

# The Youth Justice System in England and Wales: Complying with International Human Rights Law

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The youth justice system in England and Wales has repeatedly been criticised for its treatment of children's human rights. For example, in 2003 an umbrella group of children's rights organisations published a report calling for a comprehensive review of the system of justice for children in England and Wales (P Hibbert, S Moore and G Monaghan, *Children in Trouble: Time for Change* (Barnardo's, 2003)). This report argued that the youth justice system in England and Wales has failed to comply with Britain's legal obligations regarding children's human rights. The root of this criticism is that the youth justice system is not built on the framework provided by the United Nations Convention on the Rights of the Child 1989 (UNCRC). This article will consider whether the youth justice system in England and Wales is complying with its obligations under the UNCRC. I will first examine what obligations exist and then investigate to what extent the youth justice system in England and Wales is falling foul of these obligations.

## United Nations Convention on the Rights of the Child 1989

The preamble of the UNCRC recalls that the Universal Declaration of Human Rights 1948 proclaims: 'Childhood is entitled to special care and assistance'. In accordance with this ideal, the UNCRC emphasises the need for a child-centred youth justice system, as distinct from a punitive system, in which the child's interests are paramount and the inherent dignity of the child is preserved. Accordingly, Art 18.2 of the UNCRC sets out the obligations of the state to assist families in raising their children:

'States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.'

Article 40 of the UNCRC requires states to promote the 'dignity and worth' of any child alleged, accused or recognised as having committed a criminal offence. Furthermore, the UNCRC requires each state to set a reasonable minimum age of criminal responsibility, to provide non-judicial methods of dealing with children in conflict with the law, and to establish alternatives to institutional care. A variety of dispositions such as care, guidance, supervision

orders, counselling, probation, foster care, educational and vocational training programmes and other alternatives to institutional care should be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence (Art 40.4). These provisions are complemented by Art 37, which requires that imprisonment shall be used 'as a measure of last resort' and when children are imprisoned, it must only be for the shortest period of time. The UK ratified the UNCRC in December 1991; ratification of the Convention is a commitment binding in international law. Ratifying states are required, as a matter of legal obligation, to protect Convention rights in their law and practice. Thus in England and Wales the state has a conventional obligation to safeguard and promote the general health and welfare of its youngest citizens up to their eighteenth birthday. Furthermore, in 1996 the Council of Europe adopted a European strategy for children, urging Member States to fully implement the UNCRC, as well as relevant European Conventions to ensure children's rights. Although the recommendations of the Council of Europe are not legally binding, they are adopted unanimously and so carry weight and indicate a common approach to policy and minimum standards.

The principles and provisions of the UNCRC are informed by a number of more detailed standards and guidelines, for example the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines). Although these instruments are purely recommendatory and are non-binding, in that they have no direct legal impact upon either international or national legislative bodies, they do serve to identify current international thinking on human rights for young people and they represent the minimum recommended standards on youth justice issues. The UK has committed itself to aspire towards fulfilling all the obligations outlined in these instruments. Article 4.1 requires that the age of criminal responsibility not to be set at too low an age level, bearing in mind the emotional, mental and intellectual maturity of the child. However, the UN Committee has not identified an age at which criminal responsibility can be fairly attributed. Article 1.2 of the Beijing Rules stresses the idea that the state should ensure a productive life for young people within the community so as to encourage in them a process of personal development and

education 'during that period in life when she or he is most susceptible to deviant behaviour'. The Beijing Rules point to the important role that a constructive social policy for young people could play in tackling youth offending. These broad fundamental perspectives refer to comprehensive social policy in general and aim at promoting juvenile welfare to the greatest possible extent, which will minimise the necessity of intervention by the youth justice system, and in turn will reduce the harm that may be caused by any intervention. Such care measures for the young, before the onset of juvenile offending behaviour, are basic policy requisites designed to avoid the need for the application of the Beijing Rules.

The 1990 Riyadh Guidelines emphasise that policies should avoid criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or to others. The Riyadh Guidelines stress that the successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents with respect for, and promotion of, their personality from early childhood. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society, young people can develop non-criminogenic attitudes. The Riyadh Guidelines recommend that policies and measures should involve the provision of opportunities to meet the varying needs of young people and to serve as a supportive framework for safeguarding the personal development of all young people, particularly those who are demonstrably endangered or at social risk and are in need of special care and protection. The Guidelines support preventive policies which facilitate the successful socialisation and integration of all young people, in particular through the family. Article 33 states that:

'Communities should provide ... a wide range of community-based support measures for young persons, including community development centres, recreational facilities and services designed in view of the special problems of children in a situation of social risk.'

The child's right to special protection is reiterated in other, non-child specific, human rights documents, such as the United Nations Standard Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules), which promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as promoting a sense of responsibility among offenders towards society. The Tokyo Rules emphasise the principle of minimum intervention. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 is also relevant. This Declaration considers one of its principal aims to be the promotion of community efforts and public participation in crime prevention. At the 96th plenary meeting of the General Assembly

of the United Nations, Resolution 40/35, 'Development of Standards for the Prevention of Juvenile Delinquency', was adopted, which recognised that the prevention of youth crime includes measures for the protection of juveniles who are abandoned, neglected, abused and in marginal circumstances, and in general those who are at social risk. It was also acknowledged that one of the basic aims of the youth justice system is the provision of requisite assistance and a range of opportunities to meet the varying needs of the young, especially those who are most likely to commit crime or be exposed to crime, and to serve as a supportive framework to safeguard their proper development. Member States were requested to study the situation of juveniles at social risk and to examine the relevant policies and practices of prevention within the context of socio-economic development and to adopt distinct measures and systems appropriate to the welfare of juveniles at social risk.

The philosophy that directs the general principles of the United Nations Convention, Rules, Guidelines, Declarations and Resolutions is essentially based on the protection of the personality of all young people below 18 years of age and on the mobilisation of existing resources within the community. These instruments of international law emphasise the need for youth crime policies and interventions to avoid a narrow focus on the crime and to take into account the social and contextual factors that are frequently associated with youth offending (R Arthur, 'Punishing Parents for the Crimes of their Children' (2005) 44(3) *Howard Journal of Criminal Justice* 233). All of these United Nations Conventions, Rules, Guidelines, Declarations and Resolutions on youth justice and responses to children who offend consistently stress the principle of decriminalisation and diversion. Thus, under international law states should only imprison young people as a measure of last resort. International law requires the UK to have a system for diverting young people from imprisonment and the youth courts and promoting the fulfilment of each young person's potential. In the next section I will examine those areas of the youth justice system in England and Wales which are failing to comply with its international law obligations.

## **The youth justice system's failure to comply with international law**

The youth justice system in England and Wales has attracted much international and domestic criticism for its failure to fulfil its obligations under international law. The United Nations Committee on the Rights of the Child has repeatedly recommended that the UK establish a system of youth justice that fully integrates into its legislation, policies and practice the provisions and principles of the Convention, the Beijing Rules, the Riyadh Guidelines and the Tokyo Rules. In its 2002 Report, the Committee on the Rights of the Child recommended that the UK adopt the best interests of the child as a

paramount consideration in all legislation and policy affecting children throughout its territory, most notably within the youth justice system (United Nations Committee on the Rights of the Child, CRC/C/15/Add.188, Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Concluding observations: United Kingdom of Great Britain and Northern Ireland (UNCRC, 2002)). Article 3 of the UNCRC states that:

‘in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies, the best interests of the child shall be the paramount consideration.’

However, s 37 of the Crime and Disorder Act 1998 places all those carrying out functions in relation to the youth justice system under a statutory duty to have regard to the principal aim of preventing offending by children and young people. The British government has even suggested that this principal aim of preventing offending should be elevated to the single main consideration when sentencing young offenders (Home Office, *Youth Justice: The Next Steps* (Home Office, 2003), at para 6). The government proposed that this aim be supported by requirements for sentencers to also take into account factors such as the extent to which punishment is needed; whether, and if so how, there needs to be public protection because of the seriousness or persistence of the offending; the individual’s age and vulnerability; the costs of interventions; evidence of their effectiveness; whether there should be a restorative or reparative approach and/or obligations on the young person’s parents; and what particular interventions have been tried if the person has been sentenced before and what would be appropriate now. Remarkably, taking account of the best interests or the welfare of the child has been omitted from the list of considerations. Thus the ‘best interests’ of the child has been discarded as a consideration and displaced by the central aim of ‘preventing offending’. However, the government’s commitment to preventing offending rings somewhat hollow in light of the admission by Rod Morgan, the chairman of the Youth Justice Board, that presently ‘a mere 2.5% of the overall youth justice budget’ is being spent on preventing offending (R Morgan, ‘The value of targeted prevention programmes’ (2005) 26 *Youth Justice Board News* 11).

The United Nations Committee has also recommended that there be a review of all orders introduced by the Crime and Disorder Act 1998 in order to ensure their compatibility with the principles and provisions of the Convention. The Crime and Disorder Act 1998 introduced anti-social behaviour orders (s 1), child safety orders (s 11) and local child curfews (s 14). These orders do not require the child to commit a criminal offence before they are applied. This tendency to criminalise young people alarmed the United Nations Committee. The

Committee was concerned that the Crime and Disorder Act 1998 reflects an ideological conviction in favour of punishment in which more and more young people are brought within the criminal justice system for an ever-growing range of behaviour. In particular, s 73(2)(b) of the 1998 Act gives the Secretary of State power to make custody available for children under the age of 12 and courts will be able to use it where necessary for the protection of the public from his further offending, whether or not the offences are serious. Furthermore, s 130 of the Criminal Justice and Police Act 2001 grants the courts new powers to remand into secure accommodation persistent young offenders aged 12–16. The Criminal Justice and Public Order Act 1994 allows for children as young as 10 years of age to be detained in custody for grave crimes such as manslaughter or other crimes of violence. Also, the presumption of *doli incapax* was abolished by s 34 of the Crime and Disorder Act 1998, a measure that erodes the special protection historically afforded to children, thus rendering English and Welsh children almost alone in Europe in being regarded as criminals at the age of 10 (S Bandalli, ‘Abolition of the presumption of *doli incapax* and the criminalisation of children’ (1998) 37 *Howard Journal of Criminal Justice* 114).

The United Nations Committee on the Rights of the Child expressed increasing concern that in England and Wales the treatment of children in conflict with the law is deteriorating. In particular, the UN Committee was concerned that the age at which children enter the criminal justice system is low; that the principle of *doli incapax* was abolished; that an increasing number of children are being detained in custody at earlier ages for lesser offences and for longer sentences; that children between 12 and 14 years of age are being deprived of their liberty; and that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time (United Nations Committee on the Rights of the Child, CRC/C/15/Add188, Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Concluding observations: United Kingdom of Great Britain and Northern Ireland (UNCRC, 2002), at para 59). England and Wales has not only one of the lowest ages of criminal responsibility, but also locks up more young people than most other countries in Western Europe. The institutions of incarceration – Young Offenders Institutions – are characterised by appalling conditions, over-crowding, brutality, suicide and self-harm. In summary the youth justice system in England and Wales has developed into a formal and rigid system which draws younger children into contact with the youth justice system and escalates them up the sentencing ladder and into custody. This tough approach to youth justice clashes with the preventive approach promoted in the UNCRC and the associated Rules, Guidelines, Resolutions and Declarations.

# Features

The United Nations Convention, and the associated Rules, Guidelines, Declarations and Resolutions, stress decarceration, decriminalisation and prevention of youth crime, yet the youth justice system in England and Wales relies increasingly heavily on custodial sentences and persistently ignores the criticisms of the United Nations Committee on the Rights of the Child and other human rights organisations. In *Youth Justice: The Next Steps* (at p 3), the government sets out its vision of how the youth justice system will develop over the next few years. The key proposals are to: strengthen parenting interventions; improve understanding of trials and trial preparation; manage remandees better in the community; establish a simpler sentencing structure with more flexible interventions; run community intensive supervision and surveillance as the main response to repeat and serious offending, while still having custody available; introduce a more graduated progression between secure, open and community facilities; and improve youth justice skills and organisation. In the 2004 review of the youth justice system, the government boasts the main improvements which have been made in reforming the youth justice system since 1997 as including: the introduction of a range of innovative new sentences and pre-court disposals; creating a discrete juvenile secure estate; halving the time taken for a persistent young offender to proceed from arrest to sentence; and unifying the system around a principal aim of preventing offending (Home Office, *Government response to the Audit Commission Report – Youth Justice 2004: A review of the reformed youth justice system* (Home Office, 2004), at para 1). While all of these aspirations and achievements are laudable, nowhere in either of these documents is there any mention of the human rights of young people, of protecting the best interests of the child, or of Britain's obligations under international human rights law. The youth justice system should be based on a human rights framework which would provide

a clear set of principles upon which law, policy and practice could consistently be based. The aim must be to establish an effective children's rights centered system for treating children in trouble with the law that complies with Britain's international law obligations. Systems for responding to juveniles who are in trouble with the law that are purely punitive in intent, including the use of custody, are not in the best interests of the child or society and are incompatible with children's human rights.

## Conclusion

Present youth justice policy in England and Wales tends to focus primarily on retaliatory responses to youth crime. Young offenders have been conceptualised as violent predators warranting retribution, rather than as wayward children in need of a guiding hand (R Arthur, 'Young Offenders: Children in Need of Protection' (2004) 26(3&4) *Law and Policy* 309). This attitude towards young offenders has ensured that policy and practice in relation to children in trouble is concentrated upon punishment, retribution and the wholesale incarceration of children, contrary to the provisions and principles of the UNCRC. International law could potentially advance the rights of young people and create a just youth justice system that is more child-centred. Youth crime will only be prevented if we are prepared to take these young people's rights more seriously. As Cunneen and White asserted: 'if young people's rights are not respected ... then why should they respect law and state institutions?' (C Cunneen and R White, *Juvenile Justice: An Australian Perspective* (Oxford University Press, 1995), at p 267). Proper implementation of the UNCRC, the Beijing Rules, the Riyadh Guidelines, the Tokyo Rules, the 1985 Declaration and the 1990 Resolution could have important consequences for the delivery of youth justice, creating a system that is inclusive and diversionary.