

International Child Law

Trevor Buck



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Publisher's Note

The publisher has gone to great lengths to ensure the quality of this reprint
but points out that some imperfections in the original may be apparent

This book is dedicated to my wife, Barbara Buck.



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PREFACE & ACKNOWLEDGMENTS

The aim of this book has been to provide the reader with an accessible introduction to International Child Law, a subject that spans both traditional areas of private international law and public international law. There is also some critical commentary in each chapter and hopefully sufficient 'further reading' and 'Internet resources' material at the end of each chapter for the reader to be able to pursue specialist topics in greater depth. There has been an increasing number of international instruments, both at the global and regional level, that impact on children's lives. Children's issues have taken on greater importance in the policy agendas of many states. A greater focus on, and concern for, our children is literally an investment in the future that governments must not ignore.

Chapter 1 of the book provides some context for the reader on the concepts of 'childhood' and 'children's rights' from a number of disciplinary perspectives. Chapter 2 provides a brief account of the relevant international institutions and sources of international law for those unfamiliar with this territory. Chapter 3 outlines the structure and importance of the United Nations Convention on the Rights of the Child, arguably now the 'gold standard' of international child law. Chapter 4 analyses the problem of child labour and its international regulation. Chapter 5 discusses the emerging framework of European law relating to children's issues in Europe. Chapter 6 focuses on international parental abduction and the operation of the relevant Hague Convention. Chapter 7 addresses the problem of intercountry adoption and its international control by means of another Hague Convention. Finally, some concluding remarks on the state of the world's children are offered in Chapter 8. The main international legal instruments and some other material is included in the Appendices that correlate broadly to the subject matter of each of the first seven Chapters.

The book does not pretend to offer complete or comprehensive coverage of what has become a significant area of interdisciplinary study. The coverage, of necessity, has to be selective, though there are a number of cross-references between the various chapters to guide the reader through the material. To some extent, the shape of the book has followed the interests of my postgraduate students to whom I have taught International Child Law for the past nine years. However, I would be interested to hear from those of you who have enjoyed reading this book, and any suggestions you may have to improve or add further contents in any future edition.

My acknowledgments must go to my colleagues Dr Aileen Kavanagh and Professor Robin White for reading and commenting on certain sections of the book, but of course any remaining inaccuracies in the text are all mine. Thanks are also due to Jane Sowler who provided assistance with proof reading. Finally, my thanks also to all my past and present students of International Child Law.

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29 March 2005*



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ABBREVIATIONS

African Charter on Human and Peoples' Rights	Banjul Charter
African Charter on the Rights and Welfare of the Child	ACRWC
Economic, Social and Cultural Rights Committee	ESCRC
European Committee of Social Rights	ECSR
European Convention on Human Rights	ECHR
European Convention on the Exercise of Children's Rights	ECECR
European Court of Human Rights	ECtHR
European Court of Justice	ECJ
European Union	EU
International Court of Justice	ICJ
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Confederation of Free Trade Unions	ICFTU
International Labour Organisation	ILO
International Law Commission	ILC
International Monetary Fund	IMF
International Programme on the Elimination of Child Labour	IPEC
Millennium Development Goals	MDG
Non-Government Organisation	NGO
Office of the High Commissioner for Human Rights	OHCHR
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts	OPAC
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	OPSA
Organisation for African Unity	OAU
Organisation for Security and Co-operation in Europe	OSCE
Time-Bound Programme	TBP
UN Commission on Human Rights	UNCHR
UN Convention on the Rights of the Child	CRC
UN Educational, Scientific and Cultural Organisation	UNESCO
UN Population Fund	UNFPA
United Nations Children's Fund	UNICEF
United Nations	UN
World Health Organisation	WHO



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CHAPTER 1

CHILDHOOD AND CHILDREN'S RIGHTS

The international law relating to children is best understood by considering at the outset what we mean when we talk about 'childhood' and 'children's rights'. At first sight, these two concepts seem straightforward, but on closer examination they turn out to be quite contestable notions. 'Childhood' assumes some kind of understanding of what it means to be a child and, by implication, an adult. 'Children's rights' assumes a background framework of knowledge about 'human rights' of which children's rights can be considered a part. In short, the way in which we perceive childhood and children's rights will have a highly significant bearing on how we view international child law and the international community's approach to legal regulation and standard setting. This chapter seeks to introduce the reader to these two important concepts.

1.1 CHILDHOOD

The following sections include a brief overview of the historical, psychological, sociological and social policy perspectives on childhood. The study of childhood has become a truly multi-disciplinary activity. Indeed, there are now a number of research centres dedicated to the study of childhood, see the 'Internet Resources' at the end of this chapter.

1.1.1 Historical perspectives

Ariès's (1962) work is the classic historical study of the notion of childhood and his analysis is often referred to in the literature as simply the 'Ariès thesis'. Ariès examined the iconography in art and literature over several centuries to identify an emerging 'discovery of childhood'. He suggested that in mediaeval society the concept of childhood simply did not exist at all. He argued that infants below seven years old were recognised as physically vulnerable, but their parents were largely indifferent to them, probably due to the high levels of infant mortality. After seven years of age, the child was simply regarded as another (smaller) adult. By contrast, from about the 15th to the 17th centuries, Ariès suggested a transition had occurred in the prevalent notion of childhood: the child was perceived as a significant family member to be nurtured and protected. Ariès reinforced his views by pointing to the historical development of education for the young, and the establishment of the 'child' as a central figure in the appearance of the 'family', itself a newly developing institution emerging over the centuries. Subsequent commentators have questioned Ariès's thesis and methodology, and indeed some of his conclusions do not appear to be sufficiently supported by the evidence.

Archard (1993) has provided a carefully crafted deconstruction of Ariès's influential thesis. He points not only to its weak evidential basis but also to Ariès's 'predisposition to interpret the past in the light of present-day attitudes, assumptions and concerns'. Furthermore, he argues that Ariès subscribes (wrongly) to an historical understanding of 'modernity' as a linear progression to moral enlightenment. Instead, Archard argues, one can employ a distinction between a 'concept' and a 'conception' to better analyse Ariès's thesis. The argument, in brief, is that to have a *concept* of childhood is to recognise that

there is a distinction between children and adults. To have a *conception* of childhood is a specification of what are the distinguishing attributes. Archard concludes that all societies at all times have had a *concept* of childhood, but there have been a number of different *conceptions*. Historically, we cannot be confident about the reliability of our knowledge in relation to these conceptions. He therefore concludes that Ariès's thesis is flawed by what he refers to as an 'ill judged leap' from 'concept' to 'conception'.

Archard also provides an interesting conceptual framework to accommodate the examination of different 'conceptions' of childhood. He introduces three elements to the notion of childhood: its 'boundaries', 'dimensions' and 'divisions'. He defines the 'boundary' for childhood as the point at which it ends. He argues that any particular society's 'conception' of this boundary may be different according to its culture. Conceptions of childhood frequently locate the relevant boundary in relation to cultural 'rites of passage or initiation ceremonies which celebrate the end of childhood and beginning of adulthood'. According to Archard, '[t]hese are likely to be associated with permission to marry, departure from the parental home or assumption of the responsibility to provide for oneself'.

Conceptions of childhood may also differ according to their 'dimensions'. Archard suggests that a number of perspectives would render a distinction between children and adults, for example, moral, juridical, philosophical and political. Each society will have its own particular value system that may at any one time favour one or more of these perspectives. Sometimes a society sets the legal age of majority according to a view about one or more of these dimensions. A majority age need not necessarily be consistent with the 'boundary' implied by other dimensions. By way of illustration of this point, Archard points to the origins (in Europe) of the age of majority, which was fixed in the Middle Ages by the capacity of a young boy to bear arms and changed as armour became increasingly heavier and thus demanded greater strength to wear it. If, however, rationality is the key dimension, then the acquisition of reason is a better test of majority age. Similarly, in societies that focus on the overriding importance of sustaining and reproducing life, 'the ability to work and bear offspring is a strikingly obvious mark of maturity'.

Finally, Archard argues that conceptions of childhood will also depend on how its 'divisions' are ordered and managed. In most societies, there are a number of sub-categories between birth and adulthood. Most cultures recognise a period of very early infancy where the child is particularly vulnerable and deserving of adult care; a point which is consistent with the findings of developmental psychology outlined below. Some cultures attach importance to weaning, the point at which close maternal care ends. Some societies put particular significance on the point at which a child acquires speech. Roman law specified three age periods of childhood: *infantia* (child incapable of speech); *tutela impubes* (pre-pubescent child requiring a tutor) and *cura minores* (post-pubescent young person requiring the care of a guardian prior to attaining majority). At any rate, the notion of 'adolescence' or 'youth' in the modern conception of childhood is widely recognised as a period usually involving an apprenticeship for the roles to be required of adulthood. Indeed, the inclusion of the 'middle-aged child', that is, the post-infantile seven year old to the pre-adolescent 12 year old, is arguably a key element of the modern conception of childhood.

Archard concluded that:

... any conception of childhood will vary according to the ways in which its boundaries are set, its dimensions ordered and its divisions managed. This will determine how a culture thinks about the extent, nature and significance of childhood. The adoption of one conception rather than another will reflect prevailing general beliefs, assumptions and

priorities. Is what matters to a society that a human can speak, be able to distinguish good from evil, exercise reason, learn and acquire knowledge, fend for itself, procreate, participate in running the society or work alongside its other members? (Archard, 1993, p 27)

In essence, what emerges from the historical analysis is that the notion of childhood is significantly related to the way in which it has developed and been understood over a long period of time, and the particular ways it has entered the culture and priorities of the society under examination. The UN Convention on the Rights of the Child (see Appendix 3 for text) defines the child as meaning 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' (Art 1). In Archard's terminology, this is the 'boundary' of childhood as defined in international law. Given the high degree of cultural relativity inherent in the conception of childhood, it is perhaps surprising that the international community was ever able to agree on this important age limit. Equally, the proviso contained in Art 1 allows for a majority age of less than 18 years, a result achieved partly by virtue of sensitivity to cultural diversity and in part by the diplomatic awareness that such flexibility would encourage a maximum number of ratifications. See Chapter 3 for a discussion of the problems surrounding the definition of a child in the UN Convention on the Rights of the Child.

1.1.2 Psychological perspectives

While Ariès pointed to the development of education as historical evidence of a major shift in attitudes towards the nature of childhood, the adoption of universal education in some countries can also be seen as indicative of a pre-existing theory of learning. The particular shape of an education system must be based on some kind of view about the ability of children to receive and process knowledge, in other words, cognitive development.

Piaget (1952, 1960) provided an analysis of how the processes of thought were structured through his theory of learning. He realised that a child's mind was different from merely being a small version of an adult's mind. In essence, Piagetian theory attempts to explain how humans adapt to their environment via the process of the child's 'assimilation' (taking in new encounters) and 'accommodation' (revising cognitive constructs) of experience. Piaget suggested that the developmental process involved the individual in a search to achieve a balance between assimilation and accommodation. This balance is what Piaget describes as *equilibrium*.

On the basis of empirical studies, he identified a model of the child's intellectual growth through separate chronological stages. First, the sensory-motor stage (infancy) immediately after birth. In this period, which he asserted lasted until around two years old, the infant's adaptation to his or her environment is shown by motor activity without the use of abstract reasoning. At first, infants use motor reflexes to interact with their environment. The infant relies on seeing, feeling, sucking and touching to learn about their environment. Infants eventually learn that their environment is not simply an extension of themselves. The infant develops a sense of causation in learning to move an object by hand. Children acquire the concept of 'object permanence' at about seven months old, that is, an understanding that an object (or person) still exists when not in view. For example, a young infant will lose interest in a toy when it is covered up, but an older infant will actively seek it out. Following an understanding of object permanence, the infant performs motor experiments ('directed groping') and learns how to manipulate objects. An increase in the child's physical mobility allows the child to

develop new intellectual abilities. Some symbolic abilities, for example, language, are developed at the end of this stage.

Piaget's second, 'pre-operational stage' (toddler and early childhood), lasts until the child is around seven years old. In this period a child will acquire language skills, and memory and imagination are developed, but thinking is done in a non-logical, non-reversible manner. This stage is characterised by what Piaget terms egocentric thinking, that is, they will only view the outside world from their own perspective. For example, a three year old may well hide behind a chair in the belief that as he cannot see anyone else no one else can see him. Pre-operational children will develop an internal representation of the outside environment that allows them to provide a description of people, events and feelings. Children can be observed using memory and imagination during this stage.

Piaget's third stage, 'concrete operations' (elementary and early adolescence), was said to last for children around seven to 12 years old. Such children are capable of taking into account another person's point of view and can appreciate more than one perspective at the same time. The beginning of this period is marked by the acquisition of the principle of 'conservation'. This is an understanding that the number, volume, mass, liquid, weight, area and length of objects does not change when the particular configuration of the object(s) is changed. For example, a child will appreciate that two identical lengths of ribbon, one rolled up into a ball and the other laid flat, retain the same length. Children also acquire the idea of reversibility, that is, some changes can be undone by reversing an earlier action. For example, one can regain the flat ribbon by rolling out the ball. Children become capable of mentally visualising this type of action without the need to see it actually performed. Egocentric thought decreases. A child develops the ability to co-ordinate two dimensions of an object simultaneously, arrange structures in sequence, transpose differences between items in a series, and will have a better idea of time and space. During this stage, a child begins to reason logically, but can only think about actual, concrete, physical objects; they cannot yet manage abstract reasoning.

The final stage of Piaget's theory is 'formal operations' (adolescence and adulthood), acquired by children around 11 or 12 years old into adulthood. Children at this stage will be capable of thinking logically and in the abstract, and can reason theoretically, though some people may never reach this stage. Early on at this stage there is a return to egocentric thought processes. However, at this stage, thinking is not tied exclusively to events that can be observed. Some research studies have suggested that only around 40–60% of college students reach this stage! The stage is characterised by the ability to construct hypotheses and systematically test these to resolve a problem. In particular, an ability arises to reason hypothetically, or contrary to the known facts. For example, an argument based on the premise that the world is flat could be processed.

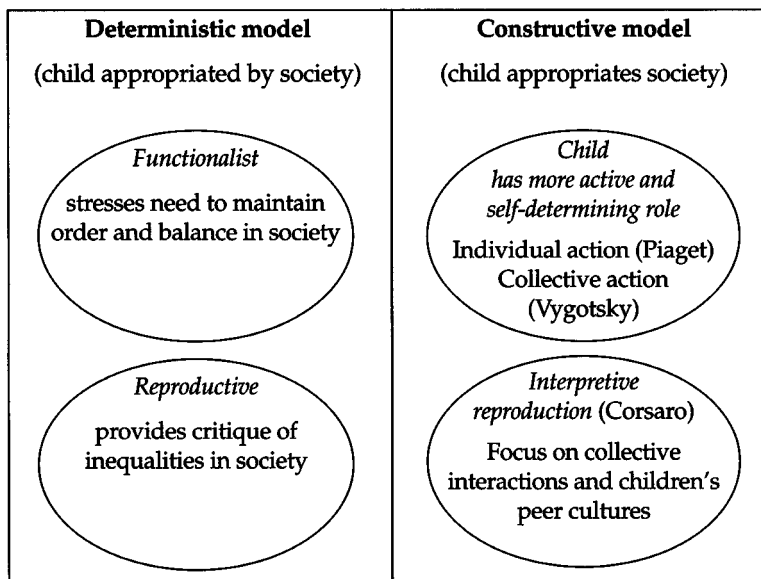
The impact of Piaget's theory on, for example, education curricula, has been immense. The lasting influence of Piaget can be seen in the 'Early Childhood Studies' courses available in university education departments. One key point to his theory should be noted. This is that a child could only pass from one stage to another when the appropriate levels of maturity and external stimuli were present. The theory thus acknowledges both the importance of the child's biological maturation and the differential influence of the external environment, in other words, 'nature and nurture'. In the absence of good conditions to sustain both, a child is unlikely to progress to his or her fullest potential. However, subsequent researchers in developmental psychology do not accept Piaget's theory uncritically. Indeed, there is an increasing body of evidence in the last 30 years that young babies, for example, do far more representational 'thinking'

than merely the motor reflexes that Piaget underlined at this (first) stage. Nevertheless, Piaget's contribution has been an enduring one. The cognitive development of the child makes much sense when applied, as in the *Gillick* case¹ in the UK, to determine the point at which teenagers can be regarded as sufficiently mature to understand the meaning and consequences of important decisions which may have significant effects upon their lives.

1.1.3 Sociological perspectives

The sociology of childhood is a relatively recent sub-discipline. It was only in the 1980s and 1990s that academic societies paid specific attention to this area. For example, in 1998 a research committee of the International Sociological Association was dedicated to the study of childhood (see the 'Internet Resources' at the end of this chapter). One explanation for the marginalisation of academic interest in children is their general marginalisation in society. Adult perspectives on children often focus on what children are to become rather than an appreciation of what they are. Children are often viewed as passive consumers of a culture already established by adults. Society can be seen, within traditional social theory, as maintaining its integrity through a process of 'socialisation'. Individuals are in effect guided into suitable roles via a wide range of institutional and other processes. The notion of socialisation itself involves society's values being lodged into individuals' personalities. Social theory has often recognised the child as particularly in need of such socialisation in order to provide the appropriate induction into the adult world. It is the family that has the expected primary role to ensure that this process of socialising the child is carried out effectively. It is useful in this context to distinguish two different models of the socialisation process: the deterministic and constructivist models (Corsaro, 1997): see Figure 1.1 below.

Figure 1.1 Models of the socialisation process



1 *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112. See section 6.4.4.4 below.

The deterministic model is based on the idea that the child is essentially appropriated by society, that is, trained into becoming a useful member of society. On the one hand, the child's potential future contribution to society is recognised. On the other hand, the underlying assumption is that without the appropriate application of socialisation the child will remain a threat to the good order of society. The child's role in this conceptualisation is essentially a passive one. Furthermore, there are 'functionalist' and 'reproductive' models contained within this deterministic approach.

The functionalist approach in the 1950s and 1960s emphasised the need to maintain order and balance in society and therefore looked at children in terms of how they could be best prepared to take up useful places in the adult world. Theorists such as Talcott Parsons advocated such an approach and viewed the child as a threat to the intricate balance required to maintain society. Parsons saw the child as a 'pebble "thrown" by the fact of birth into the social "pond"' (Parsons and Bales, 1956). The child's point of origin, the family, will be the first element to feel the effects of this potential disruption, followed by schools and then other social institutions and processes. Eventually, the child internalises the values, norms and standards of the wider society. A key criticism of the functionalist approach, however, was that the internalisation of the requirements for society's good order could simply be viewed as a sophisticated method of social control. It assumed that the status quo would be maintained. In other words, these socialisation processes were viewed as a means to reproduce social inequalities.

The reproductive model of society therefore tended to analyse more deeply the nature of such inequality in a more critical manner and not just assume that the function of society was merely to reproduce itself without improvement or any fundamental change. As regards the impact on children, such an approach takes more note of the existence and nature of social conflict and inequality. The deterministic approach as a whole can be criticised in that it will tend to overemphasise the outcomes of socialisation and underestimate the active roles played by the individual. Some advocates of the deterministic approach have advanced a behaviourist understanding of childhood, emphasising the value of training in skills needed for functional living and to the need for a clear system of rewards and punishment which would determine appropriate socialisation.

In contrast to the notion of society appropriating the child, the constructivist model focuses on how the child appropriates society. The contribution of developmental psychology, in particular Piagetian theory, is particularly important here. The child is conceptualised as extracting information from his or her environment in order to construct his or her own interpretation of society. Piaget's 'stage' analysis of intellectual development (see section 1.1.2 above) confirms children's differing qualitative understandings of their environment and their interactions with it compared to adults. Piaget's concept of 'equilibrium' also provides a view of the child as more active and self-determining than a picture of the child determined by irresistible societal forces. Though Piaget believed there was an inherent tendency for children to compensate for environmental intrusions (he termed this 'equilibrium') nevertheless: 'the nature of the compensation is dependent on the *activities of children in their social-ecological worlds*' (Corsaro, 1997, p 13).

Lev Vygotsky is another significant constructivist theorist who underlined children's active rather than passive roles. He believed that their social development, however, was based on *collective* rather than individual (Piaget) action. He argued that language and other cultural tools were developed collectively by societies over the course of history and were acquired by children in order to actively participate and contribute to that culture. Vygotsky had a notion of 'internalisation' whereby every function in the child's