conventional judicial wisdom; in the majority judgment it is a matter of parental authority not the child applicant’s human rights. The applicant’s right to a family life of his choosing i.e. to be with his father was not the central issue – the legitimacy and desirability of parental authority was. In relation to both the parental right to chastise and the law’s respect for parental authority we can see the law’s privileging of family privacy and adult power.

The courts are also concerned not to undermine parental authority within an adoptive family with the result that the adopted child’s self-defined interests in relation to his or her rights under article 8 of the ECHR can be undermined. Many siblings will be separated by adoption, so how are the rights of these children under article 8 to respect for their ‘private and family life’ to be protected? Welbourne observes that often it is the views of the prospective adopters which determine whether contact between the child and his or her birth family will take place (2002: 281). Her argument is that if children have a right to family life under article 8 of the ECHR then current adoption law and practice will have to change; at present judicial understanding and application of the welfare principle operates to defeat the child’s rights under article 8 (2002: 287).

The case of Re S (Contact: application by sibling) raised a number of issues. The case concerned the application by an adopted nine year old girl for contact with her separately adopted seven year old brother. The girl applied for leave to apply for a section 8 contact order; this was refused on the basis that the boy’s adoptive mother had the discretion to decide what was in his best interests. A refusal of contact on her part was not outside the range of decisions a reasonable parent might make. The court was not persuaded by expert evidence concerning the profound and harmful effect of the distress the separation without contact had caused the older child. Welbourne writes (2002: 281):

The court’s prioritisation of the right of the adoptive parent to make decisions about sibling contact was arguably only possible within a framework that attaches more weight to legally created adoptive parental rights than to rights based on biological and family relationships that remain after an adoption order has been made...

This prioritisation operates via the decision-making discretion provided by the welfare principle. Thus the law continues to sanction a situation in which children are not treated as fully human subjects entitled to the formal protections that adults take for granted and often when they find themselves in professional and legal arenas their voices and standpoints are systematically excluded.

Vulnerability

In the UK cases have come before the courts recently in which the civil use of secure accommodation orders (under the Children Act 1989) have been challenged under the Human Rights Act 1998. In Re K (A Child) (Secure Accommodation Order: Right to Liberty) the boy concerned was aged 15 years and was being looked after by the local authority. There was no doubt that K was dangerous and in need of professional support. As a result of a number of assaults and arson the local authority applied to the court for an order authorizing K being placed in secure accommodation: a series of secure accommodation orders were made. K appealed against one of these orders arguing that section 25 of the Children
Act 1989 was incompatible with the ECHR. His argument was that as article 5(1)(d) of the ECHR provided that “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…(d) the detention of a minor by lawful order for the purpose of educational supervision…” his placement in secure accommodation breached the ECHR. K argued that as there was no reference to an educational requirement in section 25 of the Children Act 1989 the Act was incompatible with the ECHR22. In Boumar v Belgium23 where a minor, with a history of aggression, had been placed in a remand prison the ECtHR decided that the authority was in breach of article 5(1)(d) because the detention was not for the purposes of education; the list of exceptions in article 5(1) were to be interpreted strictly precisely because their purpose was to protect the individual from arbitrary detention. Minors could only be detained in the circumstances as specified in the exceptions to article 5(1) contained in paragraphs (a)-(e). However in Koniarska v UK the ECtHR had decided that ‘education supervision’ did not have to be rigidly equated with classroom teaching and that wider forms of education e.g. therapy and guidance regarding the child’s behaviour, could amount to ‘educational supervision’ and would therefore bring the detention within paragraph 5(1)(d). In K’s case the Court of Appeal held that section 25 of the Children Act 1989 was not incompatible with the ECHR and that education need not be immediately available but the detention must result in it being provided. It is only minors who can be deprived of their liberty for such a purpose and in this sense this is another instance of the ‘special’ position of children under the ECHR. Granted there may be circumstances in which children may be in need of greater protection or control than adults yet as Masson points out (2002:91) “the availability of detention may preclude more creative and rights-respecting approaches”.

These cases illustrate the priority accorded to parental interests and rights over the views of the children, how the welfare of children is framed by an overarching respect for the rights of parents and the wariness of the ECtHR when faced by a child applicant seeking to secure his Convention right not to be deprived of his liberty. The jurisprudence of the ECtHR however has made it clear that concern for a child’s welfare can operate so as to override the rights of parents under article 8 of the ECHR24. The next section re-assesses the impact of the ECHR on children’s rights.

The ECHR – A Critical Re-assessment

So from a children’s rights perspective we can see there are grounds for scepticism regarding the inclusiveness of human rights. Other commentators in their reviews of the jurisprudence of the ECHR have made a similar assessment. Kilkelly claims that children’s rights are ‘essentially absent’ from the ECHR (Kilkelly, 1999) and Fortin, noting that the ECHR is a short list of civil and political rights25 has serious reservations as to whether the ECHR can effectively promote children’s rights (2002: 21). She observes for example that the ECHR contains no guidance on how to reconcile parents rights to freedom from state interference with children’s rights to fulfil their potential and that the case law is ambivalent about recognising the child’s right to privacy under Article 8 of the ECHR26.

But there are other levels of disquiet. At a general level it is argued that the promise of human rights is seen as illusory and unsustain-able given the role of the judiciary in interpreting human rights texts and the breadth (or openness) of the language of such texts. Cassese explores the supposed universality of human rights (1999) and sees in this ‘universality’ the strength and weakness of the human rights discourse. It is its strength in that the ‘call for human rights for all’ has an appeal for those social groups who have been historically excluded from equal treatment before the law and full membership of the societies in which they live their lives27.

It is however its weakness in that it fails to acknowledge the complexity of the debates. For example the stretch and thus applicability of human rights is contested –there are as Freeman puts it “different communities of judgment” on human rights (2002: 346). At the same time the ‘escape clauses’28 which human rights instru-ments contain provide the ‘opportunity’ for dominant understandings of the ‘good citizen’ and the ‘good life’ to prevail; the seeming universalism of human rights masks the practical reality of the triumph of vested interests, social prejudice and private property. The idea of community hides differences of interest and power within the community – between men and
women, different ethnic and religious groupings
and adults and children

Peterson and Parisi advance a more founda-
tional critique of human rights. While exploring
hard questions on the value of human rights talk
for women they ask a deeper question: what kind
of person is at the centre of the human rights
discourse. They argue that modernist references
to ‘an ostensibly universal ‘human’ are in fact
androcentric’ and that when ‘we’ talk about the
human subject ‘we’ are talking about men; women
and women’s bodies and experiences are
excluded. They note that most feminist critiques
of human rights focus on this androcentrism
concluding that human rights are in truth men’s
rights with the result that the abuses and
constraints more typical of women’s lives are
“neither recognized nor protected by human

Among the issues explored by Peterson and
Parisi are the presumption of a fixed boundary
between male and female and the reification and
thus depoliticisation of the family. Thus, for
example, in their exploration of how women have
been marginalised in human rights discourse they
observe that “the public sphere focus of human
rights discourse denies the private sphere/family
where women are particularly vulnerable, as a site
of human rights violations” (1998: 144). This
observation echoes that advanced by the
children’s rights scholars when they argue that
all forms of violence against children are
unacceptable (see for example Phillips and
Alderson, 2003), that children are all too easily
subject to human rights abuses in the private
sphere and that society needs to listen to the
voices of children as part of both protecting them
and promoting their participation in society.

O’Donovan (1993) argues that the traditional
denial of the child’s legal subjectivity is to be
explained with reference to adult power as well as
children’s vulnerability. The child is seen (as a
matter of fact and presumption) as lacking “the
attributes necessary to the legal subject” (1993:
90). In addition the law’s paternalism expressed
via the centrality of the welfare principle operates
so as to disqualify the child’s voice –
fundamentally it is adults who will decide what is
to be done on the basis of their understanding
of what is in the child’s best interests. Smith in
her analysis of judicial approaches to children’s
rights observes that adults simply cannot manage
without this principle (1997). She argues that even

“the most convincing evidence about children’s
competence to decide and even the most thorough
philosophical challenge to presumptions
about capacity and autonomy will not achieve
fundamental changes in the way the law thinks
about children”. For Smith the law simply ‘reflects
and confirms a particular construction of child-

Nonetheless children and organisations
supportive of their rights and concerned for their
welfare have used the ECHR as a means of
campaigning for an end to the corporal punish-
ment of children; supporting parents and children
in bringing cases is just one aspect of this
campaigning. The Children Are Unbeatable
Alliance seeks to move the public debate on
beyond the words of the ECHR through mobili-
sing the more aspirational language of the UNCRC
and by insisting that children should have the
same protection against assault in our society as
everyone else. The question then arises is the
UNCRC more successful in promoting children’s
rights and citizenship.

The UNCRC and the Social Citizenship of
children

The UNCRC is a broader document than the
ECHR covering civil, political and social rights
and while, unlike the ECHR, the UNCRC does not
provide for any direct means of enforcement, it
does have a distinct reporting mechanism. The
UNCRC was not the first international human
rights instrument concerned with children but it
was the first to do so in a way that was not
exclusively paternalistic.

In this sense the UNCRC can be seen as
resonating with much deeper contemporary social
debates about children, their needs, interests and
welfare, which have their roots in the questioning
in the 1970s and 1980s of traditional assumptions
about children, their capacities and competencies
and adult-child relations. The provisions in the
UNCRC dealing with children’s participation and
their civil and political rights are key. Goonesekere
(1998) sees the child’s right to be treated as a
person as crucial, as providing the linkage with
personality and identity that “gives participation
rights a special dimension and makes them vital
for the realisation of all children’s rights”; she
sees the UNCRC as recognising “the evolving
capacity of the child” (1998: 310-11). The image
of the child’s right to participate – a right given
expression in Article 12 of the UNCRC is central to the modern children’s rights movement and is one which, albeit slowly, is having an impact on legislative practice. For example the Scottish Office White paper which preceded the Children (Scotland) Act 1995 was based on the UNCRC as well as the ECHR (Scottish Office, 1993). Thus section 6(1) of the Children (Scotland) Act 1995 requires parents to consult their children over any major decision involving their upbringing and presumes that “a child twelve years of age or more is of sufficient age and maturity to form a view”35. However Article 12 is not just concerned with the participation of children in the legal process but “in all matters affecting their lives”. So it is not just a matter of ensuring that children have improved and more appropriate procedural and substantive rights before courts and tribunals. It is also a matter of taking steps to promote children’s participation in their own communities and to bring them into the policy formation process. However in evidence to the Joint Committee on Human Rights the Minister for Children and Young People noted that while there had been much activity to ensure that central government encouraged young people’s participation it was largely symbolic (2002-03 para 1446). Yet Stalford argues that social citizenship (which among other things presupposes participation) provides “a legitimate expression and enhancement of children’s role in society” (2000: 121) and allows for the recognition of children’s dependency on adults. Dependency is a basic human condition and the fact that children are to varying degrees dependent upon their parent(s) does not mean that their demands for inclusion and rights can be ignored. The language of civil and political rights however does not so easily embrace the fact of our interdependency. Stalford cites Lister’s argument in support of social rights as integral to claims to citizenship in that “they help to promote the effective exercise of civil and political rights by groups who are disadvantaged in terms of power and resources” (Lister, 1997: 16). In the context of debates on children’s rights (at the risk of some simplification) what children need is empowerment not protection: the empowered child will be a child enjoying civil, political and social rights and a child in less need of protection (Lansdown, 2001)37.

This chimes with Morrow’s observation in research into children’s perspectives on children’s rights where she writes that “it was not the lack of the right to vote which preoccupied these children, but the lack of autonomy and inclusion in decision-making” (Morrow, 1999: 155). Morrow concludes that children “want to have a say” but not necessarily decide – it depends on what is being decided. The demand is for inclusion not total decision-making autonomy; later she writes that “children don’t tend to use the language of rights”, and that their demand for inclusion reflects their “embedded-ness in sets of social relations” (ibid. 166-7).

The UNCRC can be seen as having heralded and helped legitimise a new language of children’s rights. In addition through the setting up of formal reporting mechanisms whereby the government has to participate in public discourse around children’s rights it has created the conditions for a new politics of children’ rights. Current governmental policy and practice is influenced by this agenda not only because of the reporting mechanism in the UNCRC whereby the government has to submit a report on progress in meeting its obligations under the UNCRC to the Committee on the Rights of the Child but also because the scope and language of the UNCRC provides a platform upon which children and young people, children’s rights NGOs and activists have campaigned, and are campaigning, for change in social practice.

The government’s anxieties about being perceived to be interfering in family life, which only obtains in some situations, has resulted in the drive for reform coming from non-governmental organisations and the voluntary sector. The Parliamentary Joint Committee on Human Rights has raised concerns about the interpretation of ‘reasonable chastisement’ by courts and juries and noted that “wide range of international opinion does not accept that the continuance of the statutory defence of reasonable chastisement is compatible with the UK’s international obligations – not only with Article 19 of the CRC but also with the child’s right to equal treatment under the law” (Tenth Report 2002-03 Para. 96). The right to bodily integrity is central to any claim to citizenship38.

Increasingly (or at least at the level of rhetoric) government wishes to be seen as respecting children’s rights and increasingly justifies policy on this basis. However sceptical our reading of governmental intention and practice might be, a number of developments over the past decade
reveal how central the child question, including the issue of children’s rights, has become.39.

The contemporary emphasis on participation, key to the debate over the UNCRC, is critical. It can be seen as an acceptable extension of rights – after-all adults (including professionals and parents) are not relinquishing their power to decide ultimately. However this demand for inclusion, for the right to participate, is integral to the project of imagining different kinds of adult-child relations and thus different encounters between children and professionals (Roche and Tucker, 2003). It is about recognising the multiplicity of voices in debates over children’s rights, of differently positioned children and their communities (e.g. family, school, neighbourhood). While the form of such conversations is uncertain, especially in professional settings, ultimately children’s rights are about rethinking and redefining adult child relations and are a means “with which to articulate challenge and hold to account relationships of power”. As Federle argues (1994: 355-6):

…rights claims challenge existing hierarchies by making the community hear different voices. Community and claiming are part of a slow historical process that will invigorate the debate about children’s rights and will, someday, lead to a better life for children through the articulation of ideal relationships between children and adults in the larger community.

The way in which we think about children and children’s rights has to shift and in that process adult practices practice centring on children will shift. The rhetoric of rights is as much about shifting our imagination as it is about specific demands for legal change. That said legal challenges based on the ECHR have had and will continue to have a key role here. So will mobilising around the UNCRC have a social impact creating new possibilities on the standing of children and as a consequence the context within which the ECHR makes judgements about human rights. We might all benefit from taking children and their rights more seriously. Masson and Winn Oakley in their discussion of the position that children find themselves in the court process suggest (1999: 144) that “greater opportunities to participate, where they wished to do so, might encourage some children to engage with the proceedings”. This would necessitate “changes in court practice, such as clearer use of language, shorter hearings and more attention to the needs of ordinary people”: this might also benefit all of us - parents, relatives and carers. This is a major cultural project.

Drawing on the broader language of the UNCRC, increasingly children themselves are challenging and resisting adult constructions of incompetence (see Alderson, 2000). The children’s rights movement engages with the law and law reform but not to the exclusion of other objectives and strategies. Stasilius writes that activist children ‘seek influence through a range of forms of more direct democratic engagement and opposition’ and do not see “protection and agency as mutually exclusive” (2002: 507-538).

CONCLUSION

The language of human rights is fixed in international documents and treaties and subject to debate and interpretation as lawyers’ law: it is also changing, albeit slowly. For instance as we have already seen, Article 2 of the First Protocol to the ECHR emphasises parental rights in the education sphere; similarly the equivalent provisions of the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). In contrast Article 14(1) and (2) of the UNCRC provides that ‘States Parties shall respect the right of the child to freedom of thought, conscience and religion’ and ‘the rights and duties of the parents…to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child’. This different emphasis is a reflection perhaps of changes in the perception of the proper parental role when these texts were adopted, the more recent UNCRC reflecting a more child-centred approach40.

Peterson and Parisi in their analysis of the ‘maleness’ of the human rights discourse do not “intend to dismiss the progressive possibilities of human rights or denigrate activities in pursuit of rights” (1998: 154). Rather their concern is to reveal the framing of human rights, thereby to render visible their limitations – “Only then can we adequately theorize and effectively eliminate social hierarchies and their structural violence” (ibid.). From the standpoint of children the limitations of human rights arise in part from children’s social position (in home or at school), the significance of family privacy within western liberalism and the power of paternalistic ways of viewing children. Debates around human rights
are about re-imaging social relations, arguing for a core sense of how we should treat each other and are not confined to the courtroom. These debates are informed by more than a lawyer’s sense of human rights and the ECHR; they also connect with and are reflected in changing social attitudes and practices centring on children and in which children have agency. They serve to underscore the idea that the demand for children’s rights today is fundamentally a cultural project: a project in which the politics of children’s rights centring on the UNCRC will play a key role at two levels. At the social level, by preparing the ground for and providing the opportunity for children themselves to influence social debate (this might be accomplished via representation or advocacy projects or by demands for access to information) and in law by shifting the common sense understandings (which are not immutable) of what it is to be a child. As Paolo Freire wrote albeit in a different context, “how can I dialogue if I start from the premise that naming the world is the task of an elite” (1972: 71) Children are challenging that adult premise, and the modern children’s rights movement’s claims to citizenship are supported by the fluid and aspirational character of the UNCRC as well as the more evolutionary and cautious decisions based on the ECHR.

NOTES

1 The ECHR was ratified by the UK in 1951 and from 1966 UK citizens were allowed to petition the European Court of Human Rights (ECtHR) in Strasbourg. Before 1st November 1998 there were two key institutions charged with interpreting and applying the ECHR – the European Commission of Human Rights and the ECtHR. The Commission would decide whether a case was admissible and if so give its opinion and if there was still no settlement the ECtHR would hear the case. On 1st November 1998 the European Commission was abolished and an enlarged and full time ECtHR now undertakes all investigative and judicial functions under the ECtHR.

2 Gillick v West Norfolk and Wisbech Area Health Authority [1986] A.C. 112, [1985] 3 WLR 830

3 One concrete consequence of the House of Lords judgement was that those who worked in family planning settings were now reassured that they would not be acting unlawfully in providing such advice and treatment - this was of practical significance for many young women – see ‘Victory for Mrs Gillick is a tragedy for thousands of young people’ Guardian 30 th January 1985. Despite Gillick paternalistic decisions were and could be justified e.g. the difficult cases around the imposition of life saving medical treatment on 15 year olds (Fortin, 2002; Roche,1996).

4 Any more than domestic violence is.

5 Where there is sexual activity on the part of young people under the age of 16 Crown Prosecutors rather than the police will make the charging decision and do so on the basis of the Code for Crown Prosecutors. According to the Guidance on Part I of the Sexual Offences Act 2003 ‘it is not intended that young people should be prosecuted or issued with a reprimand or final warning when the sexual activity was entirely mutually agreed and non-exploitative’ (Para 72)

6 The average case would cost £30,000 and take five years to reach the European Court of Human Rights in Strasbourg. Under the HRA 1998 it is ‘unlawful for a public authority to act in a way that is incompatible with a Convention right’ (section 6(1) HRA 1998) Those who wish to complain of a breach of their human rights can now do so via a standing application or by raising it in existing proceedings and domestic courts and tribunals are required to take into account the jurisprudence of the ECtHR in their proceedings.

7 There are already a number of excellent academic commentaries on children and human rights – see for example Masson 2002 and Fortin 2001 It should also be noted that what follows is not a comprehensive review of all human rights cases involving children. For example I do not discuss the Gaskin decision which concerned the rights of a man who, as a child had been in local authority care, to have access to his social service records; the decision led to the Access to Personal Files (Social Services) Regulations 1989 and is necessary for the protection of children’s health and morals, although it might constitute, from a particular child’s point of view, an interference with his or her own private life’, (1974) 2 DR118,119.

8 Campbell and Cosans v UK (1982) 4 EHRR 293

9 Costello-Roberts v UK (1995) 19 EHRR 112

10 Y v UK (1994) 17 EHRR 238

11 R (Williamson) v Secretary of State for Education and Employment [2003] 1 FLR 726

12 A v UK (1999) 27 EHRR 611

13 The Children Act 2004 now limits the parental right of reasonable chastisement

14 Neilsen v Denmark (1988) 11 EHRR 175 It should be noted that this was a controversial decision at the time and the view is that if such a case was to come before the ECtHR today the decision would be different – see Van Beuren 1996

15 In X v Netherlands a 14 year old girl who had run away from her parents was returned home by the authorities. She complained that they had placed more weight on her parents’ ‘right to family life’ than her own. The European Commission on Human Rights stated that ‘As a general proposition, and in the absence of any special circumstances, the obligation of children to reside with their parents and to be otherwise subjected to particular control is necessary for the protection of children’s health and morals, although it might constitute, from a particular child’s point of view, an interference with his or her own private life’, (1974) 2 DR118,119.

16 In R v Kirklees Metropolitan Borough Council ex parte C [1993] FLR 187 a 12 year old girl who was in local authority care was informally admitted into a psychiatric hospital against her will. She sought judicial review of the lawfulness of her admission
and detention. The High Court decided that she was not Gillick competent and therefore the local authority was entitled to consent to her informal admission on her behalf. The Court of Appeal upheld this judgment. The practical consequence of such informal admission is that the child or young person does not have any of the protective procedural safeguards as specified in the Mental Health Act 1983. Of course the justification for this practice is that it ‘protects’ the child or young person from the stigma of having been formally admitted into a psychiatric hospital.

18 Re S (Contact: application by sibling) [1998] 2 FLR 97

19 Welbourne (2002:284) points out that the Draft National Adoption Standards 2001 lists factors to be taken into account in considering children’s post-adoption placements. Birth parents, wider birth family members and other people who are important to them – no mention here is made of rights, the emphasis is on the child’s ‘needs, wishes, feelings, welfare and safety’


21 When he was aged eleven as a result of an assault on a member of staff the Secretary of State gave approval for K to be placed in secure accommodation – under Regulations 4 and 5 of the Children (Secure Accommodation) Regulations 1991 the secure placement of a child aged under 13 requires prior approval of the Secretary of State. In 1998 he was involved in a series of violent incidents.

22 In other words deprivation of liberty (outside of the operation of the criminal justice system) in order to be compatible with the ECHR has to come within the exceptions as specified in article 5(1) (a)-(c).

23 Boumar v Belgium (1988) 11 EHRR 1

24 See Johansen v Norway (1997) 23 EHHR 33

25 These are in contrast to social rights and the concentration on the civil and political rights of children deflects our attention way from children’s dependency on adults. Stafford (2000:120-1) observes that perhaps the emphasis on the civil and political rights casts children’s rights in opposition to adults’ rights. Rather she argues for an equal emphasis on social citizenship, with its incorporation of ‘ideological notions of participation, inclusion and equality’; this might provide a better platform for the enhancement of children’s role in society.

26 However before moving on to a different level of analysis of children and human rights it is important to consider the positive obligations that attach to many of the provisions of the ECHR. The jurisprudence of the ECHR makes it clear that states are required not only to refrain from interfering with convention rights but to take positive steps to secure these rights. Thus states have to take action to protect children from abuse if such abuse constitutes ‘inhuman or degrading treatment’ – see A v UK (1999).

27 Williams for example sees rights as part of the process whereby the human body is transformed into the social being (1991:164).

28 Here I am referring to the qualifying words that are an integral part of most of the provisions of human rights instruments. For example the ‘right to respect for private and family life’ under article 8 of the ECHR can be interfered with by a public authority if it is ‘in accordance with the law and is necessary in a democratic society in the interests of national security, public safety… for the protection of health or morals, or for the protection of the rights and freedoms of others’.

29 We also need to be alive to the heterogeneity of these categories – as Baxi observes the motto “women’s rights are human rights’ often masks, with grave costs, the heterogeneity of women in the civilizational and class positions” (Baxi.2002:78). A similar observation can be made regarding children who can be of different ages and who are viewed very differently, not only by birth parents, wider birth family members and other people who are important to them – no mention here is made of rights, the emphasis is on the child’s ‘needs, wishes, feelings, welfare and safety’

30 In this regard I am connecting with the arguments of feminists like Hughes who has argued that male philosophers have always seen women and children as belonging to the category of ‘not men’: this category also includes animals, madmen, slaves, imbeciles (1996:15).However she goes on to counsel against treating all those who belong to this group as the same – children are not identical to women. That said she advises us to be ‘very suspicious’ about claims regarding the distinctiveness of children (ibid.17).

31 Feminist scholarship has been key in opening up more critical understandings of family life. A key theme in much feminist writing has been the analysis and exploration of the fictional unity of family life, seeing it as a cover for male supremacy (O’ Donovan:1993). Feminists have so challenged and disrupted traditional views of family life it can no longer be argued that the family is a simple unity of interest or that power is exercised in a benign or fair way.

32 For example rationality and independence.

33 Hoyles commenting on educational programmes for children on child abuse points out that their aim is to teach children ‘that their bodies are their own and that they can say no’. He observes that ‘the irony seems lost on many people that children are hardly encouraged to say no in any other circumstance…They are not meant to take power over their own lives. The fact that many people still believe in corporal punishment indicates that for them the physical abuse of children is acceptable’ (1989:122).

34 In 1924 the League of Nations passed the Declaration on the Rights of the Child. This was in effect a statement of the duties owed by ‘mankind’ to provide for and protect children. Again in 1959 the United Nations passed the U N Declaration on the Rights of the Child also focused on the protection and welfare of children. Thus both instruments were concerned with the welfare and protection of children rather than their civil, social and political rights.

35 There is no equivalent provision in the Children Act 1989 though children do enjoy a number of procedural rights, albeit contingent, which allow them to participate e.g. to apply to the court for
leaf to apply for a section 8 order (Roche, 2002).

36 Joint Committee on Human Rights (Tenth Report 2002-03 Para. 14)

37 This is a radical agenda and is part of the explanation why even though the UNCRC has been ratified by every country in the world, save for the USA and Somalia, many of those who have ratified it have entered significant reservations. Thus Rwezaura (1998) observes that despite the world wide acceptance of the UNCRC the politics of children’s rights varies from region to region and from locality to locality (Lim and Roche, 2000; see further Fottrell 2000).

38 The Children Act 2004, Section 58 has amended the defence of ‘reasonable chastisement’ so that it will not be available in respect of a charge of assault which amounts to either actual or grievous bodily harm or cruelty to a child: it is still available as a defence where the assault amounts to common assault.

39 For example alongside the current war on child poverty in the UK the Children Act 2004 contains provisions for the establishment of a Children’s Commissioner to promote the views and interests of children. The Children Act now imposes a duty on the Children’s Commissioner to have regard to the UNCRC – earlier drafts of the Bill had only referred to a power. There are numerous other initiatives within the English legal system centring on the interest of children and promoting their participation e.g. the Regulations and Guidance implementing the new provisions in the Children Act 1989 requiring local authorities to make arrangements for the provision of advocacy to children and young people making complaints under the Act.

40 Yet there are still many accounts of professionals failing to engage with or ‘see’ the child. Victoria Climbié’s right to life (Article 2 of the ECHR) was not promoted or safeguarded by the many professionals she came into contact with. As the Laming Report stated ‘at virtually no point did anyone bother to ask Victoria what was happening to her’ (2004:para. 1).

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KEYWORDS Adult-child relations; civil and political rights; current debates; parental authority

ABSTRACT The language of rights and human rights has wide currency and finds institutional expression in among other things the European Convention of Human Rights (ECHR) which in theory at least guarantees the our human rights. I argue that the ECHR’s seeming inclusiveness is problematic and that while the text of the ECHR is inclusive of children and their interests the interpretation of the ECHR by the courts reveals a number of assumptions regarding children and adult-child relations which operate to undermine a broader conception of children’s human rights. The United Nations Convention on the Rights of the Child (UNCRC) however has given rise to new political possibilities providing a resource whereby the necessary re-imagining of adult-child relations, which is at the heart of the children and citizenship debate, can take place.

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