

# **‘Other Children, Other Voices’: Education and Exclusion and the Duty to ‘Progressively Realize’ Children’s Rights**

Thesis submitted in accordance with the requirements of  
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Philosophy

by

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## **ABSTRACT**

### *'Other Children, Other Voices': Education and Exclusion and the Duty to Progressively Realize Children's Rights*

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Children's socio-economic rights are once again at the centre of international legal and developmental discourses. With the memory and impact of the global economic crisis still an unforgiving reality for many children in addition to the abundance of evidence confirming that children's access to and enjoyment of their socio-economic rights have been seriously impaired, this thesis examines the very foundations upon which those rights are legally constructed. By unpacking the principle of progressive realization which underpins the delivery and realization of all socio-economic rights, this thesis argues that it can become a more durable and persuasive concept within children's human rights law to guide and consolidate state practice regarding the fulfilment of their socio-economic rights commitments.

To frame the analysis, this thesis invokes the right to education and specifically the phenomenon of school exclusions to demonstrate how progressive realization can become much more than an abstracted legal concept but rather a robust and influential tool to further enhance children's socio-economic rights. By adopting a child-participatory methodology to investigate school exclusions in England, this thesis tests the legal framework which governs exclusion and examines whether it is consistent with the obligation of the state to progressively realize children's rights.

This thesis concludes by highlighting a number of deficiencies within the school exclusion system in England which run counter to the very notion of progressively realizing children's rights. From the absence of information, to the lack of accountability and the failure to consider and apply fundamental children's rights standards such as the right to be heard and the child's best interests principle, this thesis exposes a number of areas where children's rights are found wanting. To respond to this, and to give effect to the principle of progressive realization, this thesis concludes by advancing a number of recommendations across two distinct fronts. The first set of recommendations proposes how children's rights scholarship as a whole can better re-engage and embrace the principle of progressive realization so that it can have a reformist legacy within children rights and human rights law more broadly. Central to this is the proposal that the Committee on the Rights of the Child promulgate a new General Comment on Progressive Realization. Following on from this, a number of recommendations are subsequently advanced as to how the school exclusion system in England itself can be remedied to better comply with the principle of progressive realization.

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The Convention on the Elimination of all Forms of Racial Discrimination 1965

The International Covenant on Civil and Political Rights 1966

The International Covenant on Economic, Social and Cultural Rights 1966

The American Convention on Human Rights 1969

The African Charter on Human and People's Rights 1981

The United Nations Convention on the Rights of the Child 1989

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990

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The Commissioner for Children and Young People (Northern Ireland) Order 2003

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Children and Young People (Scotland) Act 2014

Children and Families Act 2014

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*“My Kindred –  
The people of the hills and the dark-haired passes  
My neighbours on the lift of the brae,  
In the lap of the valley.  
To them Slainthe!”*

(Patrick MacGill, 1889- 1963)

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Finally, I dedicate this thesis to the memory of my late sister, Ann Marie Byrne, whom I miss every day. You are my light.

## **Preface**

The empirical research referred to throughout this thesis was conducted between January 2017 and May 2017.

The law is stated up to 29<sup>th</sup> September 2019.

## CHAPTER ONE

### *Introduction and Justification for the Research*

#### **1.0 Research Context**

Described as “a relatively young and evolving field of international law”,<sup>1</sup> children’s rights law has nonetheless exercised considerable influence on international, regional and domestic law and practice.<sup>2</sup> With the global enactment of the United Nations Convention on the Rights of the Child (1989) (hereafter the ‘CRC’),<sup>3</sup> children and young people were accorded the certified legal status of individual rights-holders in their own capacity. Consequently, the historical “moratorium in which they had to wait, learn and prepare themselves for ‘real life’”<sup>4</sup> was swiftly ended, at least textually. With almost universal ratification, save for the United States of America, and described as the “the key international legal instrument for the recognition of the human rights of children”,<sup>5</sup> the CRC provides an undeniable legal basis upon which to situate and advance children’s rights.

However, as we traverse the threshold of the CRC’s thirtieth anniversary, it is perhaps time to reflect and take stock of where exactly children’s rights are in terms of their actual realization and consequent enjoyment by children and young people themselves as individual rights-holders. Certainly, over the last three decades children and young people have come to occupy a more visible legal space in relation to their rights. On the domestic front, principles such as the child’s best interests and their right to participate have come to noticeably influence the judicial decision-making process. For instance, in his examination of 130 reported domestic family law cases in England and Wales as of April 2017, Gilmore highlights that the child’s right to participate pursuant to Article 12 CRC and consideration of the child’s best-interests principle under Article 3 CRC were ranked as the top two judicial reference points within family law proceedings.<sup>6</sup> More broadly, children’s rights have also influenced the supra-

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<sup>1</sup> See Kilkelly, U., & Liefwaard, T. (2019) international Children’s Rights: Reflections on a Complex, Dynamic, and Relatively Young Area of Law, in Kilkelly, U., & Liefwaard, T., (eds.) *International Human Rights of Children*, Springer, at p. 618.

<sup>2</sup> See generally for the influence of children’s rights on various legal systems, see Doek, J., & Liefwaard, T., (2015) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Springer.

<sup>3</sup> The CRC was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990, in accordance with article 49.

<sup>4</sup> See Verhellen, E., (1993) Children’s rights in Europe, *The International Journal of Children’s Rights*, Vol1, Issue 3 -4, pp. 357 – 376, at p. 357.

<sup>5</sup> See Doek, Jaap. E., (2019) *The Human Rights of Children: An Introduction*, in Kilkelly, U., and Liefwaard, T., (eds.) *International Human Rights of Children*, Springer, at p. 25.

<sup>6</sup> For in-depth discussion on the use of the CRC within English and Welsh family law cases, see Gilmore, S., (2017) ‘Use of the UNCRC in Family Law Cases in England and Wales’, *International Journal of Children’s*

national development of laws and regulations with the CRC and the rights therein playing a key role in the enactment of the EU's recent Directive on concretising children's procedural rights in the context of criminal law proceedings.<sup>7</sup> Such developments reflect the continuous need to systematically engage with the process of legal translation to ensure that children's rights are not some obscure or distant legal contemplations but rather form part of the everyday legal and regulatory frameworks which engage children and young people. Such developments also reflect the reality that children's rights traverse a broad terrain and encapsulate a wide array of rights. In this respect, their distillation into the three distinct, yet mutually reinforcing, compartmentalisations including protection rights, participation rights and provision rights, known as the 3 'P's, illustrates the full range of civil, political, economic, social and cultural rights which the CRC contains.<sup>8</sup> In generalist terms, protection rights embrace those which aim to protect the child from harmful abuse and practices; participation rights ensure that children has a say in matters which affect them while provision rights ensure children have their basic needs fulfilled and includes issues such as access to food, housing, health and education. However, the 3 'P framework has not evaded criticism. Quennerstedt argues that the net effect of the framework "constructs children's rights as something substantially different from general human rights".<sup>9</sup> This, she notes, arises from the practical and legal consequences which ensue from the different vocabularies which are used in the context of children's rights. By emphasising protection, participation and provision over the use of civil, political and social rights, she argues that the use of the 3 'P framework not only lacks a theoretical foundation but that it ultimately obscures the application of these rights in practice. For example, she highlights the fact within the 3 'P framework, children's 'provision rights' do not carry the same authoritative force as 'social rights'. This, she argues, is because the phrasing of provision rights is not overly clear and indicates a general level of passivity on the part of children where they are seen as the recipients of this provision. This can be contrasted with the use of 'social rights' which "does not turn the child into a receiver to the same extent, but rather points towards the child's access to education or health care, or other social rights".<sup>10</sup> Thus, Quennerstedt's important observations further highlights the need to more systematically

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*Rights*, vol. 25, no. 2, pp. 500–518.

<sup>7</sup> See Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

<sup>8</sup> See Hammarberg, T., (1990) The UN Convention on the Rights of the Child--And How to Make It Work, *Human Rights Quarterly*, Vol.12., No.1, pp. 97 – 105 at p.100.

<sup>9</sup> See Quennerstedt, A., (2010) 'Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the "3 p's"' (2010)18 *The International Journal of Children's Rights*, 619–625, 631.

<sup>10</sup> *Ibid*, 629.

engage with children's rights as enforceable and compellable entitlements in their own right. This also requires a deeper engagement with the mechanisms by which those rights are themselves enforced. And although much progress has been made in advancing and upholding children's rights across myriad spheres, from family law<sup>11</sup> to criminal justice,<sup>12</sup> this thesis argues that children's rights scholarship has failed to date to sufficiently engage with, or articulate fully, the obligations attached to the principle of 'progressive realization' which underpins the delivery and implementation of children's socio-economic rights and which is critical to the delivery of children's provision rights. Indeed, it will be contended that this failure has caused the principle to remain both legally and practically underdeveloped and thereby unable to wield its true legal potential as a reformist legal tool within the CRC.

That failure was evident in abundance with the impact which the recent global financial crisis exerted on children's socio-economic rights. With many countries undertaking deep-seated economic and structural reforms to restore budgetary and fiscal probity to their domestic economies, children's access to and enjoyment of basic socio-economic rights was seriously impaired across many fronts including health, education, housing and social security.<sup>13</sup> The number of children and young people who entered poverty increased substantially while similarly, the number of children who were not in education, employment or training (NEET) grew dramatically.<sup>14</sup> From a European perspective, the crisis directly affected children and their rights on two interrelated fronts: increasing depths of child poverty on the one hand and heightening children's susceptibility to entering poverty on the other.<sup>15</sup> Indeed, the nexus between the financial crisis and child poverty was laid bare in the report by the Commissioner for Human Rights of the Council of Europe following his visit to Spain in June 2013 wherein he recounted "*reports about children fainting at school due to lack of proper meals and children wearing the same clothes at school for three consecutive weeks, due to poverty*".<sup>16</sup>

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<sup>11</sup> See for discussion on children's involvement in family law proceedings in New South Wales, France, The Netherlands and South Africa, see Mol, C., (2019) Children's Representation in Family Law Proceedings: A Comparative Evaluation in Light of Article 12 of the United Nations Convention on the Rights of the Child, *The International Journal of Children's Rights*, Vol. 27, pp. 66 - 98.

<sup>12</sup> See Committee on the Rights of the Child, General Comment No.10 (2007), Children's Rights in Juvenile Justice, CRC/C/GC/10.

<sup>13</sup> See Ruxton, S., (2012) *How the economic and financial crisis is affecting children & young people in Europe*, EuroChild.

<sup>14</sup> See Fanjul, G., (2014) *Children of the Recession: The Impact of the Economic Crisis on Child Well-Being in Rich Countries*, UNICEF, Office of Research – Innocenti.

<sup>15</sup> See Save the Children (2014) *Child Poverty and Social Exclusion in Europe: A matter of children's rights*, Save the Children's EU Advocacy Office.

<sup>16</sup> See Council of Europe, Commission for Human Rights (2013), Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Spain from 3 to 7 June 2013, CommDH (2013)18, at p. 5.



Similarly, in country visits to Ireland<sup>17</sup>, Timor-Leste<sup>18</sup>, Namibia<sup>19</sup>, Mozambique<sup>20</sup>, Romania<sup>21</sup>, the USA<sup>22</sup> and Saudi Arabia<sup>23</sup>, the UN Special Rapporteur on Extreme Poverty and Human Rights continuously evidenced the intractable and debilitating relationship between children and poverty such that an almost automatic and disturbingly normalised connection exists between the two. Indeed, from a purely domestic standpoint, the recent report by the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, highlighted in unmistakable terms the localised impact which austerity has had on children and their rights.<sup>24</sup> From the closure of 500 children's centres between 2010 – 2018 and 340 libraries during the similar period<sup>25</sup> to the rise of food bank dependency<sup>26</sup> and the confirmation that one third of children in the United Kingdom are not only in poverty but that by 2022, an additional 1.5 million children will also fall into poverty,<sup>27</sup> the Rapporteur's report exposes how children and young people's basic socio-economic needs have gone, and will continue to go, unmet. Put simply, the economic crisis exposed children as first instance economic targets with a distinct powerlessness to mitigate against the many governmental decisions which directly impacted service provision across a range of socio-economic areas.

But the crisis also typified the deeper challenges which directly enfeebled children's access to and enjoyment of their socio-economic rights, or what Ozsu more broadly termed "the politico-economic conditions of their actual operation".<sup>28</sup> Wider contributory factors such as the ascendancy of neoliberalism<sup>29</sup> the political normalisation of austerity<sup>30</sup>, the consequential rise of privatization<sup>31</sup> and the outsourcing and sub-contraction of children's public services to

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<sup>17</sup> 17 May 2011 (para 56).

<sup>18</sup> 24 May 2012.

<sup>19</sup> 17 May 2013.

<sup>20</sup> 4 June 2014.

<sup>21</sup> 4 April 2016.

<sup>22</sup> 4 May 2018.

<sup>23</sup> 25 April 2017.

<sup>24</sup> See Report of the Special Rapporteur on human rights and extreme poverty, Visit to the United Kingdom of great Britain and Northern Ireland, (23 April 2019), A/HRC/41/39/Add.1.

<sup>25</sup> Ibid at para 40.

<sup>26</sup> Ibid at para 7.

<sup>27</sup> Ibid at para 73.

<sup>28</sup> See, Özsu, U., (2018) "Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World" 81 *Law and Contemporary Problems*, pp 139-165, at p. 142.

<sup>29</sup> See generally, Moyn, S., (2018) *Not enough: Human Rights in an Unequal World*, Harvard University Press, & MacNaughton, G. & Frey, D., (eds), *Economic and Social Rights in a Neoliberal World* (CUP, 2018).

<sup>30</sup> See Saiz, I (2009) Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis, *Journal of Human Rights Practice*, Volume 1, Issue 2, pp. 277–293 & Bilchitz, D., (2014) Socio-economic rights, economic crisis, and legal doctrine, *International Journal of Constitutional Law*, Volume 12, Issue 3, July 2014, pp. 710–739.

<sup>31</sup> See, Nolan, A., (2018) Privatization and Economic and Social Rights, *Human Rights Quarterly*. 80(4), 815-858.

private operators<sup>32</sup> have resulted in children's socio-economic rights now occupying a distinctly transformed legal space than that which prevailed at the time of entry into force of the CRC in 1989. Such realities and their direct and almost unanimously negative impact on children's rights has also resulted, in some quarters, in a near total collapse of confidence in the ability of human rights, constitutionalised or otherwise, to either counteract or mitigate the harshness of these new socio-political and economic realities.<sup>33</sup> Indeed, at a time when socio-economic guarantees should have acted as base-line legal safeguards to either mitigate or moderate the full impact of the international economic crisis, their influence and potency has been in short supply. Unsurprisingly therefore, they have been labelled, among other things, as "rhetorical admonitions"<sup>34</sup>, 'paper promises'<sup>35</sup> and "a powerless companion of the explosion of inequality".<sup>36</sup>

Therefore, if such rights are to have real meaning, then their concomitant means of delivery, namely progressive realization, must also entail enforceable consequential measures. However, as this thesis will demonstrate, progressive realization has never endured systematic scrutiny from a children's rights perspective. Rather, it has, more often than not, been referred to in passing and cursory terms. The core argument of this thesis is that if progressive realization is to have a discernible legal bite and fulfil its true potential in advancing children's socio-economic rights, then new approaches and understandings of the principle are required, and children's rights scholarship must fully engage with its possibilities. In that sense, this research responds to Reidel et.al.'s argument that the challenges associated with economic, social and cultural rights require us "to be innovative in our thinking about ... their operationalization in practice".<sup>37</sup>

### **1.1. Thesis Overview and Justification**

In view of the above, and mindful of the legal and practical vulnerability to which children's socio-economic rights have been exposed, this thesis investigates the actual and potential role of the principle of progressive realization in ensuring that contracting states to the CRC deliver

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<sup>32</sup> See Stalford, H., (2019) *The Price is Rights!: Cost Benefit Analysis and the Resourcing of Children's Services. Children and Youth Services Review*.

<sup>33</sup> See Hirschl, R., (2004) *Towards Juristocracy: The Origins and Consequences of New Constitutionalism*, Harvard University Press.

<sup>34</sup> See Moyn, S., (2015) *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 *Law and Contemporary Problems*, pp. 147-169, at p. 151.

<sup>35</sup> See Saiz, n (28) above at p. 278.

<sup>36</sup> See Moyn, n (27) above at p. 176.

<sup>37</sup> See Reidel, E., Giacca, G., & Golay, C., (2014) (eds.) *Economic, Social and Cultural Rights in International Law*, Oxford University Press, at p. 5.

on their voluntarily agreed commitments to uphold and vindicate such rights. As progressive realization symbolizes the legal principle underpinning the fulfilment of all of the socio-economic rights which are contained within the CRC, the child's right to education will be invoked as a legal frame against which to examine and interrogate the role, and potential, which progressive realization can play in advancing such rights.

The right to education is broad and extensive in scope and embraces rights to, in and through education,<sup>38</sup> in addition to education at pre-school, primary, secondary and tertiary level. Against such an extensive legal canvas, this thesis adopts the specific issue of school exclusions in England at secondary school level as its analytical backdrop. While school exclusions are principally – and supposedly – a disciplinary device, its deployment as a punitive sanction not only exposes its prevalence among certain groups of children but conversely highlights the connection between specific socio-economic, ethnic and familial factors and school exclusions. In this regard, school exclusions are bound up with wider issues such as gender, race, poverty, disability and access to broader support services. Indeed, a recent longitudinal study carried out in the South West of England based on 8,245 children who had been excluded by 8 years of age and 4,482 children who had been excluded by 16 years of age exposed a number of striking correlations between school exclusions and broader family and personal circumstances.<sup>39</sup> For instance, for children excluded from school on reaching 8 years of age, the most common factors associated with exclusions were a history of the mother being excluded from school, living in rental accommodation and maternal depression during pregnancy.<sup>40</sup> For children excluded by 16 years, common factors included the mother being excluded herself from school, youth maternal age and a history of smoking in pregnancy.<sup>41</sup> Other factors which strongly featured amongst the exclusion data were poor student/teacher relationships, high rates of SEN, communication difficulties, mental health issues and low socio-economic status.<sup>42</sup> Thus, such research again confirms that school exclusion is a multi-dimensional issue which warrants increased investigation across all fronts to ensure that children's rights are respected and accounted for before a decision to exclude is taken.

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<sup>38</sup> See Verhellen, E., (1993) Children's Rights and Education: A Three-Track Legally Binding Imperative, *School Psychology International* Volume: 14 Issue 3 (1993) ISSN: 0143-0343 Online ISSN: 1461-7374.

<sup>39</sup> See Paget et.al., (2018) Which children and young people are excluded from school? Findings from a large British birth cohort study, the Avon Longitudinal Study of Parents and Children (ALSPAC). *Child: Care, Health and Development*, 44(2), 285-296. <https://doi.org/10.1111/cch.12525>.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

Given further that exclusion from school represents a real threat to children's education, this thesis will further show that it has anchored itself as a deeply concerning reality within the English educational system and consequently within the lives of children who pass through it. In this regard, this thesis will position the legal framework governing school exclusions in England against the duty of the state to progressively realize the child's right to education. By further adopting a child-participatory approach<sup>43</sup> to the research, this thesis will draw on empirical evidence to further test and determine whether children's educational rights are actually being progressively realised, and further what steps can be taken which would progressively realise their rights. Thus, the adoption of a formal legal analysis in conjunction with an empirical investigation will allow for a more thorough and authentic examination of the law. Furthermore, positioning school exclusions squarely within the context of progressive realization allows for a deeper understanding of how the principle can become operational in practice; not just as a means to direct and consolidate the human rights obligations of contracting states to the CRC but also as a way to render them more accountable for their actions. Therefore, this thesis unites three seemingly distinct, yet delicately interwoven legal realities: the right to education; the phenomena of school exclusions; and the practical effectiveness of the principle of progressive realisation.

### **1.1.1. The Right to Education**

In her keynote speech to the Education Committee Conference on '*The purpose and quality of education in England*', on the 13<sup>th</sup> September 2016, Professor Mary Beard stated that: "A civilised society is, by definition, one that gets very worked up about how its young are educated".<sup>44</sup> She was right. And although education is a right which extends to all people, it is almost unanimously enjoyed by children and young people.<sup>45</sup> Beard's simple statement encapsulates the significance of education within the context of children's lives and the consequential disquiet which should (rightfully) ensue when children's educational rights are undermined or worst still, wilfully disregarded. More profoundly however, her words also - perhaps unintendedly - capture the wider significance of education and the role it plays in human, social, political and economic terms, and the impact education has not only on the individual, but also on the collective. As Harris states, education "not only gives the individual

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<sup>43</sup> See Chapter two for more on methodology.

<sup>44</sup> Professor Mary Beard, Keynote Speech, Education Committee Conference, '*The purpose and quality of education in England*' Tuesday 13 September 2016, p.2.

<sup>45</sup> See Lundy, L., & O' Lynn, P., (2019) *The Education Rights of Children*, in Kilkelly, U, & Liefwaard, T., (eds.) *International Human Rights of Children*, Springer, Singapore.

an important means to self-fulfilment and maximisation of personal potential, but also contributes to a collective economic and social benefits through the inculcation of skills and provision of enlightenment”.<sup>46</sup> Hence, its status as a human right should come as no surprise.<sup>47</sup>

As a ‘multi-faceted right’<sup>48</sup> with both a “qualitative as well as a quantitative aspect”,<sup>49</sup> education equips individuals with the keys to unlock their innermost potential. In this regard, it has been continuously referred to, and conceptualised as a “multiplier”<sup>50</sup> right; one which enhances and underpins the delivery of others. Widely acknowledged for its transformative capacity, it can break intergenerational poverty and disrupt established patterns of cyclical and familial unemployment and disadvantage. And aside also from the directly personal benefits which it brings, education also assumes an important role in breaking down hardened barriers, often socially and historically constructed, to advance a more equal and fair society.<sup>51</sup> Indeed, in recognition of its transformative capacity, the Committee on Economic, Social and Cultural Rights<sup>52</sup> have stated that it is both a “human right in itself and an indispensable means of realizing other rights”.<sup>53</sup> From a children’s rights perspective, such sentiments have been reiterated by the Committee on the Rights of the Child who have stated that education “goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society”.<sup>54</sup>

However, the child’s right to education is a much more layered legal entitlement in practice. In this regard, it must be positioned within and against two principal legal realities. The first is that the right to education principally falls within a category of human rights commonly referred to as economic, social and cultural (ESC) rights, or socio-economic rights for short. This classification of rights, a reflection of the textual and legal division of human rights into two separate bodies of entitlements; civil and political rights on the one hand and socio-

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<sup>46</sup> See Neville Harris (2007) *Education, Law and Diversity*, Hart Publishing, Oxford and Portland, Oregon, at p. 39.

<sup>47</sup> For more on the right to education, see Chapter 3.

<sup>48</sup> UNESCO (2000) *World Education Report 2000: The right to education: towards education for all throughout life*, UNESCO Publishing, at p. 16.

<sup>49</sup> Ibid at p. 17.

<sup>50</sup> See Annual report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9, 11 January 2001, E/CN.4/2001/52, at para 11.

<sup>51</sup> See Department of Education (2017) *Unlocking talent – Advancing social mobility: A Plan for improving social mobility through education*.

<sup>52</sup> The Committee on Economic, Social and Cultural Rights was set up pursuant to ECOSOC Resolution 1985/17.

<sup>53</sup> See Committee on Economic, Social and Cultural Rights (1999) General Comment No. 13, The right to education (article 13 of the covenant), E/C.12/1999/10 at para 1.

<sup>54</sup> Committee on the Rights of the Child General Comment No.1 (2001), *The aims of education (article 29)*, CRC/GC/1, 17 April 2001, at para 4.

economic rights on the other, and which accompanied the international development of human rights law more broadly<sup>55</sup> raises a number of specific legal issues. Chief among these and which forms the analytical spine of this thesis is how such rights, and specifically the right to education, are realized and delivered. However, as this thesis will also highlight, the right to education also encompasses elements which are civil and political in nature so therefore those points of legal distinction must be considered in the context of the realization of the right. This is because human rights law considers civil and political rights to be of immediate application. The second legal reality is that children's educational rights are inseparable, and arguably at times, indistinguishable from the intersecting and often competing wishes of both parent and state. This raises a number of questions which directly impact upon the progressive realization of the child's right to education and specifically how the legal structures, legislative and otherwise, which surround and support children's educational rights, enable the progressive realization of the right for the child herself.

### **1.1.2. The Principle of Progressive Realization**

In legal terms the principle of progressive realization is one which has become conclusively associated with the category of human rights collectively entitled socio-economic rights.<sup>56</sup> In broad generalist terms, it has become synonymous with the generation, management and disbursement of domestic state resources to fulfil the effective realization of rights such as health, education, housing and social security; rights whose fulfilment necessitate a fundamental and identifiable investment of resources. Accordingly, it enjoys widespread currency in international human rights law, including children's rights law, owing, arguably, to the inbuilt legal latitude it affords states in meeting their duties. In this regard, the principle is both legally and lexically well-anchored within the fabric of international human rights law.<sup>57</sup> As Warwick argues, it "requires that States expand their promotion and protection of economic and social rights over time to the fullest extent possible within their available resources".<sup>58</sup> However, the principle also entails a degree of flexibility designed to symbolise the fundamental economic and practical reality that resource availability within and between states will invariably fluctuate and differ enormously. Therefore, the legal obligations for contracting

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<sup>55</sup> For more on the historical development of human rights, see chapter 4, section 1.

<sup>56</sup> See chapter four for further discussion on the development of economic, social and cultural rights as a distinct classification of human rights.

<sup>57</sup> For further discussion, see chapter 4.

<sup>58</sup> See, Warwick, Ben T.C., 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Crisis' in MacNaughton, G and Frey, D., (eds), *Economic and Social Rights in a Neoliberal World* (CUP, 2018) at p. 133.

states which flow from the principle “are not uniform or universal, but are relative to levels of development and available resources”.<sup>59</sup>

Described also as being “of pivotal importance in defining obligations of economic, social and cultural rights as set out in the United Nations human rights treaties”<sup>60</sup>, including the CRC, the principle is clearly situated within objectively malleable legal and economic borders. On the one hand it provides states with the latitude within which to fulfil their socio-economic rights commitments, including education, but on the other, it fails to demarcate the limits of that latitude. Therefore, it should come as no surprise that this opaque principle has often been characterised as “misunderstood”.<sup>61</sup> Indeed, in his assessment of its architectural flaws, Leckie<sup>62</sup> contended that the principle was tantamount to an “escape hatch”<sup>63</sup>, amounting to a legal get-out clause which enabled states to circumvent their socio-economic rights obligations by falling back on the latitude permitted by the principle to justify either inaction or the non-realization of such rights. In recognition of this he called for: “New interpretations of this principle...to be developed in order to widen the legal vision of public officials and courts to reflect the view that states must move as expeditiously as possible towards the realization”<sup>64</sup> of such rights. Therefore, from a children’s rights perspective, and in the context of education specifically, this raises a number of important legal issues. This requires some unpacking of the principle of progressive realization in light of a number of critical questions, including:

- I. How is progressive realization defined?
- II. How is it achieved?
- III. How is it measured? and,
- IV. Who is accountable for its enforcement?

By responding to these questions and engaging with its constituent elements, this thesis will argue that progressive realization can provide a clear legal framework against which to monitor and track state progress in fulfilling their socio-economic rights commitments. Taking school exclusions as an illustration, this thesis will demonstrate how the principle can (and should) influence and consolidate state practice regarding the implementation and enforcement of

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<sup>59</sup> See Chapman, A., and Russell, R., (eds.) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) Intersentia at p. 5.

<sup>60</sup> See Report of the United Nations High Commissioner for Human Rights, 25 June 2007, United Nations Economic and Social Council, E/2007/82 at para 2.

<sup>61</sup> *Ibid*

<sup>62</sup> Leckie, S., (1998) Another Step Towards indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, Volume 20, Issue 1, pp 81 – 124.

<sup>63</sup> *Ibid* at p. 94.

<sup>64</sup> *Ibid*.

children's educational rights. Closely associated with this is the appreciation that children's educational rights amount to much more than a basic right of access alone but rather encompass rights *to, in and through* education.<sup>65</sup> Hence, it is necessary to juxtapose these constituent rights against the overarching state obligation to progressively realize the right to education. In the context of school exclusions where children's rights are clearly activated, this thesis explores the potential which progressive realization can play within such a context.

### 1.1.3. School Exclusions

The removal and exclusion of children from schools in England is a material and institutional reality within the English education system.<sup>66</sup> The most recent figures issued by the Department of Education in July 2019 show that in the preceding academic year 2017/8, 7,900 pupils were permanently excluded from all state-funded primary, secondary and special schools in England while during the same period 410,800 children were excluded on a fixed-term basis which can potentially amount to forty-five days in any given school year.<sup>67</sup> Put another way, this amounted to around forty-four permanent exclusions and just under two thousand and eighty-two fixed-term exclusions per day. Indeed, the prevalence of school exclusion at both primary and secondary level is such that it is now an almost unremarkable and unexceptional reality for children and young people to be excluded within the English education system. However, such figures are demonstrably inaccurate and do not represent the acknowledged and accepted widespread practice of illegal and unofficial exclusions from English schools. For example, research carried out by the Institute for Public Policy Research suggests that the official figures are themselves only "the tip of the ice-berg in terms of the full extent of exclusion".<sup>68</sup> Such research substantiates the findings by the Children's Commissioner for England who found clear and compelling evidence of illegal exclusions which included children being sent home to 'cool-off', children being sent home and not allowed back until a meeting had taken place with their parents, children being intimidated into moving schools and even schools asking parents to keep their children at home for an entire academic semester.<sup>69</sup>

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<sup>65</sup> For practical discussion on this, see Lundy, L., (2006) Mainstreaming children's rights in, to and through education in a society emerging from conflict, *The International Journal of Children's Rights*, 14(4) pp. 339 – 362.

<sup>66</sup> For more on the numerical increase of such a practice, see Chapter Three.

<sup>67</sup> See Department of Education (2019) *Permanent and Fixed period exclusions in England: 2017 to 2018* (published 25 July 2019) (available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/820773/Permanent\\_and\\_fixed\\_period\\_exclusions\\_2017\\_to\\_2018\\_-\\_main\\_text.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820773/Permanent_and_fixed_period_exclusions_2017_to_2018_-_main_text.pdf) last accessed 14<sup>th</sup> August 2019)

<sup>68</sup> See Gill K (2017) Making The Difference: Breaking the link between school exclusion and social exclusion, IPPR. <http://www.ippr.org/publications/making-the-difference> (last accessed 2 June 2019) at p. 7.

<sup>69</sup> Children's Commissioner for England (2017) *They Never Give up on You: Office of the Children's*



Furthermore, any examination of school exclusions would be incomplete without positioning such a phenomenon within the broader legal and human rights framework which pertains to the right to education.<sup>70</sup> This is because firstly, the very decision to exclude a child takes place within the school or educational establishment itself and secondly, as this thesis will demonstrate, the impact of school exclusion often has a devastatingly negative impact on children's educational experiences and outcomes. Hence, it comes as no surprise that exclusion from school was described by the late Lord Bingham of Cornhill as the "most severe sanction available to a head teacher".<sup>71</sup> Indeed, such are the enormous consequences of school exclusions that they have been the subject of a recent governmental review by Edward Timpson, the former Children's Minister.<sup>72</sup>

At first instance, the very idea of excluding a child from school would appear to fundamentally contradict the essence of the right to education. From an objective perspective, school exclusions *per se* and the right to education represent conflicting, if not, oxymoronic realities. In its most elemental form, the deliberate removal and consequential cessation of a child's ability to learn and thereby contribute to their overall personal development runs counter to any moderate or reasonable conception of education. Both pursue entirely divergent aims. Indeed, given the legislative basis<sup>73</sup> which mandates the responsibility of parents in England to ensure their children receive an education, the transgression from which activates stem statutory penalties, the practice of excluding children from such a protected purpose raises many significant questions, not least of the very function of education itself. How is it that such large numbers of children are routinely excluded from English schools? How is it also that contained within these figures certain identifiable children, such as those with a special educational need (SEN) or those from an ethnic minority background are consistently and unfailingly overrepresented?<sup>74</sup> Is the practice of excluding children from school consonant with basic human rights standards? And perhaps more significantly, is the current composition of the legislative framework in England, which permits schools to exclude children consistent with children's rights principles, not least the child's right to an education. Furthermore, given that the decision to exclude a child from school will result in either their provisional or permanent removal from the institution in which they receive instruction, the relationship

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*Commissioner School Exclusions Inquiry.*

<sup>70</sup> For more on the right to education, see Chapter 3.

<sup>71</sup> See *In Re L (a minor by his father and litigation friend) (Appellant)* [2003] UKHL 9 at para 11.

<sup>72</sup> See Department of Education (2019) *Timpson review of School Exclusion*, (May 2019).

<sup>73</sup> See section 7 Education Act 1996.

<sup>74</sup> For more on the characteristics of children who have been excluded from school, See chapter 3.

between school exclusions and the child's right to education raises a number of significant legal issues from a children's rights perspective. Among these are the legal questions relating to the extent to which children's rights are themselves upheld during the exclusion process itself, and connectedly whether the legal provisions which enable schools to exclude children in the first instance are themselves, also consistent with such principles.

#### **1.1.4. Uniting All Three**

In view of the above, this thesis therefore examines the phenomena of school exclusions in England and positions it against the human rights duty of the State to progressively realize the child's right to education. In doing this, it explores not only the potential which the former can exert in legal and practical terms over the latter, but also more broadly, the impact which progressive realization can play in our collective engagement with, and approach to, children's socio-economic rights, and indeed human rights more broadly. By positioning the phenomena of school exclusions squarely within the context of progressive realization, this thesis argues for a renewed approach as to how the principle is better understood and applied to enhance children's access to and enjoyment of their right to education. By invoking school exclusions as a reference point, it will demonstrate how the principle can and should become a more durable and central legal principle not just within the broad expanse of children's rights scholarship but also more critically within the local and everyday contexts which children inhabit. Indeed, one of the most local and universalising environments which children and young people pass through in their lives is school. In view of the compulsory nature of education in England<sup>75</sup>, children spend large amounts of their childhood, teenage and formative years within these formalised educational settings. In England, children aged between 5 - 16 years<sup>76</sup> are mandated under law to receive full time education with this compulsory requirement bearing criminal sanctions for parents who fail to ensure their children attend school.<sup>77</sup>

While the majority of such education occurs within formalised educational institutions, an increasing number of children are receiving home education.<sup>78</sup> Although permissible in English law, home education has been the subject of much academic debate and examination.<sup>79</sup> For instance, Fineman & Shephard advance an uncompromising rebuke of home education from a

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<sup>75</sup> Section 7, Education Act 1996 states that "The parent of every child of compulsory school age shall cause him to receive efficient full-time education . . . either by regular attendance at school or otherwise".

<sup>76</sup> Section 8, Education Act 1996.

<sup>77</sup> See sections 444 (1) Education Act 1996 & section 444 (1A) Education Act 1996.

<sup>78</sup> Home education is permissible under law pursuant to section 7 of the Education Act 1996.

<sup>79</sup> See for example, Monk, Daniel (2004) *Problematizing Home Education: Challenging Parental rights and Socialisation*, 24 Legal Studies, 568.

children's rights perspective by stating that not only is it "radically separatist and individualistic"<sup>80</sup> but amounts, also, to an abdication of responsibility by the state by conceding "an unregulated educational space in which children can be isolated, shielded from diversity, and, perhaps, conditioned to carry bias and discrimination into their future dealings as adult members of society".<sup>81</sup> Conversely, proponents of parental control over their children's education have likewise been vociferous in their elaboration that the wishes of parents should take priority. For example, Moschella argues from a natural law perspective that the common good is harmed when parental "primary and pre-political educational authority over their children"<sup>82</sup> is usurped while Robinson robustly contends that liberal democratic states should privilege parental efforts to inculcate their wishes and values onto their children.<sup>83</sup> While this thesis does not focus on this particular issue, it will be contended nonetheless that the progressive realization of children's educational rights necessitates a more rigorous supervisory engagement with how children are in fact home-schooled and the role of the state in such efforts. Such engagement is necessary in view of the emergent evidence regarding the direct correlation between the rise in home-schooled children and school exclusions. Indeed, recent indications by the Children's Commissioner for England has highlighted coercive patterns of behaviour within schools themselves whereby "parents may feel obliged to accept home education to avoid a formal exclusion, without realising that by doing so they are giving up important safeguards".<sup>84</sup> Thus, from a children's rights perspective, such practices warrant consideration in terms of assessing whether the child's rights to education is being progressively realized.

While the issue of school exclusions have themselves been the subject of much academic and scholarly investigation,<sup>85</sup> with considerable attention being justifiably accorded to the identification of those factors which are likely to hasten or accelerate the child's susceptibility to becoming excluded from school in the first instance, little attention, if any, has focused on the intersection of school exclusions and the principle of progressive realization. While

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<sup>80</sup> See Fineman, M A., and Shepherd, G., (2016) *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 University of Baltimore Law Review, 57 at p. 64,

<sup>81</sup> Ibid at p.70.

<sup>82</sup> See Moschella, M., (2014) *Natural Law, Parental Rights and Education Policy*, The American Journal of Jurisprudence, Vol. 59, No. 2, pp 197 – 227, at p. 198.

<sup>83</sup> See Robinson, A M., (2017) Liberal-democratic states should privilege parental efforts to instil identities and values, *Theory and Research in Education*, Vol.15(2) pp 145 – 164.

<sup>84</sup> Children's Commissioner for England (2019) *Skipping School: Invisible Children, How children disappear from England's Schools*, at p.9.

<sup>85</sup> See for example, Harris, N., & Eden. K., (2000) *Challenges to School Exclusion*, (RoutledgeFalmer: New York and London).

significant efforts have established the manifold links between broader external variables such as drug-use and anti-social behaviour<sup>86</sup>, the school itself,<sup>87</sup> criminality and youth offending,<sup>88</sup> and gender<sup>89</sup>, amongst others, and their related impact on school exclusions, either as a direct causal factor or a significant contributory consideration in the child becoming excluded, the principle of progressive realization has largely elided such important investigative endeavours. Such literature also highlights the important multi-factorial grounds which often impact the life-chances of children and young people's educational prospects. It also serves to demonstrate the reality that children's lives cannot and should not be assumed to follow a clinical or pre-ordained course. Youth alone does not inoculate children from the vicissitudes of life. While such literature provides an important account of the overarching position of children and school exclusion; it has neither aligned nor positioned this reality against the duty to progressively realize the child's right to education.

## 1.2. Scope of thesis

The scope of this thesis is limited to the English educational system and the school exclusion framework which endures therein. The decision to select England as the locus of the investigation was based on three principal reasons. Firstly, the advent of parliamentary devolution following the enactment of the Northern Ireland Act 1998, the Scotland Act 1998, the Government of Wales Act 1998 and the Government of Wales Act 2006, resulted in the transfer of education policy to the various spheres of executive competency in Scotland<sup>90</sup>, Wales<sup>91</sup> and Northern Ireland<sup>92</sup>, a process which Rees more broadly stated 'marked a sea-change in British constitutional arrangements'.<sup>93</sup> Thus, education now occupies an autonomous

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<sup>86</sup> McCrystal, P., Percy, A., & Higgins, K., (2007) Social Exclusion drug use and antisocial behaviours at 15/16 years: Implications for youth transitions, *Vulnerable Children and Youth Studies* 2,3 181 – 190.

<sup>87</sup> Razer, M., Friedman, V J. & Warshofsky, B., (2013) Schools as agents of social exclusion and inclusion, *International Journal of Inclusive Education* Vol.17 No.11, 1152 – 1170.

<sup>88</sup> See Hodgson, P., & Webb, D., (2005) Young People, Crime and School Exclusion: A Case of Some Surprises, *The Howard Journal of Criminal Justice*, Vol. 44, No.1 at pp. 12 – 28. See also Berridge et.al. (2001) *The independent effects of permanent exclusion from school on the offending careers of young people*, Home Office, RDS Occasional Paper No 71.

<sup>89</sup> Osler, A., et.al., (2002) *Not a Problem? Girls and Exclusion from School*, Joseph Roundtree Foundation.

<sup>90</sup> Schedule 5 of the Scotland Act 1998 sets out a category of reserved powers which are retained by Westminster. Areas of governance not listed as 'reserved' are by definition, including education, devolved to the Scottish parliament.

<sup>91</sup> Schedule 5 of the Government of Wales Act 2006 set out approximately twenty 'fields' or 'matters' which are to fall within the legislative competency of the Welsh Assembly. Field 5 of Schedule 5 relates to 'Education and Training'.

<sup>92</sup> Section 4(1) of the Northern Ireland Act 1998 defined a transferred matter as one which is neither 'excepted' nor 'reserved'. Thus, any matter falling outside such definitions, expanded in Schedule 2 and 3 of the Act respectively, including education, fell within the legislative competency of the new Assembly.

<sup>93</sup> Rees, G., (2002) 'Devolution and the restructuring of post-16 education and training in the UK', in Adams, J., & Robinson, P., (2002), *Devolution in Practice: Public Policy Differences within the UK*, Institute for Public

province of executive and administrative control within the devolved regions in addition to England. Within this new political structure, each region or ‘home country’ retains their own responsibilities and independence in setting education law and policy under their respective governments. However, this new devolved autonomy has also arguably led to the uneven elaboration of children’s rights protections. While Wales and Scotland have enacted legislative measures compelling public authorities, including those with responsibility for education, to have regard to the CRC in the enactment of laws and policies which affect children,<sup>94</sup> no such comparable legislation has been enacted in either England or Northern Ireland. Indeed, in the specific context of education, Northern Ireland has been without an Education Minister since the collapse of political power sharing over two years ago.<sup>95</sup> While this thesis does not engage in a comparative appraisal of education law and policy across the various regions, frequent reference will be made nonetheless as to how England can better learn how to progressively realize children’s rights within the school exclusion system specifically and the education sector more broadly, by drawing on good practice from other parts of the UK.

Secondly, as this thesis will demonstrate, the concept of progressive realization and specifically the issue as to whether contracting states are demonstrably progressively realizing children’s educational rights is inseparable from the subjective engagement with children in the first instance. This is because human rights fulfilment possesses an intrinsically individual component in addition to broad based statistical accounts as to whether rights are being realized or not. From a children’s rights perspective, the position and perspectives of the individual child are crucial benchmarks against which to properly assess whether her rights are actually being realized. Given that children lack direct political participatory entitlements<sup>96</sup> and are

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Policy Research. For more on the interface between devolution and education see generally, Chaney, P., (2011) ‘Education, Equality and Human Rights: Exploring the impact of Devolution in the UK’, *Critical Social Policy* 31(3), Mitchell, J., (2009) *Devolution in the UK*, Manchester University Press & Trench, Al & Jarman, H., ‘The Practical outcomes of devolution: policy-making across the UK’ in Trench, A., (2007) *Devolution and Power in the United Kingdom*, Manchester University Press.

<sup>94</sup> See section 1 of the Rights of Children and Young Persons (Wales) Measure 2011 and Children and Young People (Scotland) Act 2014, respectively.

<sup>95</sup> See oral evidence of Mr. Derek Baker, Permanent Secretary in the Department of Education in Northern Ireland to the UK’s House of Commons Northern Ireland Affairs Committee on the issue of “*Funding priorities in the 2019-19 Budget: Education*” wherein he stated “*I have been in post for two years. As I walked in the door, literally the previous Education Minister walked out the door ... I have never had an Education Minister in the time I have been in the Department. I have to say that, as a civil servant, I find it astonishing that in a part of the United Kingdom we have nobody politically in charge of and democratically accountable for a service of such fundamental importance to the wellbeing of our society as the education of our children*”, House of Commons, 2019: Q.358.

<sup>96</sup> For more on the political and electoral disenfranchisement of children see Nolan, A., (2014) *Children’s Socio-Economic Rights, Democracy and the Courts*, (Hart Publishing, Oxford and Portland, Oregon) wherein she argues that children “do not, and cannot, constitute a political constituency able to gain ground through political action” at p. 43.

usually less able to exercise their rights due to a confluence of factors ranging from limited financial resources, constraints on the exercise of their choice and free will, in addition to perceived developmental deficit concerns regarding their judgment, knowledge and experience<sup>97</sup>, it is imperative that children and young people are provided with the opportunity and space within which to express their views and experiences.<sup>98</sup> From the perspective of the child's right to education, this becomes all the more acute given that a breach or interruption of the right "will impact on her developmental needs, diverse evolving capacities and her acquisition of life skills to a much greater extent than it would on an adult who has already received the benefit of basic education".<sup>99</sup>

Furthermore, in the context of actually realising education rights, the importance of qualitative evidence was affirmed by the Special Rapporteur on the Right to Education as far back as 1999 when she stated that "A merger between quantitative and qualitative data is necessary to assess the state of realization of the right to education worldwide".<sup>100</sup> Therefore, by focusing on one region within the United Kingdom, this allows for a more comprehensive assessment in determining the progressive realization of children's educational rights.

Lastly, and relatedly, the decision to select England was influenced by issues of access to both co-researchers and research participants and the invariable time, resource and financial constraints which arise quite naturally during the course of a doctoral investigation.

Additionally, while this thesis does not specifically examine the rising practice of illegal school exclusions, it does allude to such a reality within the context of progressively realizing children's educational rights. As later chapters will highlight, a troubling dichotomy has emerged which reveals divergent statistical accounts between the number of children who have been officially excluded from school and those who have been unofficially excluded.<sup>101</sup> Recognition of this reality is important from the outset as the practice of unofficial school exclusions, which the Children's Commissioner for England has said involves "situations when a school requires a young person to leave the premises but the child's exit is not recorded as a

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<sup>97</sup> Ibid at pages 83 – 88.

<sup>98</sup> For more on children's right to be heard, see chapter two.

<sup>99</sup> See n (86) above at p.16.

<sup>100</sup> See Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33, 13 January 1999, E/CN.4/1999/49 at para. 26.

<sup>101</sup> For more on this, see chapter 4.

formal exclusion”<sup>102</sup> are not only a documented reality<sup>103</sup> within the English education system but are also unequivocally illegal.<sup>104</sup> And although not the investigative focus of this thesis, an appreciation of their ever-present blight on the English educational landscape is important for two principal reasons. Firstly, any academic discussion on school exclusions would appear superficial in nature without the explicit recognition of a parallel and illegal exclusionary system which undermines in its totality, the child’s right to education. And secondly, any body of work, academic or otherwise, which seeks to advance improvements to the ‘official’ school exclusion framework, should also acknowledge the fact that very many illegal and undocumented exclusions occur extraneous to that very framework and within a legal void where the right to education is routinely disregarded.

### **1.3. Thesis Structure**

In addition to this opening introductory chapter, this thesis will be made up of seven further chapters. While chapter one has briefly introduced the key concepts under investigation in this thesis, the following chapters will interrogate these from a children’s rights perspective to ascertain what impact (if any) they can exert on the school exclusion process in England.

Chapter two will set out the methodological approach to unpacking the concept of progressive realization and to further our understanding of how it should influence and guide the school exclusion framework in England. Central to this chapter will be the justification as to why a child participatory approach was adopted to investigate such issues and the significance which participation plays, not just as an approach to conducting research with, by or on children, but also, as an inseparable and inextricable aspect of complying with the principle of progressive realization. This chapter will further argue that child participation is not only a critical aspect, or practical consequence of the oft cited yet vitally important, right to participate under Article 12 CRC, but also a crucial feature of assessing whether states are actively progressively realizing children’s rights.

Chapter three will examine the legal and regulatory frameworks underpinning the child’s right to education. After establishing the legal contours which encase the right and which align it

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<sup>102</sup> See Office of the Children’s Commissioner for England, (2012) *They never give upon you*, p57

<sup>103</sup> Ibid at para’s 5 – 13.

<sup>104</sup> Department of Education (2017) *Exclusion from maintained schools, academies and pupil referral units in England, Statutory guidance for those with legal responsibilities in relation to exclusion.*

with the principle of progressive realization, this chapter will interrogate the legal sensitivities specific to education. In this regard, the triadic nature of the legal make-up of the right to education which encompasses the state, the parent and the child, will be explored from the context of the progressive realization of children's rights. By situating this analysis in the context of school exclusions, this chapter will argue that the parent-centric emphasis which dominates the legal configuration and practical operation of the right to education is inconsistent with the child's right to education.

Chapter four will unpack the definitional boundaries of progressive realization. It will argue that children's rights scholarship must engage with the discrete constituent elements which comprise progressive realization, as to date the concept has occupied a largely marginal position within children's rights law and practice. It will also be further contended that the Committee on the Rights of the Child must engage more adequately with the conceptual and practical development of progressive realization to reclaim the fullness of its legal potential. This chapter will further evidence how a more mature and advanced appreciation of progressive realization can enhance the school exclusion system in England and render it more compatible with children's rights.

Chapter five will examine how progressive realization is and could be achieved in practice. This chapter will build on the principle's definitional elements as outlined in chapter four and elaborate on the requirements expected of contracting states to the CRC to progressively realize children's educational rights. By situating this analysis within the context of school exclusions in England, this chapter will argue that progressive realization engages much more than the mere use of financial resources to satisfy the requirement of any given right; it must also embrace progressive procedural, informational and legal improvements to render the school exclusion system consistent with the CRC. By drawing extensively on the empirical evidence generated as part of this thesis, this chapter will highlight how the principle of progressive realization can influence and guide the betterment of the school exclusion system in England.

Chapter six will explore the mechanisms which currently exist to measure the extent to which states are progressively realizing their socio-economic rights commitments. After setting out the general infrastructural means by which measurement is tracked, this chapter will proceed to examine whether such measures firstly, adequately capture the extent to which children's rights in education are upheld, and secondly, whether children's rights vis-a-viz the school exclusion system are satisfactorily captured. This chapter will argue that a more holistic model



of human rights measurement is required which includes a more pronounced qualitative emphasis, to monitor, evaluate and improve the extent to which children's rights are being progressively realized.

Chapter seven will consider the issue of legal accountability for progressively realizing children's rights. Specific attention will be accorded to the issue of education rights and the legal framework which currently governs the exclusion framework. This chapter will argue that the current system does not progressively realize children's educational rights but rather dismisses and excepts children themselves from the system, thereby depriving them of both a de jure and de facto guarantee of her right to education. This chapter will further contend that a renewed appreciation of the notion of progressive realization within a judicial context could help remedy some of the deep-seated deficiencies which currently characterise both children's educational rights generally and the school exclusion system specifically in England.

Chapter eight will advance some key legal and policy recommendations to help develop and advance progressive realization as *a way of thinking* and *a way of doing* regarding children's rights. These recommendations will be two-fold in nature and will include specific reforms firstly directed at how children's rights scholarship can re-engage with the principle of progressive realization and secondly how the school exclusion system in England can better comply with children's rights. This chapter will reaffirm the potential which the principle can exert on children's rights moving forward in the transformed legal space which children's socio-economic rights currently inhabit. This will also serve to highlight that progressive realization can be reclaimed from the margins of children's rights law and reclaimed also, from the obscure and foggy legal hinterland which it arguably, currently resides in. By stripping the principle back to its elementary parts and demonstrating how it can be applied in everyday contexts, this thesis will (hopefully) illuminate the transformative potential which progressive realization could ultimately bequeath to children rights scholarship (and human rights law more generally) moving forward. Specifically, this chapter, by building on the preceding analysis, will argue that children's rights scholarship should ultimately re-engage with progressive realization by advocating for the promulgation of a new general comment on progressive realization. Ultimately, it will be argued that the principle of progressive realization can represent much more than an abstractive theoretical idiom within the vast vestibules of children (and human) rights law and become an important legal hook upon which to hold states accountable for their actions

#### **1.4.Conclusion**

This introductory chapter has set out the aims and scope of this thesis. By introducing the key concepts which will permeate the analysis to follow, this chapter has laid the roadmap for the critical examination of progressive realization which will ensue. Moreover, by positioning school exclusions within the framework of progressive realization and within the related and overarching context of the right to education, this chapter has also highlighted the dearth of treatment to date that not only progressive realization has experienced from a children's rights perspective but also the role in which it can and should play in the context of school exclusions in England.

## **CHAPTER TWO**

### ***Methodology: A child participatory methodology to examine the phenomenon of school exclusions in England***

#### **2.0 Introduction**

This chapter will provide a systematic overview of the methodological approach to examining the phenomenon of school exclusions in England. As previously stated in the introduction, the educational exclusion process in England is a central feature of this study and so exploring experiences of educational exclusions was the starting point when consulting with the young people. As the research evolved, however, the views and experiences of the young people informed examination of the broader principle of progressive realization. The method of engagement used within this thesis was the “Agenda Day” model of inquiry (discussed further in section two below) and which essentially involves an adult-free environment where children and young people, led by one of their peers acting as a facilitator, discuss and share their views on the specific issue under investigation. Complementing the empirical investigation of the study will be the doctrinal legal analysis of the concept of ‘progressive realization’ from a children’s rights perspective. Indeed, it will be argued that any analysis of the concept of the principle would be incomplete and superficial in nature without engaging with the on-the-ground realities in terms of children’s enjoyment of their rights, and in this context, their right to education. Furthermore, the implementation of a child-participatory methodology enabled the author to position the phenomenon of school exclusions against the duty of the state to progressively realize children’s education rights. This allowed for a deeper and a more authentic understanding of what exactly children’s experiences and understandings of their rights are in relation to the school exclusion system in England, and also potentially how such a framework can better comply with children’s rights.

This study comprised a small-scale qualitative investigation involving children and young people aged between 12 – 16 years of age to ascertain their views in relation to the current school exclusion system in England.<sup>1</sup> For reasons of time, costs and ease of access to both co-researchers and research participants, the study was localised to the North East of England. By

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<sup>1</sup> The exclusion system in England is governed by the Education Act 2002 (including s51A inserted by Education Act 2011), the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, and accompanying statutory guidance (Department of Education (2017) *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion*)

using the ‘Agenda Day’ model of investigation, the signature research tool of Investing in Children (IiC), a children’s rights charity based in Co. Durham, England, the author was able to ascertain a wide range of views from children and young people about their perceptions and understandings of school exclusion and the broader framework which attaches to it. By working closely with IiC, who also acted as research gatekeepers for the investigation, the process of recruiting participants to act as co-researchers and to partake in the Agenda Days was greatly assisted. In broad terms gate-keepers is a phrase “that commonly refers to adults who are able to control or limit researchers’ access to the participants. Gatekeepers have a positive function in ensuring that children are protected from research that could potentially be exploitative, invasive or coercive”.<sup>2</sup>

Moreover, as will be discussed below in further detail, the Agenda Day model was chosen as the author was keen to adopt a children’s rights-based approach to the research and one which departed from the dominant methodological approaches which have to date been deployed in the context of examining school exclusions. While much research has been carried out into school exclusions, few, if any, methodological approaches have been devoted to allowing children and young people themselves guide, frame and actively partake as co-researchers within the research itself. Indeed, an examination of the methodological designs underpinning the existent literature regarding exclusions reveal common methodological patterns which include, and affirm, the dominance of adult led and adult designed approaches to the research. For instance, Barr and Kilpatrick’s 1998 study into exclusions in Northern Ireland focused on obtaining data on excluded students through the completion of forms by the then Education and Library Boards to ascertain the characteristics of those who had been excluded,<sup>3</sup> while Munn et.al’s 2001 investigation into school exclusion in Scotland centred very much on telephone surveys with 176 head teachers in addition to a broader documentary analysis to understand the nature and extent of school s in Scotland between 1994 and 1996.<sup>4</sup> Indeed, engagement with various educational stakeholders, either the school, head teachers or the relevant educational authorities appears to have permeated much of the methodological approaches to understanding school exclusion.<sup>5</sup> And while much research has indeed involved

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<sup>2</sup> See Coyne, I (2010) Accessing children as research participants: examining the role of gatekeepers, *Child: Health, Care and Development*, Vol 36(4), pp 453–454, at p. 452.

<sup>3</sup> See Barr, A., & Kilpatrick, R., (1998) Exclusions from school: The why and wherefore, *Child Care in Practice*, 4:3, 229-239, DOI: 10.1080/13575279808413117.

<sup>4</sup> See Munn, P, Cullen, M.A., Johnstone, M., Lloyd, G (2001) Exclusion from school: a view from Scotland of policy and practice, *Research Papers in Education*, 16:1, 23-42.

<sup>5</sup> See Gazeley, L., (2010) The Role of School Exclusion Processes in the ReProduction of Social and Educational

engagement with children and young people themselves through semi-structured interviews,<sup>6</sup> the actual design and underpinning approach to such interviews has been adult conceived. In this regard, the Agenda Model represents a clear methodological departure from current approaches as it bestows young people with an active research and leadership role by involving them as co-researchers within the project. Indeed, the need to involve children within research regarding the realisation of their educational rights was neatly summarised by Lundy et.al., who argued that that research into these issues from the perspective of children themselves was a rarity within the literature.<sup>7</sup>

This methodological chapter is divided into two sections. Section one examines the research design which underpins the thesis as a whole and will outline the justifications why such an approach was adopted. This will entail a discussion of the principal theoretical approaches taken by the author and the innate attributes which accompany them. It will also involve a discussion of the socio-legal and child -participatory nature of the empirical investigation and furthermore outline the reasons why such approaches are necessary in the context of progressively realizing children's rights. Section two will concentrate on the empirical aspect of the research process itself, from its conceptual and ethical genesis to the subsequent data collection, analysis and dissemination. This will consider the real and practical challenges associated with the research, their limitations, the methods deployed in the pursuit of the research objectives and the practical and ethical issues which accompanied the qualitative investigation. The methodological analysis will close with a reflection on using a child-participatory methodology, highlighting some of the opportunities and challenges of using such an approach in future research.

## **Section One – The Research Design: A Socio-Legal and Child - Participatory Qualitative Investigation**

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Disadvantage, *British Journal of Educational Studies*, 58:3, 293-309, DOI: 10.1080/00071000903520843.

<sup>6</sup> See Daniels, H. & Cole, T., (2010) Exclusion from school: short-term setback or a long term of difficulties?, *European Journal of Special Needs Education*, 25:2, 115-130, DOI: 10.1080/08856251003658652; Gazeley, L., Marrable, T., Brown, C., & Boddy, J., (2015) Contextualising Inequalities in Rates of School Exclusion in English Schools: Beneath the 'Tip of the Ice-Berg', *British Journal of Educational Studies*, 63:4, 487-504, DOI: 10.1080/00071005.2015.1070790; McCluskey, G, Riddell, S., Weedon, E., & Fordyce, M., (2016) Exclusion from school and recognition of difference, *Discourse: Studies in the Cultural Politics of Education*, 37:4, 529-539, DOI: 10.1080/01596306.2015.1073015.

<sup>7</sup> See Lundy L., et.al. (2017) Children's Educational Rights, Global Perspectives, in Ruck, Martin, D., Petersen-Badali, M., & Freeman, M., (eds.) *Handbook on Children's Rights: Global and Multidisciplinary Perspectives*, Routledge, Abingdon, at p. 370.

## 2.1. A Socio-Legal Study

First and foremost, this thesis followed a socio-legal approach, combining classical desk-based legal and doctrinal analysis with qualitative evidence adduced through empirical research. As such, this thesis can be situated within the broader collective body of scholarship which falls generally under the classification of being ‘socio-legal’ in nature. And although no singular definition exists to express the tenets of socio-legal studies,<sup>8</sup> common to all is its interdisciplinary focus. Although Harris regarded the law ‘as a complex phenomenon, which is not likely to be adequately explained by reference to a single macro-theory’,<sup>9</sup> he argued that insights from other fields of investigation, including sociology, economics, psychology and history could generate deeper understandings regarding particular societal problems in light of ‘the all-pervasive nature of law in its social context’.<sup>10</sup> Such appreciations are critical when one considers the issue of school exclusions in England given its inextricable connection, as will be discussed in more detail in chapter three, with the wider related issues of gender, race, ethnicity, poverty and disability.<sup>11</sup> This reality is crudely evidenced by the recent governmental review into school exclusions which found that 11% of all children who have been permanently excluded from school in England were classified as having a special educational need (SEN) *and* being in receipt of free school meals (FSM) (itself a proxy for poverty) *and* also being classified as a child in need.<sup>12</sup> Indeed, as will be discussed in chapter three, school exclusions have resolutely aligned themselves with these variables such that certain (disadvantaged) groups of children are now statistically more likely to become excluded from school than others. Therefore, any investigation into school exclusions would amount to a somewhat artificial endeavour without an appreciation of the wider contextual, cultural and social factors which render certain children more vulnerable to exclusion than others.

Rooted in socio-legal study is the appreciation of the nexus between law and society; a connection which has given rise to a proliferation in, and extensive engagement with, the interface between both and the impacts which they exert on each other, particularly in the context of academic research. Such an intersection also evidences the inseparability of the

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<sup>8</sup> See Harris, D.R. (1983) The development of socio-legal studies in the United Kingdom, *Legal Studies*, Vol13, Issue 3, page 315.

<sup>9</sup> Ibid at page 319.

<sup>10</sup> Ibid.

<sup>11</sup> See also for general discussion on school exclusions from an inter-professional perspective, Blyth, R., and Milner, J., (1996) *Exclusion from School: Inter-Professional Issues for Policy and Practice*, Routledge, London.

<sup>12</sup> Department for Education (2019) *Timpson Review of School Exclusion*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/807862/Timpson\\_review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807862/Timpson_review.pdf) (last accessed 19<sup>th</sup> June 2019) at p. 10.

individual themselves from their wider legal and social structures and society which surround and govern them. As Ehrlich stated:

*“As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the working of social forces...Thus, in order to discover the social foundations of law we must seek the very form in which it is engendered by society”.*<sup>13</sup>

Thus, the position of the legal system and its impacts on the human experience have been the source of much investigation and scrutiny. Indeed, in its most elemental form, socio-legal study;

*“embraces disciplines and subjects concerned with law as a social institution with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions”*<sup>14</sup>

Socio-legal research thus involves a departure from the realm of strict and formal doctrinal legal analysis into the wider social, political, cultural and economic domains wherein the law exists and often governs.<sup>15</sup> In moving beyond the parameters of legal formalism, socio-legal research interrogates, by drawing upon other disciplines and often non-legal methodological approaches, the effect(s) and impact(s) of law upon the individual, community and the wider societal assembly. It thus re-positions the law within a wider social context and allows for a more critical examination of the net consequences of legal regulation within the ordinary and commonplace contexts of people’s lives. This permits an examination of a wide array of issues including, amongst others, whether the law is fit for purpose; whether it achieves its stated aims or whether it disproportionately impacts specific groups of individuals over others. It is this theoretical extension of the law which has arguably accelerated socio-legal research to have “collapsed the boundaries of law as an autonomous discipline”.<sup>16</sup> This further reflects the earlier distinction recognised and explicated by Pound<sup>17</sup> at the doorsill of the twentieth century between ‘Law in Books’ on the one hand and ‘Law in Action’ on the other, a distinction which demarcated the qualitative and practical separation between the academic and realistic

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<sup>13</sup> Ehrlich, E., (1916) Montesquieu and Sociological Jurisprudence, *Harvard Law Review*, Vol. 29 No. 6 (April, 1916) pp 582 – 600 at p584.

<sup>14</sup> Socio-Legal Studies Association (2009) *Statements of Principles of Ethical Research Practice*, Principle 1.2.1

<sup>15</sup> For more see Cownie, F., & Bradney, A., (2013) *Socio-Legal studies A Challenge to the doctrinal approach*, pages 34 – 54, in Watkins, D., & Burton, M., (eds.) *Research Methods in Law*, Routledge

<sup>16</sup> Economides, Kim (2013) *Measuring Law’s Impact: The Future of Socio-Legal Studies in Aotearoa New Zealand*, *Ontago Law Review*, Vol 13 No 1, at page 170.

<sup>17</sup> Pound, R., (1910) Law in Books and Law in Action, 44 *Am. L. Rev.* 12

dimensions of law, and one which implicitly recognised the human and subjective impact(s) and effect(s) of legal norms and standards. As Schiff stated;

*‘According to a socio-legal approach, analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part that law plays in the creation, maintenance and/or change of the situation’<sup>18</sup>*

From a children’s rights perspective, the overlap between children and their wider social situation assumes increased significance. As chapter one outlined, with children’s socio-economic rights now occupying a markedly transformed legal space since that which prevailed at the time of entry into force of the CRC, this necessitates sustained and renewed engagement at the most immediate and local level to examine how contracting states are upholding and delivering on their socio-economic rights commitments. Indeed, writing in 1997, Jo Boyden and Judith Ennew argued that research into children’s issues was itself necessary for providing a “basis of programme and policy development”.<sup>19</sup> Conscious of these wider realities, the research examines school exclusions and specifically children and young people’s experiences of the legal framework which surrounds it. The socio-legal focus of the investigation juxtaposes a doctrinal examination of the concept of progressive realization with the views and opinions of children who live both within and under the shadows of a legal framework which governs their potential exclusion from school. Through the mapping and transposition of such views on to the legal framework, this thesis will interrogate the human rights obligations and their consequent fulfilment by the State by engaging with the experiences of children and young people.

Central to the author’s investigation is the adoption of empirical methods to supplement the wider legal analysis with a view to generating a deeper, more authentic understanding of the concept of progressive realization within the context of educational exclusion in England. Empirical research methods cover a broad expanse and “include the study of law, legal processes and legal phenomena using social research methods such as interviews, observations or questionnaires”.<sup>20</sup> Such methods also include the implementation of either qualitative or quantitative research approaches or, indeed, both. The former endeavours to access and

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<sup>18</sup> Schiff, D. N., (1976) Socio-Legal Theory: Social Structures and Law, 39 *Modern Law Review* 287 at p 287.

<sup>19</sup> Boydon, J., and Ennew, J., (1997) *Children in Focus – A Manual for Participatory Research with Children*, (UNICEF) at p. 9.

<sup>20</sup> Burton, M., (2013) *Doing Empirical Research, Exploring the decision-making of magistrates and judges*, in Watkins, D., & Burton, M., (2013) *Research Methods in Law*, Routledge at p. 55.



comprehend the personal experiences of the participants in a manner which “seeks to contribute to a better understanding of social realities and to draw attention to processes, meaning patterns and structural features”.<sup>21</sup> The latter encompasses research methods which “emphasises quantification in the collection and analysis of data and that embodies views of social reality as an external, objective reality”.<sup>22</sup> The author will adopt a qualitative approach as such a method is more responsive to changing social structures and offers a means to examine, in a subjective and reflexive manner, the individual human experience of exclusion and ascertain the practical and idiosyncratic effects thereof. As Economides argues;

*‘In order to assess and evaluate law’s social, cultural and economic impact - and expose the gap between legal ideals and legal reality - we need methodological tools and insights drawn from the social and behavioural sciences, and also the humanities, that place law within its wider context’<sup>23</sup>*

## 2.2. A Child Participatory Approach

Complementing the socio-legal approach taken in this thesis is the qualitative aspect of the author’s research which was child participatory in nature. This section will firstly outline the broad legal and theoretical underpinnings of what constitutes such an approach, while the next section will outline how it was operationalised. Firstly, and fundamentally, a child-participatory approach invokes key provisions of the CRC (which will be discussed below), namely those relating to participation, and builds a methodological framework around them. Such approaches have gained considerable traction within academic research involving children and are well-anchored within child participatory literature.<sup>24</sup> Moreover, the ascendancy of both the sociology of childhood<sup>25</sup> on the one hand and children’s rights scholarship on the other, as two distinct, and often intersecting fields of inquiry have rendered children not only more visible within the research academy but has also accelerated their recognition as “rights-holding social actors”.<sup>26</sup> This has also arguably hastened the

<sup>21</sup> Flick, U., et al. (2004) *A Companion to Qualitative Research*, Sage Publications, at page 3.

<sup>22</sup> Bryman, A., (2012) *Social Research Methods*, 4<sup>th</sup> Edition, Oxford university Press, at page 35.

<sup>23</sup> See Economides, n (16), 169.

<sup>24</sup> See for example, Tisdall, E.K.M, Davis, J.M. and Gallagher, M. (2009) *Research with Children and Young People: Research design, methods and analysis*, London: Sage; Powell, M.A and Smith, Anne. B (2009) Children’s Participation Rights in Research, *Childhood*, 16(1): 124– 142; Horgan, D. (2017) ‘Child Participatory Research Methods: Attempts to go ‘Deeper’’. *Childhood*, 4(2): 245– 259. Graham, A., & Fitzgerald, R. (2010) ‘Children’s participation in research: Some possibilities and constraints in the current Australian research environment’. *Journal of Sociology*, 46: 133-147.

<sup>25</sup> See James, A., Jenks, C., and Prout, A. (1998) *Theorizing Childhood*, Polity Press & James, A., and Prout, A. (1997) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, New York/ London, Routledge.

<sup>26</sup> Larkins, C., Thomas, N., Carter, B., Farrelly, N., Judd, D. & Lloyd, J. (2015) ‘Support for Children’s Protagonism’, *International Journal of Children's Rights*, 23(2): 332-364 at p. 333.

paradigmatic shift within research, which historically regarded children and young people as objects of research, towards the recognition that they are active agents in their own right, with much to say and tell in the here and now.<sup>27</sup> Such a recognition has also resulted in an increase in attention to the design and development of methodological approaches to research which reflect and symbolise not only children's agency, but also their fundamental right to participate.<sup>28</sup> In that regard, the author derived enormous practical assistance from previous empirical projects which have used a similar methodological frame. In particular, the researcher drew heavily upon the '*Children's Rights-Based Approach*' espoused by Lundy and McEvoy<sup>29</sup> wherein they argued that such an approach must not only remain faithful to the CRC, but also that all stages of the research process, including the framing, conducting and dissemination of the research must comply with CRC principles. They stated;

*the research aims should be informed by the CRC standards, the research process should comply with the CRC standards; and the research outcomes should build the capacity of children, as rights-holders, to claim their rights, and build the capacity of duty-bearers to fulfil their obligations. Cutting across all of this is a requirement to ensure that the process furthers the realization of children's rights.*<sup>30</sup>

Central to such a methodological framework is the direct and ascertainable involvement of children and young people in all stages of the research. And central to that involvement is the operationalization of CRC rights within the context of the research project. Such sentiments have been further captured by Tobin who articulated that a core principle of a rights-based approach to research involves "the requirement to integrate rights into the resolution of the issue that is the subject of analysis and consideration".<sup>31</sup> Indeed, Beazley et.al. argue that: "Rights-based research with children acknowledges their agency, not as the outcome of academic theory but rather as recognition that they are subjects of rights. The difference may

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<sup>27</sup> See Freeman, M (1998) *The Sociology of Childhood and Children's Rights*, International Journal of Children's Rights, 6: 433 – 444.

<sup>28</sup> See for example, Lundy, L. and McEvoy, L., (2011) Children's rights and research processes: Assisting children to (in)formed views, *Childhood*, 19(1): 129 – 144 & Lundy, L., McEvoy, L., & Byrne, B. (2011) 'Working With Young Children as Co-Researchers: An Approach Informed by the United Nations Convention on the Rights of the Child', *Early Education and Development*, 22(5), 714-736.

<sup>29</sup> Lundy, Laura & McEvoy, Lesley (2012) Childhood, the United Nations Convention on the Rights of the Child, and research: What Constitutes a 'Rights-Based' Approach? *Law and Childhood Studies: Current Legal Issues*, Vol. 14

<sup>30</sup> Ibid at page 78

<sup>31</sup> Tobin, J, (2011), Understanding a Human Rights Based Approach to matters Involving Children: Conceptual Foundations and Strategic Considerations, in Invernizzi A & Williams J. (eds.) *The human rights of children: from visions to implementation*, pp. 61-98 at page 66.

be subtle, but it is vital”.<sup>32</sup> Thus, common to all child-participatory methodologies is their adherence to a number of basic children’s rights principles.

### 2.2.1 The Right to Participate

The primary principle permeating all strands of child-participatory methodologies is the right to participate, the contemporary genesis of which can be traced to Article 12 of the CRC which states at 12(1) that;

*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

In its most elementary form, Article 12 accords a right to children and young people to express their opinions on matters relevant and pertinent to their individual circumstances. Respect for the child’s wishes represents a most significant provision in the CRC and gives children a direct opportunity to articulate their views in relation to any and all matters which affect them. It further represents the reality that children are bearers of rights and are entitled to have a say in matters affecting their rights and are permitted to participate in the realization of those rights.<sup>33</sup> Indeed, in her analysis of participation rights, Kjørholt argues that they denote a change in our understanding of children “as competent and autonomous, more so than seeing them as vulnerable, dependent and in need of being protected by adults only”.<sup>34</sup> In this regard, Article 12 has been broadly conceptualised as a right to participate.<sup>35</sup>

Inseparable from issues such as capacity, maturity and relational power with adults, the right to participate comprises the direct overlapping of such considerations. With no prescribed biological or numerical limitation on the exercise of the right,<sup>36</sup> Article 12 directly envisages the elective exercise of the right by children and young people. In one of the earliest theorizations on the right to participate, known as the *Ladder of Participation*, Hart outlined a

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<sup>32</sup> See Beazely, H., et.al., (2009) The right to be properly researched: research with children in a messy, real world, *Children’s Geographies*, Vo. 7. No.4. pp. 365 – 378 at p. 369.

<sup>33</sup> For more on the importance of recognising children’s rights, see Freeman, M. (2007), ‘Why it Remains to Take Children’s Rights Seriously’, *International Journal of Children’s Rights*, 15(1): 5 – 23.

<sup>34</sup> See Kjørholt A.T. (2017) Children’s Rights to Participation: ‘Out of Place’ or ‘In Context’?. In: Invernizzi A., Liebel M., Milne B., Budde R. (eds) *‘Children Out of Place’ and Human Rights. Children’s Well-Being: Indicators and Research*, vol 15. Springer, Cham, at p. 158.

<sup>35</sup> For more, See Committee on the Rights of the Child (2009), General Comment No.12, The Right of the child to be heard & UNICEF (2011) Every Child’s Right to Heard, A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12

<sup>36</sup> Committee on the Rights of the Child, (2009) General Comment No. 12, The right of the child to be heard at para 21.

continuum of participation ranging in terms of substance and meaning, from the inconsequential, manipulative, decorative or tokenistic participation of children to their material and measurable involvement<sup>37</sup> in matters affecting them. Hart subsequently defined participation as;

*The process of sharing decisions which affect one's life and the life of the community in which one lives. It is the means by which a democracy is built and it is a standard against which democracies should be measured. Participation is the fundamental right of citizenship*<sup>38</sup>

Hart's ladder has been subsequently built upon by Shier who, rather than seeking to replace Hart's conceptualisations, complements his analysis by articulating five levels of participation which include: listening to children; supporting them in expressing their views; taking such views into account; involving children in decision-making and ensuring that children share power and responsibility for decision-making.<sup>39</sup> Indeed, in their treatment of participation rights, the Committee on the Rights of the Child have stated that affording due weight to the wishes and views of the child is not an age-dependant exercise, conditional upon the attainment of a specific numerical standard. The Committee state;

*Children's levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and level of support all contribute to the development of a child's capacities to form a view*<sup>40</sup>

Participation also envisages the recognition of both conventional and unconventional means of communication. In recognition that children and young people possess, at different times, dissimilar levels of capacity and may occupy different environments, Lansdown states that:

*Implementation of Article 12 requires recognition of and respect for non-verbal forms of communication such as play, body language, facial expressions or drawing and painting, through which very young children make choices, express preferences and demonstrate understanding of their environment*<sup>41</sup>

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<sup>37</sup> Hart, R.A., (1992) *Children's Participation, From Tokenism to Citizenship*, UNICEF International Child Development Centre,

<sup>38</sup> Ibid at page 5

<sup>39</sup> See Shier, H., (2001) Pathways to Participation: Openings, Opportunities and Obligations, *Children & Society*, Vol. 15, pp. 107 – 117.

<sup>40</sup> Committee on the Rights of the Child, (2009) *General Comment No. 12, The right of the child to be heard*, at para 29

<sup>41</sup> Lansdown, G., (2009) The realisation of children's participation rights, in Percy-Smith, B., and Thomas, N., (eds.) *A Handbook of Children's Participation: Perspectives from Theory and Practice*, Routledge, at page 12. Indeed, in a two-year ethnographic study involving four neonatal intensive care units, Alderson concluded that respecting the participation rights of babies was a feasible and possible reality, noting that infants express themselves in a variety of manners thereby justifying the delivery of high standards of care. See Alderson et al (2005) *The Participation Rights of Premature Babies*, *The International Journal of Children's Rights*, 13; pp 13 – 50.

Moreover, the scope of Article 12 commands a right to participate ‘*in all matters affecting the child*’. Such views often traverse broad personal, familial and social landscapes including medical, domestic, educational, judicial and other contexts which involve children and young people. Woodhead states that “Article 12 demands that children’s views be respected, not as evidence of their relative competence, but as evidence of their unique experiences of the world they inhabit”.<sup>42</sup> Thus, participation and its realisation in the context of children and young people assumes a wider significance. The indissoluble nexus between the right to participate and other fundamental rights, including the right to information<sup>43</sup> and freedom of expression<sup>44</sup> evidence the reality that participation does not and cannot endure within a solitary legal vacuum. Rather, such rights ensure, particularly for children and young people, the meaningful and tangible operation of the right to participate. Children should be provided with the relevant information, enabling them to form a view and opinion to subsequently articulate, with such views to be accorded ‘due weight’ in light of the child’s age and maturity. Indeed, in her seminal conceptualisation of children’s participation pursuant to Article 12 CRC, Lundy<sup>45</sup> advocated a four-fold framework, instituted on the mutually reinforcing pillars encompassing space, voice, audience and influence. Lundy’s conceptualisation affords the young person concerned the space to form a view with that view expressed freely, with such views listened to and subsequently acted on.

However, the translation of the right to participate into an accessible and operable reality is a much more loaded endeavour. Atypical from classical negative rights wherein simple state abstention satisfies their realisation such as the prohibition of torture whereby non-action and non-interference with the individual satisfies the right in question, the right to participate encompasses the operative engagement of others. As a free-standing individual right and a concurrent interpretative principle under the CRC, the right to participate can neither be conceptually nor practically detached from other Convention rights and in particular Article 5 which recognises the evolving capacities of the child.

### **2.2.2 Evolving Capacities of the Child**

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<sup>42</sup> Woodhead, M., (2005) Early Childhood Development: A Question of Rights., *International Journal of Early Childhood*, 37(3), pp. 79 – 98 at page 89.

<sup>43</sup> Article 17 CRC.

<sup>44</sup> Article 13 CRC.

<sup>45</sup> Lundy, L., (2007) ‘Voice’ is not enough: conceptualising Article 12 of the United Nations Convention on the rights of the Child, *British Educational Research Journal*, Vol. 33, No. 6, pp. 927 – 942 at p 933.

Respect for the evolving capacities of the child is enshrined in Article 5 of the CRC which states that;

*‘States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention’*

Article 5 in many respects, represents the textual and practical accommodation of the interface between children’s autonomy rights on the one hand and the need for protection on the other. It exposes the legal and social equilibrium sought to be achieved in the CRC between promoting the exercise of children’s agency and participation in matters which affect them while simultaneously according them the requisite protection in light of their age and maturity. It accords neither parent nor child legal superiority nor does it endorse a child-liberationist nor parent-centric ethos. Rather, it recognises and espouses the necessity for parental guidance and direction in the context of children’s lives within an over-arching framework wherein the autonomy and agency of the child is both valued and promoted.<sup>46</sup>

As children do not occupy a homogeneous unit within society, Article 5 recognises that age-based biological developmental equivalence does not materialise.<sup>47</sup> Rather, child development is comprised of, and influenced by, a range of issues including cultural, social, biological, familial and environmental elements amongst others.<sup>48</sup> Therefore, the capacities of children

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<sup>46</sup> For more discussion on the evolving capacities of the child, see Varandan, S., (2019) The Principle of the Evolving Capacities under the UN Convention on the Rights of the Child, *The International Journal of Children’s Rights*, Vol.27, pp. 306– 338.

<sup>47</sup> For more, see Landsdown, G., (2005) *The Evolving Capacities of the Child*, UNICEF Innocenti Research. Landsdown argues that children are “a highly differentiated group and a wide range of factors impacts the development of their capacities, and how those capacities are viewed and interpreted by the world around them”. Ibid at p. xiii.

<sup>48</sup> For more see Committee on the Rights of the Child, General Comment No. 15 (2013) on the right to the highest attainable standard of health which states at paragraph 20 that “Childhood is a period of continuous growth from birth to infancy, through the preschool age to adolescence. Each phase is significant as important developmental changes occur in terms of physical, psychological, emotional and social development, expectations and norms. The stages of the child’s development are cumulative and each stage has an impact on subsequent phases, influencing the children’s health, potential, risks and opportunities. Understanding the life course is essential in order to appreciate how health problems in childhood affect public health in general”. Similarly, the Committee on the Rights of the Child in General Comment No.14, (2013) on the right of the child to have his or her best interest taken as a primary consideration state at paragraph 55 that “Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities”.

evolve within different contexts at different stages and with different levels of intensity. In her contribution to the theorisation of Article 5, Lansdown advanced a three-fold conceptual framework in support of the ‘evolving capacities’ of the child. Firstly, as a ‘developmental concept’<sup>49</sup>, she asserted that child development and evolving capacities are inherently inseparable realities; noting that human development is a life-long process with the CRC; “a tool for promoting children’s development, competence and emerging personal autonomy”.<sup>50</sup> Secondly, she stated that the ‘evolving capacities’ of the child can be seen as a “participatory or emancipatory”<sup>51</sup> concept which involves a shift in the execution of responsibility from the parental sphere to the personal domain of the child in accordance with their level of capacity and competence. In this vein, Lansdown also noted;

*“Capacity or competence spans a wide range of qualities – moral, social, cognitive, physical, and emotional – that do not all develop according to a uniform pattern. Children, like adults, will not acquire a consistent and overall level of capacity across all fields. Rather, their expressions of competence will vary according to the nature of the tasks involved, their personal experiences, expectations placed on them, social context and individual abilities.”*<sup>52</sup>

Thirdly, she argued that the ‘evolving capacities’ of the child embrace a “protective concept” which recognises that children and young people have a right to protection on the part of both parents and the State in relation to activities, practices and behaviour which can, could or likely cause them harm. In this regard, Lansdown states that child protection falls into four discrete sections including protection from physical and emotional harm, protection in personal decision-making, protection from harmful social or economic factors and protection from exploitation and abuse.<sup>53</sup> Additionally, in its espousal of two central tenets; namely the recognition of the child as an active participant in her own development and the subsequent collocation of this with the duty and responsibility of parents and/or carers to provide the appropriate direction and guidance to the child in furtherance of the realisation of the rights enshrined in the CRC,<sup>54</sup> Article 5 ensures the provision of a degree of assistance responsive to the particular developmental circumstances of the child. Therefore, by recognising that children

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<sup>49</sup> See n (47) above at page 15.

<sup>50</sup> See n (47) above at p.16.

<sup>51</sup> See n (47) above at p.15.

<sup>52</sup> See n (47) above at page 23.

<sup>53</sup> See n (47) above at page 33.

<sup>54</sup> See Kamchedzera, Garton, (2012) *Child’s Right to Appropriate Direction and Guidance*, Martin Nijhoff Publishers who states at page 14 that “The parent or carer is expected by the Article to be sensitive to the child’s evolving capacities, preferences and environments”.

may require less protection as they develop their own competencies, Article 5 not only complements Article 12 but in many ways underpins it. For children's views to be given due weight in accordance with their age and maturity, this will very often depend on their own individual development and central to that is the appreciation that children do not develop in either a linear or identical fashion. Therefore, recognition of their participation rights also involves an appreciation of their evolving capacities.

### 2.2.3 The Right to Information

Article 13 of the CRC enshrines the right of the child to information. It states;

*“The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice”*

This right to information is subsequently solidified in Article 17 which states;

*“States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health”*

Collectively, Articles 13 and 17 encase the rights to information and freedom of expression, both mutually reinforcing entitlements. Both are fundamental to the substantive operation of other Convention rights, namely Article 12 and ensure the meaningful realisation of others<sup>55</sup> as information ‘is essential for the child’s development and represents an essential precondition for participating in social life’.<sup>56</sup> Indeed, Stalford et.al., argue that the right to information is “an essential starting point for stimulating meaningful participation”.<sup>57</sup> In its most elementary construction, participation is futile and meaningless in the absence of access to information, from a multiplicity of sources, which consequently enables the formation and articulation of views thereafter. Articles 13 and 17, part of the broader spectrum of civil and political rights within the CRC, and their direct connection with Article 12 highlight the interdependent and

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<sup>55</sup> For more, see Report of The Special Rapporteur on the Promotion and Protection of the right to Freedom of Opinion and Expression (2014) UN General Assembly 21<sup>st</sup> August 2014, 69<sup>th</sup> Session.

<sup>56</sup> Ibid at para 18

<sup>57</sup> Stalford et.al., (2017) Achieving Child Friendly Justice through Child Friendly Methods: Let’s Start with the Right to Information, *Social Inclusion*, Volume 5, Issue 3, pp 207–218 at p.210.



indivisible nature of human rights.<sup>58</sup> Indeed, the relationship between such rights exemplifies the cyclical and practical context within which they exist. Children require appropriate information to both form and subsequently ventilate their views pursuant to Article 12. Moreover, such rights play a profound role in the development of an active citizenship. They assist in the communication of the child's view(s) and give meaning to the view(s). Their direct relevance and applicability to Article 12 illustrates their significance but also their empowering qualities. Thorgeirsdóttir argues that "the instrumental value of these rights is to construe citizens rather than mere consumers. It is to involve individuals as active participants in society".<sup>59</sup> Therefore, in the absence of appropriate and understandable information, the ability of children to meaningfully participate is undermined. Such information plays a critical role in ensuring Article 12 CRC has real bite. Having outlined the principal legal and theoretical foundations of the researcher's methodology, section two will proceed to outline how this was operationalised in practice, and the ethical and practical challenges which were involved.

## **Section Two: The Research Process – Operationalizing a Child-Participatory Approach**

### **2.4. Putting Principles into Practice**

From the forgoing analysis, a child-participatory approach centres around the deployment of several critical CRC rights, namely the right to participate and be heard pursuant to Article 12. And while much of the theorisations of participation have relegated tokenistic participation or participation which merely plays lip-service to children's participatory rights, to the bottom of the participatory mound, Lundy has recently reminded us that there is indeed much value to be had in tokenistic participation.<sup>60</sup> In highlighting the efforts and resources required to ensure participation takes place in the first instance, Lundy reinforces her argument against dismissive predilections towards tokenism by stating that: "It is difficult to think of another situation where it would be presented as honourable to deny an individual the enjoyment of their rights on the basis that full compliance is impossible".<sup>61</sup> By further reiterating that participation should "not be rarefied to the point that it is considered unattainable"<sup>62</sup>, Lundy starkly reminds us that not

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<sup>58</sup> See Thorgeirsdóttir, H. (2005) *A Commentary on the United Nations Convention on the Rights of the Child, Article 13: The Right to Freedom of Expression*, Martinus Nijhoff Publishers at p.18

<sup>59</sup> Ibid at page 20.

<sup>60</sup> See Lundy, L., (2018) In defence of Tokenism? Implementing children's right to participate in collective decision-making, *Childhood*, Vol.25(3), pp. 340–354.

<sup>61</sup> Ibid at p. 343.

<sup>62</sup> Ibid at p. 352.

listening to children and young people in the first instance is itself a breach of their human rights.

Indeed, to date, much of the academic treatment concerning research into children's rights has tended to focus on the alignment of such research and the approaches underpinning it around Article 12 CRC. By invoking the right of the child to be heard in matters which affect her, and for her views to be given due weight in accordance with her age and maturity, children's rights scholarship has unquestionably advanced children's participatory rights beyond its mere textual existence in Article 12. Child participation has now become a legal and practical mainstay in many areas of law which affect children.<sup>63</sup> For instance, the recent adoption by the Irish government of the Lundy model of participation, designed to ensure child participation across all public policy and legal spheres including education and health, amongst others,<sup>64</sup> exemplifies this and attests to the traction which sustained engagement with, and refinement of, children's participatory rights have had.

While this thesis deploys Article 12 CRC and the related rights central to its operation as outlined above as the key legal justification for adopting a child participatory approach to the investigation of school exclusions, it is not the only reason for such an approach. Rather, by its very nature, adhering to the principle of progressive realization necessitates a qualitative and subjective assessment of the level of realization of the right in question. Be it the right to health, housing, or in this context the right to education, children's access to and enjoyment of such rights is inseparable from their factual and individual experiences, and the circumstances surrounding, their enjoyment of that right. Indeed, such subjective standpoints are critical safeguards in assessing the extent to which contracting states are actually delivering on such rights. Indeed, in highlighting the criticality for high quality reliable data, Ennew reminds us that that such evidence "determines the policies and programmes that directly affect children's experiences of childhood and the extent to which their rights are fulfilled".<sup>65</sup> Therefore, from a children's rights perspective, and in light also of the significance which the Committee on the Rights of the Child have attached to the importance of qualitative evidence,<sup>66</sup> it is contended

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<sup>63</sup> See Children Act 1989.

<sup>64</sup> See Department of Children and Youth Affairs (2015) *National Strategy on Children and Young People's Participation in Decision-making, 2015–2020*. Dublin: Government Publications (Available at: [www.dcyia.ie](http://www.dcyia.ie))

<sup>65</sup> See Ennew, J., (2011) Has Research improved the Human Rights of Children? Of Have the Information Needs of the CRC Improved Data About Children?, Invernizzi, A., & Williams, J., (eds.) *The Human Rights of Children*, (Farnham: Ashgate) pp. 133–158, at p.133.

<sup>66</sup> For example, in General Comment No. 5 on the General Measures of Implementation, the Committee state that "Interviewing children and using children as researchers (with appropriate safeguards) is likely to be an important way of finding out, for example, to what extent their civil rights, including the crucial right set out in article 12,

that child participatory approaches to research are important for not only adhering to Article 12 CRC but also for complying with the principle of the progressive realization of children's rights. Within the specific context of children's socio-economic rights, much methodological value and strength resides in the deployment of participatory approaches to both highlight and embed an increased awareness of the principle of progressive realization within children's rights scholarship. In this regard, the child-participatory approach adopted in this thesis was the 'Agenda Day' model.

## 2.5. The Agenda Day Model

The signature research model of Investing in Children (IiC), an Agenda Day "is a unique technique developed by IiC to create an adult-free opportunity for children and young people to consider specific issues or concerns and identify priorities and proposals for improvement".<sup>67</sup> The 'Agenda Day' model of inquiry not only endorses the essence of child participation but is also an important (and practical) vehicle in driving forward the necessity to engage with children's direct subjective experiences of issues of concern to them. Within the Agenda Day framework, children and young people are directly involved in the generation of the issues and questions relevant to the research itself. Moreover, the researcher had spent time visiting the offices of IiC in Co. Durham, meeting the staff, speaking to children and young people who had been involved as co-researchers in different projects where Agenda Days had been used, and examining the extensive catalogue of research reports which followed the successful use of these Agenda Days. These ranged from investigations concerning children's health and well-being issues,<sup>68</sup> to the provision of sex and relationships education in school<sup>69</sup> to young people's views and experiences of school and education.<sup>70</sup> Indeed, in a recent study on children's educational experiences in both England and Scotland, in which the researcher was involved and which followed an Agenda Day approach,<sup>71</sup> the findings highlighted a rights-respecting deficit within schools with children feeling marginalised where their views were given 'no

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to have their views heard and given due consideration, are respected within the family, in schools and so on." Committee on the Rights of the Child, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2001/5 at para 50.

<sup>67</sup> See n (57) above at p. 209.

<sup>68</sup> Investing in Children (2015) *Young People's Feedback - Children, Young People & Families Plan, Joint Health Wellbeing Strategy 2015*

<sup>69</sup> Investing in Children, (2015) *Review of Sex and Relationship Education (SRE) in Schools 2015*.

<sup>70</sup> Investing in Children (2016) *Partnerships for Change: working together for social justice in schools. Laurel Avenue Community Centre Agenda Day Report*.

<sup>71</sup> See Cairns, L., Byrne, S., Davis, J.M., Johnson, R., Konstantoni, K., & Kustatscher, M. (2018) 'Children's Rights to education: Where is the weight for children's views?' *The International Journal of Children's Rights*, 26: 38-60.

weight' within schools and where they were also discriminated against because of their background.

Consequently, the cumulative effect of both the researcher's exposure to, and experience of, the Agenda Day model of inquiry, was that it offered a new methodological approach to understanding the issues of direct concern and relevance to children and young people. It involved children in research and gave them a role within it. Agenda Days also ensure that their voice carried through to the dissemination of the research so that the children and young people were involved from beginning to end. In this way, the Agenda Days offered an avenue which enabled the realization of what Beazley et.al. stated was the right of children "to be properly researched".<sup>72</sup> Such a right, they argued, in practical terms, means "using methods that make it easy for them to express their opinions, views and experiences; being protected from harm that might result from taking part in research conducted by researchers who use quality, scientific methods and analysis".<sup>73</sup> In more recent writings, and to honour the memory of the late Judith Ennew, Bessell et.al., movingly highlighted that central to Ennew's research philosophy was her long-held belief that adults "are not able to act as proxies for children ... adults' views are not – and cannot be assumed to be – the same as children's views".<sup>74</sup> With this in mind, Agenda Days permitted the authentic transmission of children's experiences and understandings of the school exclusion system in England.

In terms of their actual operation, children and young people are invited to attend the Agenda Day depending on the issue under discussion, which in this context was the issue of school exclusions. They are designed so that "children and young people come together to discuss their ideas, express their views and opinion and to create solutions to their problems and concerns".<sup>75</sup> An agenda is established which guides the flow of questions and the Agenda Day runs in many ways like a focus group, with the views of the young people recorded by another young person who acts as a facilitator among them. Although the zones are adult -free, adults are present on-site, though not as part of the Agenda Day, to assist should anything arise with IiC also assisting with the recruitment of participants through their established networks. Thus, although adults are involved with the overarching organisational aspects of the research,

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<sup>72</sup> See n (32) above at p. 370.

<sup>73</sup> Ibid.

<sup>74</sup> See Bessell S., Beazley H., Waterson R. (2017) The Methodology and Ethics of Rights-Based Research with Children. In: Invernizzi A., Liebel M., Milne B., Budde R. (eds) '*Children Out of Place*' and Human Rights. *Children's Well-Being: Indicators and Research*, vol 15. Springer, Cham, at p.213.

<sup>75</sup> L Cairns et al., 'Children's Rights to Education – Where is the Weight for Children's Views' (2018) 18 *The International Journal of Children's Rights*

children and young people are the primary research protagonists in terms of data gathering, analysis and dissemination. Before the Agenda Days could take place, research ethical approval had to be obtained.

### **2.5.1. Research Ethics**

Ethical protocols are essential safeguards against illegal and immoral research practices.<sup>76</sup> They ensure research is rigorous and robust and adhere to the highest standards in terms of safety for both researcher and participant and for the adherence to privacy rights and data protection. As such, ethical procedures militate against disordered research practices. However, from a children's rights perspective, the issue of ethics and children's rights raises a number of important and at times uncomfortable questions. Such issues tend to revolve around the actual or perceived capacity and/or vulnerability of children to partake in research<sup>77</sup> and whether their involvement is in fact strictly necessary. For example, European Union guidance on the receipt of funding pertaining to research refers to children as requiring "special attention"<sup>78</sup> and further conditions that children's involvement in research should be "absolutely necessary".<sup>79</sup> While research should of course be guided by the principles of voluntary participation on the basis of full, free and informed consent, children's rights does not impose an upper threshold of absolute necessity for participation.

For this thesis and the use of Agenda Days, where children and young people would have quite a prominent role, ethical approval was sought from the University of Liverpool Ethics Committee. Ethical approval was finally granted after the committee were supplied with additional information, and reassurances, regarding Investing in Children's role as research gatekeepers and with the recruitment process, that the research would proceed on the assumption that the young people involved would be Gillick competent<sup>80</sup> and all security and privacy protocols would be complied with.

### **2.5.2. Research Recruitment**

Once ethical approval had been obtained, the empirical aspect to the thesis could commence.

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<sup>76</sup> European Commission (2010) *European Textbook on Ethics in Research*.

<sup>77</sup> See Mortari, L., & Harcourt, D. (2012). 'Living' ethical dilemmas for researchers when researching with children. *International Journal of Early Years Education*, 20(3), pp. 234-243.

<sup>78</sup> European Commission (2013) *Ethics for Researchers: Facilitating Research Excellence in FP7*, at p.14.

<sup>79</sup> Ibid at p.27.

<sup>80</sup> Gillick competency typically refers to assessing whether the young person has a sufficient level of understanding regarding a particular situation.

Firstly, the researcher recruited a panel of children and young people and established a ‘*Children’s Rights Reference Group*’ (CRRG) with the responsibility to conduct the Agenda Days. The group also provided considerable counsel and guidance to the researcher by explaining current educational dilemmas many children and young people are confronted with in school and about their own experiences of school exclusions. The CRRG was formed after a one-day information workshop which was held at the offices of Investing in Children who acted as gatekeepers for the researcher. The workshop involved the researcher imparting information regarding the research project to the children and young people concerned; thereby complying with the requirements under Articles 13 and 17 of the CRC. This involved outlining the nature of the research and explaining the concept of progressive realization to the young people by stating that children and young people are entitled to have their socio-economic rights continuously improved and bettered and this also applied to the right to education. It was further outlined that given the widespread nature of school exclusions and the impacts they have on children’s future prospects that the research was concerned with understanding how children and young people not only currently felt about exclusions but how their education rights could be better improved within schools. For the children and young people to agree to become members of the CRRG, they were entitled to be supplied with the relevant information to enable them give full, free and informed consent. Information was provided in a child-friendly and accessible manner on the issue of their right to education in the CRC; what the concept of ‘progressive realization’ entails and the existence and reality of school exclusions in England (Appendix 1). Upon the receipt of the information, the children and young people were asked whether they wanted to join the CRRG and carry out the Agenda Days. Consent Forms were provided (Appendix 2) and signed by Leah, Caitlin, Jasmine and Chloe. A fifth young person, Ali, also joined the CRRG at a later date and was not present at the information workshop.

### **2.5.3. Data gathering, Analysis and Dissemination**

Once established, the researcher and the CRRG talked through what questions should form the agenda for the subsequent Agenda Days. Central to this process was the author’s appreciation that adult’s views and adult’s expectations of what questions should be asked cannot and should not be imposed on the young people. In this regard, this process was influenced immensely by Ennew’s philosophy that children are not simply proxies for adults, but rather they will have their own independent views and suggestions. On a deeper, more reflective level, given the children’s role as co-researchers, this also necessitated the sharing of control and power

regarding the issues to be discussed within the Agenda Days. In view also of the proximity of the CRRG to current educational issues given the fact they were still in full time secondary education, the researcher was aware that the children and young people would have a more nuanced and contemporary appreciation of the on-the-ground realities of the issues facing children in schools. Eventually, fourteen questions were settled on and included:

1. Do children and young people have a say in school punishments?
2. Do they know the exclusion policy code?
3. Does it affect their education when they are punished?
4. Why do they get excluded?
5. Does it impact the right to education?
6. When you have a return meeting from exclusion, do you have a say in your education?
7. Do children and young people know their rights when they get excluded?
8. Do they get a choice of education when they get kicked out?
9. Do they feel like their rights are being continuously upheld?
10. Do you feel you are treated differently by the school when you have returned from exclusion?
11. What rights do you think you have in school?
12. Do you get a say in your rights?
13. Do they (the school/teachers) let you get your opinions across?
14. Do you feel as if teachers abuse their rights?

These questions were arrived at after a discussion with the CRRG in which they spoke about their own experiences of school. As such the questions in many respects reflect the issues which are of relevance to the children and young people themselves. And while some of the questions may contain language which may objectively appear inflammatory such as using the phrase ‘kicked out’ or either appear to be leading in nature such as question 14, it is important to firstly remind ourselves, as Punch has, that: “Children are used to having much of their lives dominated by adults, they tend to expect adults’ power over them and they are not used to being treated as equals by adults”.<sup>81</sup> Thus, given such power, and indeed generational differentials, adult researchers should not be overly surprised that children’s language may often externally reflect their own experiences and their own everyday vocabulary. On the issue of leading questions, it is important to remember that the adult free nature of the Agenda Days are such that the potential of power imbalances arising are significantly reduced given that no adults are

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<sup>81</sup> See Punch, S, (2002) Research with Children: The same or different from research with adults? *Childhood*, Vol. 9(3): 321–341, at p. 324.

either asking the questions or are present during the exchange of information between the young people.

On reflection and from engaging with the CRRG, it became clear that many of the issues which emerged and as reflected within the questions which were ultimately settled on, were of a procedural character. These included questions regarding children's awareness of the exclusion code itself, the reasons underpinning the decision to exclude and whether they felt their rights were being continuously upheld, amongst others. This emphasis on the procedural dimensions to school exclusions subsequently influenced the wider doctrinal legal analysis of this thesis as it provoked a deeper engagement with not only how children's procedural rights can and should be enhanced within the exclusion process itself, but also with how the principle of progressive realization can also more meaningfully connect with the procedural dimensions to children's socio-economic rights, including their right to education.

Six Agenda Days were held across Co. Durham in the North East of England. These took place in three separate venues: two at Spennymoor Youth Centre, three in 'Room 14', Pelton and one in the Four Clocks Centre, Bishop Auckland. While the researcher was involved in the recruitment of the CRRG, Investing in Children were instrumental in setting up and recruiting participants to take part in the Agenda Days. In total, 77 children and young people aged between 12 – 16 years, took part. Additional information capture forms (Appendix 3) were supplied by the researcher to the CRRG to obtain a further breakdown of the children and young people who attended the Agenda Days. The questions on the capture forms concerned issues regarding ethnicity, disability, eligibility for free school meals and whether the children had experienced parental divorce. These were entirely optional for those participating in the Agenda Days to complete but were nonetheless completed by 62 participants. Of those who completed the capture forms, 53 identified as being of White British origin which represented about 85.5% of the sample, while 6 identified as being from a traveller/gypsy background, representing just under 10% of the sample. Just under 18% stated they had a disability while just over 32% declared being in receipt of free school meals, itself a proxy for poverty.

Although the researcher was not involved in Investing in Children's recruitment process, nor was privy to the recruitment sources used, such figures raise some significant issues. Firstly, the overwhelming identification of the children as white British corresponds with, and indeed



supersedes, the national average of 68.2% who attend state-funded secondary schools.<sup>82</sup> Secondly, in relation to disability, while the capture form did not specify the nature or degree of disability involved, the 2018 governmental figures for children who have a special educational need (SEN), for example, in a state-funded secondary school was 20.9%<sup>83</sup> which generally corresponds with the figure of 18% documented in the capture forms. Lastly, in relation to those in receipt of free school meals, the sample size represents more than double the national average for those who are in receipt of free school meals. With the 2018 governmental statistical release showing that the free school meal eligibility uptake in secondary schools stood at 12.4%,<sup>84</sup> the figures in this study show an uptake of two and half times the national average. While caution must of course be exercised with such figures; children with SEN, those in receipt of free schools' meals and those from traveller/gypsy backgrounds statistically endure higher levels of school exclusion than other children. Therefore, on the face of it, the children within this study are already statistically marked out as having a higher probability of being excluded from school on the basis of a set of characteristics which is not of their choosing. Such realities further embed the need to break the connection which exists in our education system where disability, ethnicity and poverty operate as automatic red-flags for educational disadvantage. It further underscores the need for children's right scholarship to engage with how states can be held to account for progressively realizing children's educational rights.

Moreover, the Agenda Days were facilitated by the CRRG and the results and findings therefrom were subsequently disseminated back to the researcher at a follow up workshop at the offices of LiC on the 1<sup>st</sup> July 2017. This also provided an opportunity to consider and examine the data, discuss some of the main findings within it and go through the reports for accuracy. One of the clear issues which came out of this meeting with the CRRG, itself informed by the Agenda Days, was the issue of the procedural protections afforded to children within the exclusion process. This consequently generated a wider sense of inquiry for the researcher into how the principle of progressive realization engages with broader procedural protections for children's socio-economic rights, including their right to education. In this regard the Agenda Days were influential in developing and shaping the researcher's approach to the doctrinal legal analysis into the principle of progressive realization. Prior to the follow-

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<sup>82</sup> See Department of Education (2018) *Schools, Pupils and their Characteristics, January 2018*, at p. 9.

<sup>83</sup> See Department of Education (2018) *Special Educational Needs in England, January 2018*

<sup>84</sup> See n (82) above at p. 6.

up workshop, some initial findings were disseminated by the CRRG at the annual SLISA conference on the 17<sup>th</sup> April 2017 which was held at Newcastle University. This provided an opportunity not just for the CRRG to present at an academic conference, but also to provide them with an opportunity to disseminate the results of their work, as co-researchers. It also provided an opportunity for children's rights researchers more broadly to witness first-hand the vivid and direct involvement of children and young people as co-researchers. Indeed, at the formal follow-up workshop, the CRRG not only presented their findings to the researcher but also highlighted their personal and subjective experiences of carrying out the Agenda Days as part of this thesis. Expressions from Chloe included the following;

*"I think it's important that we get to hear other opinions as well as our own"*

[Chloe, Follow-up Workshop]

*"Gets me confidence up speaking to people I don't know"*

[Chloe, Follow-up Workshop]

Indeed, reflections by Leah and Ali highlight an additional insight into the importance and exactitude regarding disseminating the research and findings of the Agenda Days. They stated:

*"Also we should share feedback with people high in authority who deal with this so people can really start to understand the reasons for being excluded"*

[Leah & Ali, Room 14, Pelton Report]

Such sentiments, on a deeper level perhaps, reflect the very purpose of education as espoused in Article 29 CRC which endorses a broad holistic approach to human learning and development, to include the development of the child's personality, talents, and mental and physical abilities to their fullest potential in addition to preparing them for life in general. Thus, child participatory approaches can also serve a wider educative function and assist in the instillation of confidence and respect for other opinions and viewpoints among children and young people. After the follow-up workshop, the CRRG handed the researcher the written responses and data to the questions which they had amassed during the Agenda Days. These were subsequently read and analysed numerous times by the researcher with the main issues and themes extrapolated from the responses. This involved grouping the responses given within the Agenda Days into relevant themes but not altering the language or content of the reports.

Further to this, the researcher was keen that the exact words and expressions used by the children and young people would not be changed. These findings permeate this thesis and in addition to the doctrinal analysis, form the basis of the contention that numerous deficiencies within the school exclusion system are directly impeding the progressive realization of children's educational rights in England.

## 2.6. Wider Reflections on the 'Agenda Day' Methodological Approach

While the preceding sections have outlined the reasons why a child-participatory methodological approach was undertaken as part of this thesis, this section will now critically reflect on the suitability and appropriateness of the Agenda Day model of research for undertaking the research questions which this thesis sought to address, and indeed as part of doctoral research in general. Although child-participatory methodological approaches "have become de rigueur in social research involving children"<sup>85</sup>, and are important avenues through which children's voices can be captured within research,<sup>86</sup> it is also important to reflect on the research process itself. Such reflective practices not only contribute to the maintenance of good research etiquette but also develop and extend our understanding of theory and knowledge. Indeed, while participatory approaches have gained considerable traction within children's rights research,<sup>87</sup> it is equally important to develop our understanding of the value of these approaches.

For instance, McGarry's investigations into partner exploitation and violence in young people's intimate relationships in the UK ultimately questioned the "validity of the argument that participation necessarily involves positive benefits for the participants or even the research".<sup>88</sup> Although McGarry's research revolved around the sensitive issue of interpersonal violence and employed the services of a Young Persons Advisory Group (YPAG), one of the key methodological findings from her observations was the need for researchers to reflect on the connection between the methods used and the research question(s) under investigation. In her

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<sup>85</sup>Bradbury-Jones, C., & Taylor, J., (2015) Engaging with children as co-researchers: challenges, counter-challenges and solutions, *International Journal of Social Research Methodology*, 18:2, 161-173, p. 161.

<sup>86</sup> Lundy, L., & McEvoy, L., (2011) Children's rights and research processes: Assisting children to (in)formed views, *Childhood*, 19(1), pp. 129–144.

<sup>87</sup> See Thomas, N. (2017) 'Turning the Tables: Children as Researchers' in Christensen, P. and James, A. (eds) *Research with Children: Perspectives and Practices* (3rd edition, Routledge) & Thomas, N. (2007) Towards a Theory of Children's Participation, *International Journal of Children's Rights*, Vol. 15, 199–218.

<sup>88</sup> McGarry, M. (2012) Who benefits? A critical reflection of children and young people's participation in sensitive research, *International Journal of Social Research Methodology*, Vol. 15, No. 1, 55–68 at p. 64.

words, “researchers have to consider the methods applied to investigate it”.<sup>89</sup> On a deeper level, McGarry’s observations highlight the significance of reflecting on our own research practices in order to generate valuable lessons regarding future research and the development of our methodological approaches in undertaking that research. In many ways, it is by engaging in an objective rearward gaze over the methodological terrain covered within a research endeavour that future research projects and methods are improved and enhanced. What follows now is a discussion of the two principal methodological issues, and indeed limitations, which arose within this research project.

### 1. The ‘Thinness’ of the Data

One of the primary issues which arose within this research project revolved around the quality of the data which was ultimately collected within the Agenda Days. In particular, this related to the thin spread of the views and experiences of the children and young people who participated within the Agenda Days on the issue of school exclusions in England. In essence, Agenda Days, from their conceptual origins, were established less as a research tool but more for the purpose of policy consultations, evaluations and as a method to improve a particular policy issue under consideration. As such, their ability to assist in policy development or as a catalyst to bring about change within a specific area is one of their alluring features. Within this thesis, no specific sampling process was utilised. Rather, in view of the fact that all children and young people are themselves subject to a school’s disciplinary guidance, the transgression of which can result in an exclusion, the Agenda Days were set up to collect a wide range of views and opinions on this matter. This was further underpinned by the fact that the very process which LiC adopt as part of their recruitment strategies for participation within Agenda Days is one which is open-ended and inclusive in nature, with all children and young people encouraged to participate. Agenda Days tend to be advertised through LiC’s existing networks and participation through ‘word of mouth’ is regularly used.<sup>90</sup> Therefore, against this backdrop, the data which was subsequently generated was relatively ‘thin’ in nature and was more of an all-embracing generic quality, in comparison to what would be adduced through more conventional empirical approaches such as semi-structured interviews or focus-groups. While such data is of course welcome and valuable, as it greatly assisted in the development of the wider conceptual and legal analysis of the principle of progressive realization within his thesis, it is important to nonetheless recognise its empirical limitations. Rather, the collective and

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<sup>89</sup> Ibid, 64.

<sup>90</sup> For more on the process underpinning Agenda Days, see n (75).

generalised nature of the data meant that no individual or uniquely personal testimonies were gathered within the research.

As referred to earlier, Agenda Days in many respects emulate how focus groups take place. However, instead of a moderator who conducts a traditional focus group,<sup>91</sup> Agenda Days are mediated by a facilitator. In their examination of the benefits of focus group research involving children and young people, Adler et al argue that they possess a number of advantages.<sup>92</sup> These include the fact that focus groups with children and young people can be used to “create a safe-peer environment for children”,<sup>93</sup> that they enable the researcher to circumvent traditional power imbalances, best exemplified “between an adult and a child in a one-on-one interview”,<sup>94</sup> and that they can “elicit the perspectives of youths”.<sup>95</sup> However, in highlighting some of the implicit drawbacks which can attach to focus groups, Acocello reminds us of the inherent limitations which arise in such circumstances.<sup>96</sup> These include the dangers arising from conformist behaviour which “can derive from the pressure of social conventions, thus pushing participants to express more socially desirable and stereotypical answers”.<sup>97</sup> Acocella further argues that participants may fall back on “defensive strategies to protect themselves from the anxiety deriving from being in a group”,<sup>98</sup> which may in turn lead them to conforming and/or agreeing to the most popular or common viewpoints expressed within the group. All of these advantages and concerns are equally transferrable in the context of Agenda Days in light of the operational overlap which exist between both research methods.

However, important differences also exist between both. While focus groups are typically either audio-taped or video-taped which assists with data analysis,<sup>99</sup> Agenda Days are manually recorded in real time by the facilitator who subsequently writes up the findings in a report format which is then given to the researcher.<sup>100</sup> While the Agenda Day model evidently adhered to children’s participatory rights pursuant to Article 12 CRC, it did raise a number of

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<sup>91</sup> Krueger, Richard A., & Casey, Mary Anne (2000) *Focus Groups: a practical guide for applied research*, (Thousand Oaks, Calif: SAGE)

<sup>92</sup> Adler, K., Salantera, S., & Zumstein-Shaha, M., (2019) Focus Group Interviews in Child, Youth, and Parent Research: An Integrative Literature Review, *International Journal of Qualitative Methods*, Vol. 18, pp 1-15.

<sup>93</sup> Ibid, 2.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Acocella, I., (2012) The focus groups in social research: advantages and disadvantages, *Qual Quant*, 46:1125–1136.

<sup>97</sup> Ibid, 1134.

<sup>98</sup> Ibid, 1133.

<sup>99</sup> Adler et al n(92), 9-10.

<sup>100</sup> For discussion on Investing in Children, see Davis, John M. & Smith, M (2012) *Working in Multi-Professional Contexts: A Practical Guide for Professionals in Children’s Services*, (SAGE Publications Ltd) chapter 3.

practical issues for the researcher in relation to the eventual quality of the data which was collected. In the absence of recordings, the researcher was unable to explore or analyse the group interaction itself, the frequency in which a particular issue or theme arose within the group discussion, and by implication the perceived importance (or otherwise) which the participants attached to that theme. As such, the researcher was unable to engage in ‘group to group validation’, which Morgan describes as the process which “means that whenever a topic comes up, it generates a consistent level of energy among a consistent proportion of the participants across nearly all the groups”.<sup>101</sup> This would have allowed the researcher to draw inferences from the level of engagement which a particular topic under discussion generated within the Agenda Day.

Similarly, issues such as dealing with the potential presence of dominant voices<sup>102</sup> or how the participants themselves interacted with one another within the group discussion were not possible within the Agenda Days.<sup>103</sup> As such, the data presented to the researcher upon the completion of the Agenda Days in the form of the finalised report by the CRRG was quite ‘thin’ in nature. While the data did yield important insights into the overarching views and perceptions which the participants held regarding school exclusions and provided important accounts of the reasons which triggered an exclusion in the first instance, such data could have been strengthened significantly by the availability of the information referred to above. That said, the Agenda Days and the data therefrom did provide the conceptual basis for the wider legal analysis in this thesis around how the principle of progressive realization can be better understood and applied. For instance, as chapter five will highlight, much of the data which came out of the Agenda Days revolved around wider issues of fairness, procedural exactness, transparency, and accountability, and how these can be better applied in the context of school exclusions. And although such data was broad-based in nature, it did nonetheless influence the legal analysis of progressive realization within this thesis and how the principle also includes broader procedural, participatory and accountability dimensions.<sup>104</sup>

## 2. Organisational Limitations

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<sup>101</sup> Morgan, David L. (1997) *Conducting and Analyzing Focus Groups in Focus groups as qualitative research* (2<sup>nd</sup> Ed.) SAGE, 64.

<sup>102</sup> Smithson, J (2000) Using and analysing focus groups: limitations and possibilities, *International Journal of Social Research Methodology*, Vol. 3, No 2, pp 103 – 109.

<sup>103</sup> Grønkjær, M., Curtis, T., de Crespigny, C. & Delmar C. (2011). Analysing group interaction in focus group research: Impact on content and the role of the moderator. *Qualitative Studies*, 2(1):6-30

<sup>104</sup> See Chapter Five for discussion on the Agenda Day findings.

Closely connected with the above concerns is the issue of the organisational limitations which arose in the context of this research. Such organisational issues principally derived from the fact that the researcher and the CRRG were located in two separate parts of England: the North West and the North East of England respectively. Therefore, distance alone militated against regular contact with the CRRG. Looking back, it is suggested that a number of organisational protocols could be implemented in future to ameliorate some of the issues raised above. These include the future possibility to record the Agenda Days. However, such an issue would have to be arguably negotiated with Investing in Children who have devised this research model themselves. Consent for future recordings would also have to be obtained by the facilitators and the participants within the Agenda Days themselves and all recording practices would have to adhere to the relevant statutory guidelines regarding data protection.<sup>105</sup>

Aside from the recording issue, a number of other practical and organisational measures should be implemented which could contribute to the effective running of an Agenda Day. For example, after the first Agenda Day, the researcher should meet the facilitator(s) to talk through any issues which arose within the Agenda Day. This would provide an opportunity for the researcher to examine whether the questions which were asked within the first Agenda Day were eliciting responses or engendering discussions among the participants, or whether in fact such questions needed to be revised or altered. This would also provide an opportunity to examine whether any dominant voices were present within the Agenda Days and what possible steps the facilitator(s) could take to ensure other participants express their views in the subsequent Agenda Days. This would also provide an opportunity, if necessary, to engage with Investing in Children to confirm that future participant recruitment processes ensure that subsequent Agenda Days possess a robust mixture of homogenous and heterogenous participants to contribute to a vibrant discussion. As Acocella argues “in order to guarantee the collection of detailed and relevant information regarding the research topic, it is important that the people involved are interested in the topic and that they are able to discuss it thoroughly in the little time available”.<sup>106</sup> On reflection, it is contended that these organisational measures could contribute to ensuring that Agenda Days elicit information and data which is rich and consistent with the research questions while simultaneously maintaining their participatory integrity. In view of the distance between the researcher in this project and the invariable time and cost constraints associated with doctoral research, such measures were not implemented in

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<sup>105</sup> This includes the Data Protection Act 2018 which is the UK’s implementation of the EU’s General Data Protection Regulation (GDPR).

<sup>106</sup> See n(94) above at p. 1127.

this research project. However, on reflection, it is clear that they could have contributed to the collection of richer data and they therefore represent important organisational measures which could be incorporated into future research where Agenda Days are used.

Additionally, in view of the preceding concerns relating to data collection and indeed the wider organisational issues which arose within this research, it is contended that Agenda Days could exert significant methodological traction for future research if used in conjunction with other research approaches. This will of course obviously depend on the specific research context itself. However, given that this research was investigating what role, if any, the principle of progressive realization could play in the context of school exclusions, which is itself intricately connected with children's educational rights, it is contended for example, that follow-up semi-structured interviews with excluded children and young people would have allowed for a deeper interrogation of children's direct and personalised experiences of the school exclusion process. Indeed, on reflection, the data from the Agenda Days could be used to frame and design the questions within such interviews. This would have consequently enabled the researcher to explore the individual and subjective experiences of excluded children, their engagement with the schools concerned and their overall perceptions of the fairness, or otherwise, of the current school exclusion system. Given the acceptance that semi-structured interviews "are well suited for the exploration of the perceptions and opinions of respondents regarding complex and sometimes sensitive issues and enable probing for more information and clarification of answers",<sup>107</sup> such an approach, if informed by Agenda Days, possesses much promise in relation to future participatory research involving children and young people. For example, Goodall and Mackenzie's use of semi-structured interviews, in addition to supplementary participatory methods, including the use of a children's research advisory group (CRAG), for examining the views and experiences of two autistic girls in Northern Ireland on the issue of mainstream educational inclusion, highlighted the ability of such combined methods to scratch beneath the surface and probe the individual circumstances of the children involved.<sup>108</sup> In revealing the negative mainstream educational experiences both girls endured, the use of supplemental interviews were fundamental in adducing the deeper subjective experiences and viewpoints of the girls involved. Similarly, Munro's 2001 research into the experiences of fifteen 'looked after children' and their understandings of the level of power

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<sup>107</sup> K Barriball & A White (1994) Collecting data using a semi-structured interview: A discussion paper, *Journal of Advanced Nursing*, 19, 328–335, p. 330.

<sup>108</sup> Goodall, C., & MacKenzie, A., (2019) Title: what about my voice? Autistic young girls' experiences of mainstream school, *European Journal of Special Needs Education*, 34:4, 499-513.



and influence they had regarding the decisions being made about them employed the use of unstructured interviews.<sup>109</sup> This enabled the researcher to dig deeper into the experiences of ‘looked after children’ and reveal important findings surrounding the important role of the social worker, the variant levels of satisfaction which the young people had regarding the review process, the desire for contact with birth families, the significance of the advocate and the lack of confidentiality involved within corporate parenting. Again, the value of the interview resided in the fact it permitted the researcher to delve deeper and extrapolate the individual experiences and views of the children concerned. Therefore, taking everything together, the conclusions one can draw is that while Agenda Days are an important participatory mechanism through which children and young people can express views on matters which affect them, in the context of doctoral research, they should be used in conjunction with other methods as listed above to ensure the rich extraction of empirical evidence.

## **2.7. Conclusion**

Research with children and young people has been described as a ‘messy’ affair.<sup>110</sup> However, not ascertaining the views of children and young people in matters which affect them, for the sake of methodological or organisational ease, arguably represents a more egregious disavowal of children’s rights. In highlighting the child-participatory approach which this thesis adopted, this chapter has also highlighted the limitations which the Agenda Day model possessed for this particular research project. In highlighting these limitations and reflecting on the ways in which things could have been done differently and what methodological modifications could be undertaken in future research involving Agenda Days, this chapter has also sought to develop our understanding of the manner in which Agenda Days can be subsequently used in future child participatory research. For to understand, challenge and remediate the problems faced by many children in our education system today, it is firstly necessary to listen to them, and in their own words. Indeed, such views, which will form the analysis of the subsequent chapters, serve as a powerful reminder that engaging with children and young people is a vital means of exposing any shortcomings in the delivery of children’s rights. In their recollection of the labour and vision of the late Judith Ennew, Bessell et.al., remind us that research is “not simply an exercise in data gathering, but the basis of solutions to real-world problems”.<sup>111</sup>

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<sup>109</sup> Munro, E (2001) Empowering looked-after children, *Child and Family Social Work*, Vol6, pp. 129 – 137.

<sup>110</sup> See n (32) above.

<sup>111</sup> See n (74) above at p. 216.

## Chapter Three

### The Right to Education

#### 3.0 Introduction

*'You might be poor, your shoes might be broken, but your mind is a palace'*<sup>1</sup>

This chapter will set out the structural and regulatory framework which surrounds the right to education, commencing with a brief history of the development of the right itself. The analysis will be undertaken from a children's rights perspective. This chapter will examine the existence of the right from the various spheres within which it finds expression and foundation, and in so doing, will contextualise the analysis and argumentation which will follow in subsequent chapters. This chapter will then address the provision of education as it exists under the CRC and in so doing will expand on the core features of the right from a children's rights perspective, enumerating both the obligations and duties of the State in its delivery and realization of the right to education. Specifically, this section will scrutinise the classification of education as an economic, social and cultural Right (ESC) and the resultant consequences, both practically and legally, of such a categorisation. Central to this is the contention that as a legal entitlement, the right to education is broadly connected with the principle of progressive realization and as such, the realization of the right must be positioned against this legal standard. However, as this thesis will also highlight, various aspects of children's educational rights are of immediate application and so therefore it is necessary to understand not only the legal limits of the principle of progressive realization, but also how a socio-economic right like education contains elements which are not subject to progressive realization. As later chapters will establish, engaging with progressive realization can provide a durable and persuasive basis on which to hold states accountable for their education policies and to examine whether such policies are in fact complying with the human rights obligations expected of the state.

After setting out the broad legal framework relating to the right to education, this chapter will proceed with an examination of the legislative framework which underpins the system of school exclusions in England. An understanding of this broad legislative framework is necessary as subsequent chapters will challenge their legal and theoretical compatibility with the duty of the state to progressively realize the child's right to education.

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<sup>1</sup> McCourt, Frank (1996) *Angela's Ashes*, Scribner, at page 208

### **3.1. The Right to Education**

#### **3.1.1. Historical Developments**

The historical trajectory of the right to education has been characterised by change and adaption. Initially bereft of any form of theoretical or intellectual contiguity, the original aims of education undoubtedly served the immediacy of the time and context within which the individual was located. Writing nearly half a century ago, Foy asserted that this historical actuality was a reflection of education as “a history in the extension of the dimensions of time”.<sup>2</sup> From primitive beginnings where survival was the dominant educational goal to Athenian Greece which reserved the holistic educational development to the privileged young male; and from Spartan Greece which mandated the direction of education towards the preservation of a strong State to the Roman educative model which espoused the training of skilled professionals and administrators in furtherance of the interests of the State, the journey of education has been one of adjustment.

Moreover, in his analysis of the philosophical foundations underpinning the right to education Beiter<sup>3</sup> outlines three core reasons why education should be considered a fundamental human right. These include, firstly, the social utilitarian argument; namely the recognition of the wider positive societal benefits which education brings. Second is the recognition of the relationship between education and individual development, such that without the former, the latter would be seriously impaired. Lastly, Beiter outlines the individual welfare argument, which proceeds along the basis that education should be considered an individual welfare necessity which should be provided. However, it is perhaps Beiter’s argument that respect for, and recognition of, “man’s inherent dignity”<sup>4</sup>, which proves the most compellable basis for ensuring equal access to, and enjoyment of, the right to education. As one tracks its historical development, one can begin to witness the distinct role of the state as a key stakeholder in the delivery of education. Indeed, with the advent of human rights and the formalised documentation of state obligations regarding the delivery of education, the role of the state has become paramount

#### **3.1.2. Human Rights Developments regarding Education**

The position of education within the human rights movement, from its initial conception to its current formation has always been dominant. The International Human Rights framework, the

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<sup>2</sup> Foy, R., (1968) *The World of Education – An Introductory Text*, The Macmillan Company, at page 9.

<sup>3</sup> See Beiter, K D., (2006) *The Protection of the Right to Education by International Law*, Martinus Nijhoff Publishers, at p. 26 – 27.

<sup>4</sup> Ibid at p.27.

origin of which can be traced back to the aftermath of two world wars and the Great Depression and the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, has contributed immensely to the development and espousal of human rights norms upon which individuals and groups can advance and secure their rights and freedoms, and where necessary, challenge State practice when such rights are endangered. As Raphael observed, the UDHR denoted the ‘symbolic moment of ‘arrival’ when all humankind came to acknowledge the reason of rights’.<sup>5</sup> Extensive in its scope, although non-binding in nature, the UDHR set out an all embracing array of human rights embodying civil, political, economic, social and cultural rights (ESC) and established itself as the sub-structure upon which the human rights movement was to expand in terms of scope, reach and reference. As noted by Eide, the enjoyment of the rights enunciated in the UDHR were to be achieved by the mutually reinforcing process of ‘both absorption and global institutionalization’;<sup>6</sup> the former representing the domestic incorporation of such rights into the national legal configuration of all national societies while the latter denoted the development of an international monitoring mechanism regarding the implementation of human rights worldwide. Indeed, this first unitary collection of human rights in many respects laid the foundation for subsequent developments at both international and regional level concerning the elaboration of both individualised and specific human rights, in terms of both content and audience. This also included the right to education.<sup>7</sup>

### **3.1.3. The International Human Rights Framework**

Within the broad expanse of international human rights law, the right to education has permeated all major accords,<sup>8</sup> is resolutely anchored within the international legal system and has established itself as a seminal entitlement, which as discussed in the introduction, fortifies the activation of many others. Indeed, its inclusion in such treaties is matched by its presence in numerous national constitutions,<sup>9</sup> an increasing number of supra-national political

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<sup>5</sup> Evans, T., (ed.) (1998) *Human Rights Fifty Years On A Reappraisal* (Manchester University Press) page 3

<sup>6</sup> Asbjorn, E., Krauss, C., & Rosas, A., (2003) *Economic, Social and Cultural Rights*, (2<sup>nd</sup> Revised Edition, Brill Nijhoff), at page 19.

<sup>7</sup> Article 26 of the UDHR.

<sup>8</sup> See for example, Article 22 Convention relating to the Status of Refugees, Article 5 (D) V Convention on the Elimination of all Forms of Racial Discrimination, Article 30 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 24(1) Convention on the Rights of Persons with Disabilities, Article 17 African Charter on Human and People’s Rights, Article 31 ASEAN Human Rights Declaration & Article 40 (4) Arab Charter on Human Rights.

<sup>9</sup> For example, see Article 56 El Salvador Constitution, Article 14 Constitution of the Philippines and the Bill of Rights chapter in the South African Constitution.

declarations<sup>10</sup> and recent international developmental goals.<sup>11</sup> Indeed, the vast support which education commands at both domestic and international legal and political levels attests to its importance. As the engine through which human potential and attainment are realised, education is necessary for the just and proper advancement of all children, persons, societies and nations. From a children's rights perspective, this reality becomes all the more acute. Fortin contends that the 'right to be educated is probably one of the most important of children's moral and legal rights; without it they may be unable to develop their 'personality, talents, and mental and physical abilities to their fullest potential'<sup>12</sup> Similarly, in her acknowledgement of education as a 'crucial human right for children',<sup>13</sup> Quennerstedt argues that the unique and holistic configuration of the CRC is such that 'rights are regarded as interwoven and not possible to separate from each other in any relevant way'.<sup>14</sup> Indeed, such sentiments capture and confirm what Tomasevski describes as the multiplying effect of education; namely, in its absence or non-realization, numerous other rights would not only go unfulfilled but the human cost of such failures would reveal themselves in heightened levels of unemployment, lower levels of educational attainment and the increased risks of social, political and economic exclusion among those whose right to education was not realized.<sup>15</sup> Such realities, in many respects, also align with Beiter's three-fold articulation of the benefits which education brings which include its ability to lead to political empowerment, socio-economic development and cultural participation.<sup>16</sup>

From its first codification in Article 26 of the UDHR, the right to education has found expression in a multiplicity of international human rights treaties and covenants. Indeed, that initial codification set in motion a number of key legal duties which have come to characterise and define its delivery. Chief among these has been the recognition of the principle of

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<sup>10</sup> See for example, The World Conference on Education for All in Thailand in 1990, the outcome of which was the production of 'The Framework for Action to Meet Basic Learning Needs' and the World Education Forum in Dakar in 2000, where the international community further pledged itself to the achievement of six stated goals within a wider conceptual framework known as 'Education For All'. For more recent political developments regarding education see the recent Abidjan Principles on the right to education, which were adopted on 12 – 13 February 2019.

<sup>11</sup> See Goal 4 of the Sustainable Development Goals which centres on the right to education,

<sup>12</sup> Fortin, J., (2005) *Children's Rights and the Developing Law*, Cambridge University Press, p 162

<sup>13</sup> Quennerstedt, Ann (2009) Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child, *Journal of Human Rights*, 8 at page 162

<sup>14</sup> Ibid at page 173

<sup>15</sup> See Tomasevski, K., (2001) *Removing obstacles in the way of the right to education*, Right to Education Primers No.1 (Right to Education Initiative) at p. 9.

<sup>16</sup> See n (3) above at p.29.

progressive realization as inseparable from the duties expected of contracting states regarding their commitment towards upholding the right to education.

For example, the UDHR contains within its preambular proclamation a reference to implement “*progressive measures*” to secure the universal and effective enjoyment of the rights therein while Article 22 asserts that everyone is entitled “*in accordance with the organization and resources of each State*, to the economic, social and cultural rights indispensable for his dignity and the free development of his personality”, which includes by extension, the right to education. Specifically, however, on the right to education, the UDHR states that primary education shall be compulsory and free, while “Technical and professional education shall be made *generally available* and higher education shall be equally accessible to all on the basis of merit” [emphasis added].<sup>17</sup> Subsequent treaties have similarly expounded the connection between the right to education and progressive realization in a more explicit fashion. For instance, Article 13(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that “with a view to achieving the full realization” of the right, primary education shall also be compulsory and free but that secondary education, in all its forms, shall be “made generally available and accessible to all by every appropriate means, and in particular by the *progressive introduction* of free education” [emphasis added].<sup>18</sup>

At the regional level, the connection between the two is equally evident. The additional protocol to the American Convention on Human Rights, commonly referred to as the ‘Protocol of San Salvador’, further aligns the right to education with the principle of progressive realization. For example, Article 13 stipulates that secondary education “should be made generally available and accessible to all by every appropriate means, and in particular, by the *progressive introduction* of free education”<sup>19</sup> while higher education should be “made equally accessible to all ... by the *progressive introduction* of free education”.<sup>20</sup> From a European perspective, both the Revised European Social Charter and the European Convention on Human Rights (ECHR) also contain explicit references to progressive realization. In relation to the former instrument, Article 17 which provides for the rights of children and young people to social, legal and economic protection states that such rights, which includes the right to education and training, is instituted on the state’s obligations “*to take all appropriate and necessary measures*” designed to fulfil such entitlements. The latter instrument also makes a

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<sup>17</sup> Article 26 (1) UDHR.

<sup>18</sup> Article 13 2(b) ICESCR.

<sup>19</sup> Article 13 (b) Protocol of San Salvador.

<sup>20</sup> Article 13 (C) Protocol of San Salvador.

number of references to contracting parties' obligation to 'take steps' towards achieving the rights in question. This includes Protocol One to the ECHR which protects the right to education and property, amongst others, and which obliges contracting parties "*to take steps*" to ensure the "collective enforcement" of the rights therein.<sup>21</sup> Indeed, even beyond the legal text of human rights treaties, the relationship between progressive realization and the right to education was practically affirmed on the international stage through the establishment of the mandate of the Special Rapporteur on the right to education, which amongst other aims, was convened; "To report on the status, throughout the world, of the progressive realization of the right to education".<sup>22</sup> Therefore, the legal relationship between the right to education and the principle of progressive realization is beyond doubt. From a children's rights perspective, however, the right to education as enshrined in the CRC represents the fundamental starting position regarding the child's right to education.

### **3.2. Education and the CRC**

Adopted and opened for signature, endorsement and accession by General Assembly resolution 44/25 of 20<sup>th</sup> November 1989 and entering into force on 2<sup>nd</sup> September 1990, the CRC swiftly received the imprimatur of the international community. Extensive in its scope, and with near universal ratification, the Convention set out an all-embracing array of civil, political, economic, social and cultural rights and according to Freeman, represents "a landmark in the history of childhood".<sup>23</sup> With regard to education however, the CRC in a comparable fashion to the preceding treaties unequivocally continues the legal connection between education and progressive realization. The seminal provisions are contained in Articles 28 and 29. Article 28 states;

'1. States Parties recognize the right of the child to education and with a view to achieving this right *progressively* and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the

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<sup>21</sup> See Preamble to Protocol One of the ECHR.

<sup>22</sup> See UN Commission on Human Rights Resolution 1998/33 at para 6 (a) (i).

<sup>23</sup> Freeman, M (1996) *Children's Rights: A Comparative Perspective*, Dartmouth, at p 1.

introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.

In this regard, particular account shall be taken of the needs of developing countries'

This is followed by Article 29 which expands upon the duties as outlined above and gives qualitative effect to such obligations, thereby highlighting the importance of the right to education.

Article 29 states;

'1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;



(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State’.

By dedicating two distinct articles to education, the CRC explicitly recognises its significance. Indeed, writing shortly after the enactment of the CRC, the late Eugene Verhellen reiterated the importance of education by calling it “an instrument of socialization”<sup>24</sup>. However, a closer inspection of the legal duties which flow from both Articles 28 and 29 reveal some clear commitments which contracting states must implement. Such obligations, based on the principles of equal opportunity and progressive realization, include the provision of free primary education, the progressive realization of different forms of secondary education, accessible higher education, the reduction of drop-out rates, the establishment of safeguards relating to school discipline and the encouragement of international cooperation in matters relating to education. While such obligations would appear to fall within the conventional parameters of the right to education, the CRC expounds further duties in Article 29 which relate to the grounding ethos which should support, frame and guide the delivery of education within contracting states. Crucially however, no reference is made within Article 29 CRC of the principle of progressive realization. Such duties refer to the requirement for education to assist in the development of the child’s personality in a holistic and all-inclusive manner and also the child’s preparation for their broader engagement with life. Thus, the intersectional configuration of the right to education within the CRC has led to it being described by Lundy as ‘multi-faceted’ in nature and one which “cannot properly be described as a simple right ‘to’ education in the way that there is a right to an adequate standard of living or access to

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<sup>24</sup> See Verhellen, E., (1993) Children’s Rights and Education: A Three-Track Legally Binding Imperative, *School Psychology International*, Volume 14, Issue 3, pp 199–208 at p. 199.

healthcare”.<sup>25</sup> Indeed, Lundy further argues that the CRC provides for education in a manner which reflects its very ‘complexity and significance’ with such a right placing “a substantial burden on those who have agreed to implement its principles in domestic law and policy”.<sup>26</sup> And central to that burden is the obligation to progressively realize the right itself.

Thus, the translation and transposition of children’s educational rights into concrete, ascertainable and tangible educative structures for children within the domestic domains of contracting states raises questions pertaining to not only the specificity of the obligation’s incumbent on such states, but also what exactly is meant by the right to education in the first instance, and also how can and should states progressively realize the right.

### **3.3. Obligations Flowing from the Right to Education (Articles 28 & 29)**

The correlative consequence of ratification of a human rights treaty is the direct assumption by the state of distinct duties thereunder. This offers a protection against the distillation of such rights into mere abstractive or theoretical conceptualisations. At the international level, the process of delineating the legal substance and content of such rights, including education, has been supported enormously by the pronouncements of General Comments of the many treaty monitoring bodies which have unpacked the obligatory and necessary conduct expected of states in furtherance of the realization of the rights contained within the conventions, including the CRC. Despite the non-binding nature of such comments<sup>27</sup> and their mutable status within the international legal order, such comments, in amplifying the scope and meaning of specific human rights nonetheless “play a substantive role in the elaboration of standards and possible future custom within the complex matrix of international law”.<sup>28</sup> For example, on the domestic front, the general comments have been frequent points of judicial reference in a wide range of cases where children’s rights were engaged. In *ZH Tanzania v Secretary of State for the Home Department*<sup>29</sup> the Supreme Court, per Lady Hale, drew extensively on General Comment No.6

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<sup>25</sup> Lundy, L., (2012) Children’s rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child, *Oxford Review of Education* Vol. 38. No. 4 at page 395.

<sup>26</sup> Ibid at page 396.

<sup>27</sup> See International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, (Presented at the Berlin Conference 2004: International Human Rights Law and Practice) paragraphs 15 – 28.

<sup>28</sup> Gerber at al. (2013) General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect? *Melbourne Journal of International Law*, Vol.14 at page 101.

<sup>29</sup> [2011] UKSC 4.

(2005) on the Treatment of Unaccompanied Minors and Separated Children Outside their Country of Origin to construe the best interests principle in conjunction with domestic immigration legislation. Similarly, in *Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions*<sup>30</sup>, a case involving a challenge to the regulations underpinning the provision of Disability Living Allowance (DLA) which provided for the cessation of such payments to children under 16 after their 84<sup>th</sup> day as an inpatient in an NHS hospital, the Court, per Lord Wilson, made explicit reference to GC No. 14 on the child's best interest principle and further endorsed an earlier Supreme Court decision which referred to the General Comment as "authoritative guidance".<sup>31</sup> Such cases, and others, demonstrate the ability of the Committee's General Comments to permeate judicial thinking and outcomes by centralising such guidance within the adjudicative process.

Explanatory in their composition, they "address in a comprehensive fashion the substantive content of some of the major rights"<sup>32</sup> within human rights treaties. However, their impact beyond the mere amplification of the core legal and textual content of rights is where their true potency lies. As Bodig argues, they "offer the opportunity of securing a foothold within the UN system for more progressive interpretation of human rights norms"<sup>33</sup> and "can be more responsive to the ever-shifting challenges of human rights protection".<sup>34</sup> One of those challenges is for contracting states to progressively realize their socio-economic commitments by ensuring the continuous de jure and de facto progression from existing levels of socio-economic rights enjoyment.

However, before examining the obligations which flow from the right to education, it is firstly necessary to understand that education itself does not endure within a seamless legal paradigm. Education encompasses much more than rights of access or entry alone. Rather, in one of its earliest conceptualisations, the right to education was theorized as encompassing rights *to* education, rights *in* education and rights *through* education.<sup>35</sup> Breaking these summations down further into practical realities, we see how education presents as a right which contains

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<sup>30</sup> [2015] UKSC 47

<sup>31</sup> Ibid at para 39.

<sup>32</sup> See Alston, P., (2010) The General Comments of the UN Committee on Economic, Social and Cultural Rights, *American Society of International Law Proceedings*, Vol.104, pp. 4 – 7, at p.5.

<sup>33</sup> See Bodig, M., (2016) Tracing the Roles of Soft Law in Human Rights in Lagoutte, S., Gammeltoft-Hansen, T. & Cerone, J. (eds.) *Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights* (Oxford: Oxford University Press) pp. 69-88 at p. 70.

<sup>34</sup> Ibid.

<sup>35</sup> See n (24) above.

both procedural and substantive aspects, both of which raise distinct legal issues in relation to the principle of progressive realization. For instance, the right to education means that states must ensure that a basic educative infrastructure exists. At the very minimum this should include free and compulsory primary schooling and, subject to resources within the state, generally available secondary and tertiary education. This essentially represents some of the substantive components of the right to education. For children who have been excluded from school, this does not mean a cessation of their right to education. Rather their right persists and arguably acquires increased significance. For such children, their right to education must and should be continued by the local authority complying with their statutory obligations pursuant to section 19 of the Education Act 1996, which mandates them to ensure suitable and alternative education has been provided for the child. From a procedural perspective for example, principles such as non-discrimination and permitting the child or young person to express their views in matters which affect them are of direct applicability and are thus not contingent on the principle of progressive realization. Such issues arise within the context of a decision on whether to exclude a child from school or not. Such nuances are important as they carry distinct and significant legal consequences.

Rights *in* education span an array of issues and entitlements to ensure that children have their rights upheld within the educational establishment and sector itself. As Verhellen has previously, also, argued this involves clarifying the legal position of children within education to prevent breaches of their rights therein.<sup>36</sup> This may include for example states enacting laws to abolish corporal punishment within schools<sup>37</sup> or the strengthening of procedural rights for children when a school's disciplinary procedures are activated to include participation rights and/or appellate rights in the event of a school exclusion.<sup>38</sup> Indeed, evidence by the English Children's Commissioner in 2013 revealed that many schools in England were illegally excluding children and were acting in direct contravention of the CRC by failing to consider their views and also by denying them an autonomous right of appeal against the exclusion.<sup>39</sup> Indeed, school exclusions represent a specific area of education law and policy where

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<sup>36</sup> See Verhellen, E., (1999) *Facilitating Children's Rights in Education: Expectations and Demands on Teachers and Parents, Prospects* (Brussels) pp. 223–231.

<sup>37</sup> See Stalford, H., & Byrne, S., (2018) Human Rights, children's rights, and the family. In L. Ruth (Ed.), *Family law*. Oxford University Press & Committee on the Rights of the Child, General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia) CRC/C/GC/8.

<sup>38</sup> For more on this, see chapter seven.

<sup>39</sup> See Office of the Children's Commissioner (2013) "*Always Someone Else's Problem*" Office of the Children's Commissioner's Report on illegal exclusions.

children's rights *in* education remain seriously underdeveloped. Similarly, rights *through* education recognise the significance which education plays in the inculcation of those skills and outlooks which enable young people to live and participate within society.<sup>40</sup> This may require ongoing curricular engagement, consultation and modification to ensure the delivery of these important objectives. In England, the passing of the Children and Social Work Act 2017 contained two key educational developments for enhancing children's rights *through* education. These included the commitment pursuant to section 34 of the Act to place both Relationships and Sex Education (RSE) and Personal, Social, Health and Economic Education on an explicit statutory foothold to be taught in schools. Envisioned to take effect from September 2020, the cumulative intention of such developments is to ensure children and young people are taught age-appropriate relationships education in primary schools and age-appropriate relationships and sex education in secondary schools.

Therefore, the forgoing analysis reveals two important factors when considering the right to education. The first is the necessity to continuously engage with and view the right through its three-fold prism and recognise that rights *in* or *through* education are equally as important as rights *to* education. The second issue is the necessity to further recognise and appreciate that all three conceptualisations of the right to education raise several questions regarding the applicability of progressive realization. While the establishment of secondary and tertiary education is contingent on the principle of progressive realization, a closer analysis of the various conceptualisations of the right reveals that it also contains aspects which will likely engage rights which are civil and political in nature and which are therefore of immediate application. This could include instances where the school's disciplinary procedures are activated and the extent to which children and young people have their rights upheld within this process. In the similar vein, children's rights through education are very often contingent on the provision of the relevant information, itself a civil and political right, to enable them to make choices and decisions for themselves. As was stated by the former Special Rapporteur on the Right to Education, the right "straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand".<sup>41</sup> This reality also demands a more rigorous appreciation of the legal nuances which arise in the context of

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<sup>40</sup> See Lundy, L (2006) Mainstreaming children's rights in, to and through education in a society emerging from conflict, *The International Journal of Children's Rights*, 14 (4) pp. 331–350.

<sup>41</sup> UN Economic and Social Council, Annual report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9, (2001) E/CN.4/2001/52, para 6.

progressively realizing children's educational rights, whereby not every element of the right will be subject to progressive realization. Such a reality also highlights the fact that a deeper engagement with the very principle of progressive realization is fundamental in ensuring that such nuances are reflected and accounted for within children's rights law and scholarship.

Moreover, the Committee on the Rights of the Child has stated in General Comment No.1<sup>42</sup> that education is to be 'child-centred, child-friendly and empowering' and to develop the child's personalities, talents and abilities. In expounding an expansive model of education, compatible with the ethos underpinning both Articles 28 and 29 and one which transcends an orthodox educational version, epitomized best by the power differentials in the conventional classroom where children are mere passive recipients of instruction<sup>43</sup>, children should be considered rights holders and are to be afforded a say in all matters affecting them. Such a model is compatible with the earliest configuration of the right as contained in the UDHR. In adopting a 'holistic' approach to education, the Committee emphasises the need for children to be taught as to enable them to fully participate in school, community and society.<sup>44</sup> Additionally, the Committee emphasise the need for a specific 'quality' of education, one which supports the child's ability to 'participate fully and responsibly in a free society' and therefore state that the creation and development of this model of education may require the re-configuration of the curriculum to include the specified aims of education as espoused in the Convention. Indeed, the right to education as contained in the CRC encapsulates a broad purposive approach wherein human autonomy and dignity are promoted for the advancement of the child herself. Education is framed in a manner which should enable the child to fully develop her personality and abilities and contribute freely to all aspects of life. In General Comment No.9, on the rights of children with disabilities, the Committee further extends the rights as set out above to children with disabilities, stating they "have the same right to education as all other children and shall enjoy this right without any discrimination and on the

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<sup>42</sup>See Committee on the Rights of the Child, General Comment No.1: The Aims of Education (2001), 17 April 2001, CRC/GC/2001/1.

<sup>43</sup> In this regard, the Committee notes at paragraph 8 that children 'do not lose their human rights by virtue of passing through the school gates' and 'education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her view freely in accordance with article 12(1) and to participate in school life'.

<sup>44</sup> The committee states that article 29(1) of the CRC 'insists upon a holistic approach to education which ensures that the educational opportunities made available reflect an appropriate balance between promoting the physical, mental, spiritual and emotional aspects of education, the intellectual, social and practical dimensions, and the childhood and lifelong aspects'.

basis of equal opportunity as stipulated in the convention'.<sup>45</sup> Such is the centrality of the right to education that it permeates all of the General Comments thus far issued by the Committee on the Rights of the Child. From the right of the child to rest, leisure, play, recreational activities, cultural life and the arts<sup>46</sup> to the right to be free from all forms of violence<sup>47</sup>, the right to education and its associated theoretical and practical components infuse both the understanding and activation of many, if not all, of the rights within the CRC. Therefore, in view of the connection between education and the role it plays in supporting broader human rights values such as dignity and autonomy, in addition to the centrality which it assumes within the context of the development of children's lives themselves, the issue of educational exclusion, which possesses the possibility of disrupting or preventing such development warrants increased oversight.

Additionally, in examining the obligations emanating from the CRC with respect to the right to education, the commentary of the Committee on Economic, Social and Cultural Rights<sup>48</sup> (ComESC), the treaty monitoring body of the ICESCR, is of considerable significance. Indeed, Nolan argues that in the context of economic, social and cultural rights, the CRC have relied heavily on the work of ComESC despite both bodies having 'instrument-specific mandates'.<sup>49</sup> Indeed, in General Comment No.1 on the Aims of Education (2001) the Committee on the Rights of Child, the CRC's monitoring body, takes specific note of the ComESC's General Comment No.13 on the right to education.<sup>50</sup> In its comment on the right to education<sup>51</sup>, the ComESC in highlighting the importance of education have emphasised that such a right should exhibit and contain in all its forms, four key constituent elements. These include availability, accessibility, acceptability and adaptability, and have collectively become known as the 4A Framework.

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<sup>45</sup> See Committee on the Rights of the Child, General Comment No.9: The rights of children with disabilities (2006) 27 February 2007, CRC/C/GC/9 at para 62.

<sup>46</sup> Committee on the Rights of the Child, General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) 17 April 2013, CRC/C/GC/17 at para 27.

<sup>47</sup> Committee on the Rights of the Child, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, at para's 20 & 21.

<sup>48</sup> The Committee on Economic, Social and Cultural Rights was established under ECOSOC Resolution 1985/17 of the 28<sup>th</sup> May 1985 to carry out the monitoring functions of the United Nations Economic and Social Council in Part IV of the Covenant, namely the International Covenant on Economic, Social and Cultural Rights.

<sup>49</sup> Nolan, A., (2013) *Economic and Social Rights, Budgets and the Convention on the Rights of the Child*, International Journal of Children's Rights 21 at page 254.

<sup>50</sup> See note 42 above.

<sup>51</sup> CESCR General Comment No.13: The Right to Education (Art.13) (1999).

### 3.3.1. The 4A Framework

Devised by the very first Special Rapporteur on the right to education, the late Katarina Tomasevski, the 4A framework provides a useful analytical guide against which to track how states are actively moving towards the progressive realization of the right to education.<sup>52</sup> In further delineating the exact specificities which attach to the right, the framework exposes not only the multi-faceted nature of education but also of the need to continuously reflect on whether states are actually meeting their obligations thereunder. The framework also delivers a durable basis upon which to assess whether states are meeting their obligations to progressively realize children's rights to, in and through education. In her elaboration on the 4A framework, Tomasevski stated that "A consequence of the symmetry of law is that there could be no right to education without corresponding obligations for governments".<sup>53</sup>

#### 3.3.1.1. Availability

In broad-brush terms, availability comprises the requirement of states to ensure that a basic and available education system exists within the state. Further to this, the ComESC stressed the need for the requirement of operational 'educational institutions and programmes' in 'sufficient quantity' within the jurisdiction of the relevant contracting state.<sup>54</sup> Such institutions and programmes should 'be accessible to everyone without discrimination' with the committee underlining the intrinsic overlapping facets of this requirement. The committee further state that education must and should be accessible on a non-discriminatory basis, be physically accessible in terms of reach and economically accessible in terms of affordability.<sup>55</sup> This is an important observation as the duty of non-discrimination is not subject to progressive realization. Yet one can see how it is an important element in realizing educational rights, thereby highlighting the legal and practical overlap between the various rights and duties which underpin the realization of the right to education. Central also to the notion of availability is the freedom of non-state actors to set up, within the limits of the law, their own educational institutions. Therefore, within the context of school exclusions, this would mean that education

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<sup>52</sup> See generally, UN Economic and Social Council, Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 at para's 42 – 81.

<sup>53</sup> See Tomasevski, K (2001) *Human rights obligations: making education available, accessible, acceptable and adaptable*, Right to Education Primers No.3 (Right to Education Initiative) at p.13.

<sup>54</sup> See n (51) above.

<sup>55</sup> Ibid at para 6.



facilities for excluded pupils exist and that their right to education continues, as uninterrupted as possible.

### **3.3.1.2.Accessibility**

The issue of accessibility broadly relates to the obligation to make education freely accessible to all, on the basis of non-discrimination, which itself is not subject to the principle of progressive realization, but rather of immediate application.<sup>56</sup> However, an understanding of accessibility within the context of education also necessitates an appreciation of the long-standing position of certain groups of children who have been frequently and routinely shut-out of education. These include girls and the disabled; two categories of children whose denial of educational rights has also prompted the international community to respond.<sup>57</sup> However, in the context of school exclusions in England, the issue of accessibility prompts further interrogation, given the increased statistical prospect of certain groups of children becoming excluded from school than others. Specifically, the issue as to why factors such as ethnicity, sex, poverty and disability render exclusion a more statistical outcome of the educational experiences of specific children, demands further attention in terms of the progressive realisation of their educational rights.

### **3.3.1.3.Acceptability**

Educational acceptability embraces a wide array of issues from ensuring the role of parents within their children's education is protected and upheld to conversely, ensuring the child herself is treated as a rights-holder within the education system.<sup>58</sup> In their explanation of acceptability, the ComESC stated that it included "the form and substance of education, including curricula and teaching methods"<sup>59</sup> which they continued should be acceptable to both students and in some instances, parents, and conform to the minimum educational standards which persist within the state.<sup>60</sup> In the context of school exclusions, the issue of educational acceptability becomes a critical safeguard for ensuring that children who have been excluded from school continue to receive good quality acceptable education. With evidence from the recent Timpson Review into school exclusions affirming that the educational

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<sup>56</sup> See chapter Five for further discussion on this.

<sup>57</sup> See n (51) above at para's 57 – 61. See also n (53) above at pages 27 – 29.

<sup>58</sup> See n (51) above at para's 62 – 69.

<sup>59</sup> See n (51) above at para 6 (c).

<sup>60</sup> Ibid.

establishments where children and young people are often educated in post-exclusion, known as Alternative Provision, not only carry with them a “stigma” but have persistent problems in terms of staff recruitment, the quality of the buildings themselves and the quality of educational instruction itself,<sup>61</sup> the necessity to ensure acceptable education for excluded children becomes evident. This also substantiates the findings by the House of Commons Education Select Committee in their 2018 investigations into Alternative Provision where clear evidence was uncovered of the differential nature of the educational quality which characterises alternative provision with the Committee noting that children in these settings are “twice as likely as a mainstream pupil to be taught by a supply teacher”.<sup>62</sup> Thus, progressively realizing children’s educational rights demands that school exclusion should not automatically or innately result in the diminution of the acceptability of children’s educational rights.

### **3.3.1.4. Adaptability**

Lastly, on the issue of adaptability, this mandates that education “be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings”.<sup>63</sup> However, beyond the need for such flexibility is the requirement also that the education system responds to, and better accommodates children and young people, such as those with disabilities, who have been frequently been segregated within it.<sup>64</sup> Thus, for many children the question of adaptability is crucial for their educational experiences as children and young people will have different and varying needs and may require additional support to assist them with their education. Children with special educational needs (SEN) illustrate this reality and as previously stated represent the largest proportion of children who are excluded from school. In this context, when one considers the progressive realization of their rights, the question of adaptability must also be considered. Thus, taking the 4A framework together, we see how the right to education is much more nuanced and multi-layered in practice than a simple right of access alone. Therefore, progressively realizing children’s educational rights demands engaging with all these aspects.

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<sup>61</sup> See Department of Education (2019) *Timpson review of School Exclusions*, at pp. 74 – 77.

<sup>62</sup> House of Commons Education Committee (2018) *Forgotten Children: Alternative provision and the scandal of ever increasing exclusions*, Fifth Report of Session 2017 – 19, (18 July 2018) at para 91.

<sup>63</sup> See n (51) above at 6 (d).

<sup>64</sup> See n (53) above at pages 31 – 32.

While the above 4 A framework was devised in relation to the framing of the right to education and exemplifies the nuances which attach to the realization of the right, it is not the only overarching framework applicable to the delivery of children's rights. Rather, the CRC's four guiding principles (discussed below) are inseparable from the delivery of all children's rights, including education and therefore must also be considered and assessed in the context of children's educational rights. Both frameworks are not mutually exclusive to one another but rather inform and complement each other. For instance, any changes to the delivery of education such as improving its acceptability should be made in the best interests of the children to improve their life chances and development. Similarly, ensuring the accessibility of education must ensure that any changes, either legislatively or otherwise, to the delivery of education does not directly or indirectly discriminate against any group of children. Thus, both frameworks play a crucial role in the progressive realization of children's educational rights.

### **3.3.2. Education and the CRC's Four Guiding Principles**

From their origins in the 1996 *communiqué* on the 'General Guidelines for Periodic Reports', the four existent general principles of non-discrimination (Article 2), the best-interests principle (Article 3), the right to life, survival and development (Article 6) and the right of the child to be heard in matters which affect them (Article 12) have assumed an important function in holding contracting states answerable for their agreed commitments. As Doek states, they "have a well-established and widely accepted position in the reporting on and monitoring of the CRC".<sup>65</sup> As individual entitlements, in addition to their status as general principles, these four provisions have created an enduring legal connection such that all other provisions within the CRC must be upheld and delivered against them.<sup>66</sup> Simply put, all other rights must not be viewed as either separate to or distinct from these principles.<sup>67</sup> Importantly, and from the perspective of the principle of progressive realization, none of the CRC's guiding principles are subject to progressive realization. Rather, the progressive realization of all rights within the CRC, including education, is subject to full adherence to these principles.

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<sup>65</sup> See Doek, J.E., (2005) The CRC General Principles, in *18 Candles: The Convention on the Rights of the Child Reaches Majority*, Institut international des droits de l'enfant (IDE) Sion, Switzerland, at p.38.

<sup>66</sup> See Lundy, L. and Byrne B. (2017) 'The Four General Principles of the United Nations Convention on the Rights of the Child: The Potential Value of the Approach in Other Areas of Human Rights Law', in E. Brems, E. Desmet, and W. Vandenhoele (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration*. Routledge.

<sup>67</sup> See Peleg, N., (2019) *International Children's Rights Law: General Principles*, in Kilkely, U., & Liefwaard, T., (eds.) *International Human Rights of Children*, Springer: Singapore.

### **3.3.2.1. Non- Discrimination (Art. 2)**

Firstly, in relation to the principle of non-discrimination, this precept applies to all the rights and entitlements set forth in the convention and serves as a powerful tool in the attainment of meaningful equality between all children. It also mandates the equitable realization and enjoyment of the rights and freedoms protected by the convention. While thus far, the CRC Committee has not issued any interpretative general comment on the principle of non-discrimination, it has in its first general comment on the right to education asserted that: “Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child”.<sup>68</sup>

While Article 2 does not contain an independent or freestanding guarantee against discrimination,<sup>69</sup> it does however ensure that contracting states must ensure the fulfilment of the rights set forth in the convention without discrimination. Containing both positive and negative obligations, the CRC Committee have been unequivocal in their elaboration that the non-discrimination principle can only be meaningfully effectuated through the implementation of applied, positive and proactive measures.<sup>70</sup> Thus, in the context of the right to education in England and the associated exclusion framework which forms part of it, as discussed later in this chapter, the principle of non-discrimination must and should ensure the equivalent enjoyment of the right to education for all children and young people in England.

### **3.3.2.2. The Best Interests Principle (Art. 3)**

Secondly, the best interests of the child occupies a central position within the legal make-up of the CRC with Shackel observing that it is “the first time it has been utilized at the international level as a general guiding principle with respect to a wide bundle of rights”.<sup>71</sup> Such a principle, in its most elemental form, ensures the centralisation of the welfare and interests of the child in the decision making process. Indeed, the Committee on the Rights of the Child have stated

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<sup>68</sup> Committee on the Rights of the Child, General Comment No.1 (2001) The Aims of Education at para 10

<sup>69</sup> For more see Besson, Samantha (2005) The principle of Non-Discrimination in the Convention on the Rights of the Child, *The International Journal of Children's Rights* 13 at pages 445 – 452.

<sup>70</sup> For more see General Comment No.13 (2013) On the Right of the Child to have his or her best wishes taken as a primary consideration at paragraph B (1).

<sup>71</sup> Shackel, Rita (2003) The UN Convention on the Rights of the Child: A Review of its Successes and Future Directions *Australian International Law Journal* 21(4) at page 34.

that the principle is ‘a dynamic concept that encompasses various issues which are constantly evolving’.<sup>72</sup>

However, it must be recollected that the best interests of the child is to be a primary consideration in any decision-making process and it is not *the* primary thought. Thus, as a matter of first importance among other considerations, the best interests of the child do not override or automatically supersede other deliberations. However, the CRC Committee have been equally vociferous in its clarification that the best interests standard must be allotted considerable and significant weight in any and all decision-making processes which affect children.

*“Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions”<sup>73</sup>*

Thus, it is obvious that any consideration which falls short of a primary consideration is incompatible with the spirit of the convention and every state party or emanation thereof, including schools and local authorities, must incorporate the best interests principle into their decision making processes to ensure the welfare of the child is a primary consideration and a thought of first importance. This finds further emphasis in the General Guidelines for Periodic Reports, which require that:

*“States parties should provide up-to-date information on legislative, judicial, administrative or other measures in force, particularly on how the principles of the best interests of the child (art. 3) and respect for the views of the child (art. 12) are addressed and implemented in legislative, administrative and judicial decisions.”<sup>74</sup>*

As enunciated by Freeman<sup>75</sup> Article 3 in its entirety imposes obligations on states parties to take appropriate legislative and administrative measures to ensure the child’s well-being and also to guarantee that those in positions of authority, responsible for the child’s care and

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<sup>72</sup> See n (55) above at para 11.

<sup>73</sup> CRC General comment no. 5 (2003): *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para 12.

<sup>74</sup> Committee on the Rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, CRC/C/58/Rev.3, (3 March 2015) at para 25.

<sup>75</sup> Freeman, Michael (2007) *Article 3 The Best Interests of the Child*, Martinus Nijhoff Publishers.

protection conform to the standards established by the competent authorities in guaranteeing that the best interests of the child are at all times a primary consideration. As the Committee on the Rights of the Child have stated, the principle is a “dynamic concept that requires an assessment appropriate to the specific context”.<sup>76</sup> Moreover, the Committee have adopted a useful three-fold conceptual framework underpinning the application of the best-interests principle in practice. Firstly, the Committee has stated that the principle encompasses a substantive right which includes the individual personal right of the child to have his or her best interests taken as a primary consideration. Secondly, the right also amounts to an interpretative legal principle such that when a legal provision is open to more than one meaning, it must be construed in a manner which best serves the child’s best interests. Lastly, the Committee has outlined that the principle also includes a procedural rule so that any decision likely to impact upon the best interests of the child must include an evaluation as to the probable impact such a decision will have on the child’s best interests.

Indeed, the Committee has placed particular emphasis on the role of the best-interests principle “especially in judicial and administrative decisions as well as in other actions concerning the child as an individual, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines – that is, all implementation measures – concerning children in general or as a specific group”.<sup>77</sup> Thus, the extensive configuration of the best interest principle ensures the centrality of the welfare of the child within any process and procedure which affects and impacts them including the education system and all aspects thereof. Therefore, within the context of children’s educational rights and school exclusions, the best interests of the child should form a central aspect of law and policy underpinning it.

### **3.3.2.3. The Right to Life, Survival and Development (Art.6)**

Thirdly, regarding the right to life, survival and development, this article builds on similar provisions from various international covenants and obligates contracting states to preserve and protect the life of children and to advance and further their survival and utmost development. The alignment of ‘survival and development’ with the right to life is evidence

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<sup>76</sup> See UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC/C/GC/14 at para 1.

<sup>77</sup> Ibid at paragraph B (10).

that Article 6 is not to attract a rigid nor narrow construction. Rather the right to survival and development, both natural and fundamental to the human condition in many ways make up the circularity system of the convention. Numerous other rights contained in other convention provisions such as health, education, freedom of thought, religion and freedom from exploitation among others are incontrovertibly correlated with Article 6. Indeed, the survival and the development of children, in the absence of such convention rights would be severely jeopardized.

The right to life is itself a straightforward entitlement in that the state is obliged to protect the life and to refrain from any behaviour, which would threaten the life. However, the right to survival and development are bereft of such precision. As asserted by Hodgson<sup>78</sup> the right to development “is concerned with those minimum requirements or basic needs which must be met to sustain human life or perhaps more accurately, to avoid death from preventable causes”.<sup>79</sup> In a similar vein he articulates that the right to development tends to be coloured by the immediate context provided by the provision and that occasionally such a right overlaps with survival. Thus, the convention and all its substantive articles have a direct impact on the survival and development of all children. As enunciated by the CRC Committee, States must

*“interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children”*<sup>80</sup>

Therefore, states are under a distinct obligation to sure that children and young people are accorded the necessary fundamentals to ensure and enhance their life, survival and development. In the context of the child’s rights to education, one can infer from the earlier analysis that it is critical to the life chances and development of the child that her education continues and flourishes. Therefore, when considering school exclusions, states should consider how the decision to exclude will impact on her education and impede her subsequent development. Indeed, that decision must also be considered also in line with her best interests.

#### **3.3.2.4. Respect for The Child’s Wishes**

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<sup>78</sup> Hodgson, Douglas (1994) The Child’s Right to Life, Survival and Development, *The International Journal of Children’s Rights* 369.

<sup>79</sup> Ibid at p 383.

<sup>80</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, at para 12.

Fourthly, respect for the child's wishes represents a most significant provision in the CRC and gives children a direct opportunity to articulate their views in relation to matters affecting them, including their right to education. It further represents the reality that children are bearers of rights and are entitled to have a say in matters affecting their rights.<sup>81</sup> Indeed, Kilkelly articulates that the 'iconic and symbolic' nature of Article 12 reflects "children's inherent right to dignity and respect".<sup>82</sup> Accordingly, within the context of the right to education, Article 12 envisages that states should enable children and young person express their views and that these views be listened to and acted on. Indeed, in the specific context of school exclusions, where children's rights *in* education are clearly activated, Article 12 would suggest that children be given a say in all matters which affect them which includes disciplinary matters. This would also align with Article 12(2) which states:

*"the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law"*

Moreover, as Verhellen cogently posited: "What would be the point of setting up a complete theoretical educational process on the values of human rights without putting them into practice as well?"<sup>83</sup>

From the foregoing analysis, a number of discernible observations can be made regarding the right to education. Firstly, while the right is routinely acknowledged to be contingent on the principle of progressive realization for its fulfilment, certain aspects of the right are of immediate application and are this not dependent on progressive realization. Connected with this is the fact that the effective delivery of children's education rights engages other human rights which themselves not subject to progressive realization. Secondly, the right involves an appreciation of the unique configuration of the right itself which comprises right *to*, *in* and *through* education and the disparate procedural and substantive facets which each of these entails. Lastly, from a children's rights perspective, the right to education, in all of its parts,

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<sup>81</sup> See Chapter Two, Methodology for earlier discussion on Article 12.

<sup>82</sup> Kilkelly, Ursula (2014) 'The CRC in Litigation Under the ECHR' in *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Springer at page 198.

<sup>83</sup> See n (24) above at p. 206.



must be delivered and realized in conjunction with the CRC's four existent guiding principles. What follows now is an examination of the school exclusion framework in England which will consequently be situated within the broader context of the right to education as outlined above.

### **3.4. School Exclusions and the Right to Education**

The reality of school exclusions within English education, law, policy and practice raises many further questions regarding the duty of the state to progressively realize the child's right to education.<sup>84</sup> Numerous issues abound. Why are these exclusions taking place? How are the rights of the child upheld during the exclusion process? Are her best interests taken into consideration? Does she have a direct say in the process? And does exclusion ultimately negate her right to education? Beyond these questions, the issue further arises as to the function and role of both the 4A framework and the CRC's guiding principles in the framing of delivery of education in England. All of these issues converge acutely within the context of school exclusions. Indeed, the existence of school exclusions within the education sector, at both primary and secondary level in England has been a phenomenon which has generated much academic, political and judicial discussion for many years. Regarded as "the most severe sanction"<sup>85</sup> that can be imposed on a pupil within the school setting, the consequences of an exclusion from school are both immediate and enduring. Indeed, Daniels and Cole argue that a permanent exclusion from school itself constitutes a precursor to wider societal exclusion.<sup>86</sup> Such sentiments further corroborate what Harris and Eden argued was the link between school exclusion and child boredom, isolation and frustration, the effect of which was their retreat from society and the typical customs and behaviours of children their age.<sup>87</sup>

At the most basic level, the expulsion of the child from the school constitutes an interruption in her education which assumes increased import depending on whether the exclusion is permanent or fixed term. Such is, and are, the ramifications of school exclusions that they have been said to subject children and young people to a form of "double jeopardy" in that their instant and immediate removal from the school is compounded by the fact that they "will almost certainly suffer a further decline in educational opportunities."<sup>88</sup> Aside also from the

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<sup>84</sup> See generally, Blyth, E., & Milner, J., (eds.) (1996) *Exclusion From School: Inter-Professional Issues for Policy and Practice*, (Routledge, London)

<sup>85</sup> Bainham, A & Gilmore, S (2013) *Children: The Modern Law*, 4th Edition, at page 973

<sup>86</sup> See generally, Daniels, H., & Cole, T., (2010) Exclusion from school: short-term setback or a long term of difficulties?, *European Journal of Special Needs Education*, 25:2, 115-130.

<sup>87</sup> See generally Harris, Neville & Eden, Karen (2000), *Challenges to School Exclusions* RoutledgeFalmer, pages 58 – 80.

<sup>88</sup> House of Commons (1998) *Disaffected Children Education and Employment – Fifth Report*, at paragraph 41

direct impact on the child herself, which the charity Barnardo's have said causes "reduced confidence and increased disaffection with school, with poor qualifications and job prospects in the long run",<sup>89</sup> the effects of school exclusion extend far beyond the child herself and encroach upon the family, community<sup>90</sup> and wider societal and political economy.<sup>91</sup> Indeed, the link between school exclusions and long-term economic and personal fulfilment was a clear issue which emerged from one of the Agenda Days with the children and young people expressing a shrewd awareness of the lasting consequences of exclusion. Evidence from the Agenda Day included:

*"If you have been excluded it will be put on your reference and could influence your job chances in future"*

*"Some schools put it on your record which could lessen your chances at a job in the future"*

(Leah & Ali, Room 14 Pelton Report)

Described further as a "multidimensional problem"<sup>92</sup> which engages with and affects issues such as law and order, criminality, social control, fiscal policies, citizenship, human rights, educational rights and wider participatory capacity,<sup>93</sup> the need to position school exclusions within the context of progressive realization becomes apparent. The financial consequences of school exclusions upon the social and economic well-being of the state are also beyond doubt. In its 2007 report *Misspent Youth: The Cost of truancy and exclusion*, New Philanthropy Capital estimated that in 2005 alone, the total cost of an individual exclusion was £63,851 with the aggregate cost of all exclusions amounting to £650m per annum.<sup>94</sup> Furthermore, in their assessment, The Princes Trust in conjunction with the Centre for Economic Performance at the London School of Economics in their 2007 report *The Cost of Exclusion: Counting the Cost of Youth Disadvantage in the UK*, estimated that the cost of educational underachievement compounded by school exclusions, amounted to £18 billion.<sup>95</sup> While this figure does not exclusively constitute the economic net result of school exclusions, they do however contribute

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<sup>89</sup> See Barnardo's (2010) *Not present and Not Correct: Understanding and preventing school exclusions*, at p.42.

<sup>90</sup> See n (76) above at paragraph 2 wherein the House of Commons alluded to the fact that disaffection and disengagement from education 'diminishes the contribution individuals make to the well-being of the community'.

<sup>91</sup> See n (87) at pages 58 – 80.

<sup>92</sup> See generally, Macrae, S., Maguire, M., & Milbourne, L., (2003) Social exclusion: exclusion from school, *International Journal of Inclusive Education*, 7:2, 89-10.

<sup>93</sup> *Ibid* at p. 91.

<sup>94</sup> New Philanthropy Capital, (2007) *Misspent Youth: The Cost of Truancy and Exclusion*.

<sup>95</sup> Pages (41 – 59)

to it. And in her more recent examination of the cost's association with school exclusions, Kiran Gill<sup>96</sup> approximated that the net economic “cost of exclusion is around £370,000 per young person in lifetime education, benefits, healthcare and criminal justice costs”.<sup>97</sup> However, taking into account the number of children who had been excluded in the year leading up to her calculations, Gill estimates the costs of same to be in the region of £2.1 billion.<sup>98</sup> Thus, Gill's evidence, in conjunction with the preceding financial costs clearly demonstrate that the financial consequences of school exclusions are colossal for the state. Perhaps more troubling is Gill's assertion that given the discrepancy between the official and unofficial figures regarding school exclusions and specifically for those children and young people who have been “functionally excluded through methods which elude government data. The true cost of exclusion is an unknown number, likely many multiples of this conservative estimates”.<sup>99</sup> Consequently, the costs of school exclusions, even if one proceeds from the approximations based on the official figures, are immense. One might assume, therefore, that school exclusions would be a tightly monitored and strictly controlled state practice given the enormous financial costs which it subsequently generates.

### **3.4.1. Prevalence of School Exclusions**

From their peak in 1996/7 when there was 12,670<sup>100</sup> permanent exclusions, the number of school exclusions has since decreased. However, large numbers of children are still excluded annually from English schools. Recent governmental figures show that in the academic year 2017/8, some 7,900 children were permanently excluded from English schools while 410,800 children were subjected to a fixed-term exclusion, which can amount to anything up to forty-five days within the academic year.<sup>101</sup> While such figures reveal an overarching numerical reduction in the number of school exclusions from their peak, the macro-statistical evidence is at variance with the micro-statistical data in relation to both fixed term and permanent school exclusions. The figures are not indicative of a clear and linear annual reduction. For example, the recent figures represent an increase across both types of exclusion from the previous academic year with both categories of exclusions incrementally rising since the 2012/3

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<sup>96</sup> Gill K (2017) *Making The Difference: Breaking the link between school exclusion and social exclusion*, IPPR. <http://www.ippr.org/publications/making-the-difference> (last accessed 29th July 2019).

<sup>97</sup> Ibid at p. 22.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> See Department for Education (2012) *A Profile of Pupil Exclusions in England* at page 12

<sup>101</sup> See Department of Education (2019) *Permanent and fixed period exclusions in England: 2017 to 2018*, (25 July 2019)

academic year.<sup>102</sup> Indeed, in its concluding observations on the third and fourth periodic report submitted by the United Kingdom, the Committee on the Rights of the Child expressed their concern at the high number of permanent and fixed term exclusions in the UK.<sup>103</sup>

While departmental figures document the official and recorded number of exclusions, such statistics do not however account for, nor incorporate, those children and young people who have been unofficially excluded from school. This is significant as the existence of accurate and reliable data is a key tool for assessing whether the state is actually progressively realizing its obligations under the right to education and indeed, other socio-economic rights.<sup>104</sup> The failure of official figures to either capture or even acknowledge the recognised practice of illegal school exclusions raises further the ability of children and young people to adequately enforce their right to education in the first instance. Such realities were recognised by the recent governmental review on school exclusions, known as the Timpson Review,<sup>105</sup> which highlighted “concerning evidence”<sup>106</sup> of children having been “made to leave their school without access to the formal exclusion process and the structure and safe-guards this provides”,<sup>107</sup> in addition to evidence of unrecorded, informal and unofficial school exclusions. While the focus of this thesis relates to the compatibility of the school exclusion framework with the obligation to progressively realize the right to education, cognisance must be had of unofficial exclusions which extricate children and young people from any legal and statutory protections afforded by the official process.

### **3.4.2. Unofficial Exclusions**

Despite the legal obligation on schools to accurately record the number of exclusions and to follow the prescribed legislative and statutory framework when a decision to exclude has been made, as will be outlined below, the practice of unofficial and unlawful exclusions nonetheless persists within the educational system in England.<sup>108</sup> The reality of such practices not only distorts the official number of exclusions, thereby undermining the validity and veracity of the recognised number of ‘official’ exclusions, but further raises serious and uncomfortable questions regarding the right to education for those children and young people subject to an

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<sup>102</sup> Ibid at p.3.

<sup>103</sup> Committee on the Rights of the Child, (2008) Concluding Observation on the United Kingdom of Great Britain and Northern Ireland, at para 66(d).

<sup>104</sup> The importance of data will be discussed in chapter six.

<sup>105</sup> See n (72) above.

<sup>106</sup> Ibid at p. 10.

<sup>107</sup> Ibid.

<sup>108</sup> See Office of the Children’s Commissioner School Exclusions Inquiry “*They Never Give Up on You*”, (2010) 57 – 62.

‘unofficial exclusion’. As the Centre for Social Justice articulated, the consequences of such practices are that children and young people ‘can become lost – utterly detached from the education system’.<sup>109</sup> Indeed, the overt illegality of such practices has been highlighted by the Office for Standards in Education, Children’s Services and Skills (Ofsted) in their 2013 report, *Pupils Missing out on Education* wherein they discovered that some 1,400 pupils from across fifteen separate local authorities in England were not participating in full time education, a pattern which, if transposed nationally, would result in some 10,000 children being ‘missing’ from full-time education.<sup>110</sup> Indeed, the report highlights further and deeper accountability deficits within the education system with some local authorities unaware of the exact number of children within their area not receiving an education; a reality compounded by the acute absence of cross-sectoral support and information-sharing by various agencies including schools, health services, youth offending services and local authorities.<sup>111</sup> Indeed, the existence and continuity of such practices are manifestly at variance with the human rights obligations the duties of the State to progressively realize the right to education. Moreover, the deliberate circumvention and disapplication of the law governing school exclusions, removes children from the statutory protections which exist to ensure their education continues even after an exclusion.<sup>112</sup> In this regard, such behaviour is particularly egregious.

### **3.4.3. Who gets excluded?**

That the reality and gravity of school exclusions are immeasurable is beyond doubt. The twin reality of a formal legal process existing in juxtaposition with an informal illegal procedure has resulted in certain identifiable categories of children being disproportionately represented within the exclusion figures. According to the 2013 report, *They Go the Extra Mile*, the Children’s Commissioner of England noted the statistical prevalence of certain children to become excluded from school. These included children with a special educational need (SEN) who were nine times more likely to be permanently excluded than their peers. Children from specific ethnic backgrounds were also more likely to be excluded. Notably, black Caribbean boys were more than three times more likely to be permanently excluded than their peers. This aligns with earlier research findings by Parsons et al whose seminal report into minority ethnic

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<sup>109</sup> The Centre for Social Justice (2011) *No Excuses, A Review of Educational Exclusion* at page 129.

<sup>110</sup> Ofsted, (2013) *Pupils Missing out on Education*, at page 9.

<sup>111</sup> Ibid.

<sup>112</sup> Section 19(1) of the Education Act, 1996 states that “Each local education authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them”.

school exclusions and the Race Relations (Amendment) Act 2000 found that black Caribbean pupils and pupils from other black backgrounds were still two to three times more likely to be excluded from school than their white peers.<sup>113</sup> Furthermore, children in receipt of free school meals were deemed around four times more likely to be permanently excluded than those not in receipt of free meals and the exclusion rate for boys was three times higher than that for girls.<sup>114</sup> In the six years since the Commissioner's report, little has changed regarding the statistical connection between such groups of children and their heightened chances of exclusion.<sup>115</sup> Indeed, the most recent governmental evidence affirms such statistical linkages in addition to disproportionately higher rates of exclusion of children from a Gypsy/Roma or an Irish Traveller background as well as children from areas of economic deprivation.<sup>116</sup> Looking deeper into such figures, the question arises as to why these children are being excluded at such higher levels than other children. While this thesis does not address the critical question of why such differential variations in the levels of exclusion between particular children exist, an appreciation of that reality nonetheless underscores this thesis and the duty of the state to progressively realize the child's right to education.

To date much of the research conducted in the area of school exclusions has examined the links between such exclusion and other significant variables and factors which are likely to hasten and accelerate the probability of an exclusion from the education system. Research has substantiated the connection between the prospect of school exclusion and factors such as drug use and anti-social behaviour<sup>117</sup>, criminality and youth offending<sup>118</sup>, the school itself<sup>119</sup> and poverty<sup>120</sup>. While such research has contributed immensely in exposing the social and relational influences which often underpin and instigate exclusion from schools, the research, in largely concentrating on such causal connections fails to address and/or examine the process and

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<sup>113</sup> See Department of Education and Skills (2004) *Minority Ethnic Exclusions and the Race Relations (Amendment) Act 2000*, Research Report R616, (London: 2004)

<sup>114</sup> The Children's Commissioner for England, (2013), *They Go the Extra Mile*, pages 25 – 27. For more, see The Children's Legal Centre, *The Right to Education: Alternative report to the UN Committee on the Rights of the Child*, pages 37 – 40 and *The Right to Education* (2008) *Alternative report to the UN Committee on Economic, Social and Cultural Rights* at pages 37 – 40.

<sup>115</sup> See generally n (96) above.

<sup>116</sup> See n (92) above.

<sup>117</sup> McCrystal, P., Percy, P., & Higgins, K., (2007) Social Exclusion drug use and antisocial behaviours at 15/16 years: Implications for youth transitions, *Vulnerable Children and Youth Studies*, *Vulnerable Children and Youth Studies* 2,3 181 – 190.

<sup>118</sup> Hodgson, P., & Webb, D., (2005) Young People, Crime and School Exclusion: A Case of Some Surprises, *The Howard Journal*, Vol 44 No 1 12 - 28

<sup>119</sup> See Razer, M F., Victor J., & Warshofsky, B., (2013) Schools as agents of social exclusion and inclusion, *International Journal of Inclusive Education*, Vol.17 No.11, 1152 – 1170.

<sup>120</sup> See n (96) above.

reality of exclusion itself as a legal phenomenon. Put simply, insufficient attention has thus far been accorded to the examination of whether the legislative basis governing school exclusions is itself fit for purpose.

### **3.5. School Exclusion – The Legislative Basis**

The law relating to school exclusions has developed from common law principles which were previously instituted on the twin notions of discipline and authority. These notions historically resided in, and derived from, the teacher acting *in loco parentis* where they supplanted the role of the parent.<sup>121</sup> These have since evolved into a carefully constructed legislative framework, whereby school exclusions and the associated duties which flow from such a practice are managed and administered. School exclusions are thus a creature of statute.

The Education (No.2) Act, 1986 was the first statutory codification relating to exclusion with section 22(f) providing for the:

*‘power to exclude a pupil from the school (whether by suspension, expulsion or otherwise) to be exercisable only by the head teacher’*

This power, exercisable only by the head teacher was later incorporated into the Education Act, 1996<sup>122</sup> but which further prohibited indefinite exclusions and/or exclusions which resulted in the exclusion of the pupil for fifteen days in any one term. Such powers were subsequently incorporated into the School Standards and Framework Act 1998.<sup>123</sup> However, the current law on school exclusions is governed by three principal reference points. These include: the Education Act 2002 (s51A as inserted by section 4 of the Education Act 2011); SI 2012/1033 The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 (hereafter ‘the 2012 Regulations’); and the statutory guidance (Department for Education, Exclusion from Maintained Schools, Academies and Pupil Referral Units in England, (2017)) for those with legal responsibilities in relation to exclusion (hereafter ‘the Statutory Guidance’).<sup>124</sup> The

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<sup>121</sup>The Elton Committee (1989) *Discipline in Schools Report* alluded to the uncertain foundations pertaining to the authority of teachers and recommended that the “Secretaries of State should consider introducing legislation to clarify the legal basis of teachers’ authority”. The Committee proceeded to enunciate core areas where Parliament should legislate within the sphere of teachers’ authority to include the teacher’s power to set homework and to administer punishment for conduct breaching school rules amongst others. The Committee pointed out that the authority of teachers was not delegated by the parent but rather derived from the teacher’s position as a teacher. Paragraph 74.

<sup>122</sup> Section 156 provided for near identical terms as the 1986 Act, allotting the power to exclude solely to the head teacher.

<sup>123</sup> Section 64 demarcated the role of the head teacher to exclude pupils.

<sup>124</sup> See Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units*

specific legal basis for dispensing an exclusion is provided by section s.51 A(1) of the Education Act 2002 which allows the exclusion of a pupil, either on a fixed or permanent basis, from a maintained school. It states that:

*“The head teacher of a maintained school in England may exclude a pupil from the school for a fixed period or permanently.”<sup>125</sup>*

Section 51 A(2) of the same Act permits a head teacher to exclude a pupil from a Pupil Referral Unit (PRU) on exactly the same basis. However, under the 2012 Regulations, a head teacher may not exclude a pupil for one or more fixed term periods, in the case of both maintained schools<sup>126</sup> and pupil referral units,<sup>127</sup> if that pupil would be excluded for more than 45 school days in any given school year. Similarly, common to all the legislative and statutory guidance regarding school exclusions is the clear stipulation that the decision to exclude must be taken on disciplinary grounds.<sup>128</sup> This usually involves a student breaching, or persistently breaching, a school’s disciplinary or behavioural policies.

Provision was also made within the Education Act 2002 for the formation of regulations across a number of important areas.<sup>129</sup> These were to ensure the provision of information relating to any exclusion to be given to a ‘prescribed person’ and further that they stipulated the requirement of the appropriate body to consider whether the pupil should be reinstated. These regulations further require that the local authority make arrangements for enabling the ‘prescribed person’ to appeal to a review panel to review the decision to exclude and to outline the procedural requirements for the review.<sup>130</sup> These regulations were introduced in the form of ‘the 2012 Regulations’. Indeed, one of the central features of the legislative framework is that the exclusive power to exclude is vested in the head teacher,<sup>131</sup> thus, according a vast measure of power and authority within a single individual. In the most recent governmental

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*in England, Statutory guidance for those with legal responsibilities in relation to exclusion.*

<sup>125</sup> Education Act 2002, section 51 A (1)

<sup>126</sup> Section 4, School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>127</sup> Section 13, School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>128</sup> Section 51 A (10), Education Act 2002; section 21(5) School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 & Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*, para 1.

<sup>129</sup> Education Act 2002, s.51 A (3)

<sup>130</sup> Ibid.

<sup>131</sup> Section 579 (1) of the Education Act, 1996 states that the head teacher includes the acting head teacher also



review on exclusions (The Timpson Review), the role of the head teacher was conferred with a notable degree of deference. For example, the terms of reference for the review itself did not include examining the powers of head teachers have to exclude”.<sup>132</sup> While head teachers of course play a vital role in the education sector, the mounting evidence of both illegal exclusions, off-rolling<sup>133</sup> and the heightened vulnerability of particular children to becoming excluded should have prompted a whole-sale rights-based approach to exclusion which could have interrogated the compatibility of the legal framework with children’s rights principles.

The statutory guidance and the 2012 Regulations are central to the exclusion process and elaborate in substantial detail the procedures and processes which schools must follow in the event of an exclusion. The purpose of the statutory guidance firstly is “to provide greater confidence to head teachers on their use of exclusion and to provide greater clarity to independent review panels and governing boards on their consideration of exclusion decisions”.<sup>134</sup> Throughout the guidance, the emphasis on school discipline is the variable which dominates the legal and policy landscape relating to school exclusion.<sup>135</sup> Indeed, a permanent exclusion should only be used as a ‘last resort’ and in response to ‘to a serious breach or persistent breaches of the school’s behaviour policy; and where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school.’<sup>136</sup> Moreover, the use of exclusion is to be determined by a threefold consideration comprising lawfulness, reasonableness and fairness<sup>137</sup> and general compatibility with the enduring principles of administrative justice. In short, the decision to exclude must be lawful, rational, reasonable, fair and proportionate.<sup>138</sup> As such, the power to exclude and the strict legal considerations which underpin it arguably amount to the exercise of a quasi-judicial function by the head-teacher, authorised by statute and framed in the age-old legal language of public law litigation. The head teacher must not exclude a pupil for a non-disciplinary matter<sup>139</sup> and is encouraged “where practical ... to give the pupil an opportunity to present their case before taking the decision to exclude”.<sup>140</sup> This is significant as no further elaboration is given within the guidance as to what is meant by ‘where practical’. Moreover, from a children’s rights

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<sup>132</sup> Department of Education (2019) *Timpson Review on School Exclusion*, 6.

<sup>133</sup> For more on the practice of ‘off-rolling’, see Chapter 6, section 6.1.

<sup>134</sup> See n (124) above at p.6.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* at p.8.

<sup>139</sup> *Ibid* at p.9.

<sup>140</sup> *Ibid* at p. 10.

perspective the realisation of Article 12 CRC is not conditioned by, or dependent on, situations of practicality. Rather, the right persists in all circumstances and arguably accrues increased importance in situations involving a potential school exclusion. In addition, the behaviour of pupils outside the school may be relevant and considered as grounds for an exclusion decision.<sup>141</sup> Upon deciding whether to exclude, the head teacher must ‘have regard’<sup>142</sup> to the statutory guidance.

Exclusions may be either for a fixed term period or permanent. In relation to the former, a pupil may be excluded on a fixed term basis on more than one occasion up to a maximum of 45 days in a single academic year while the latter version of exclusion results in the deletion and removal of the child’s name from the school register. Additionally, any decision taken by or on behalf of the school in question must be in accordance with the duty of non-discrimination as laid out in the Equality Act 2010, which prohibits discrimination on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>143</sup>

### **3.6. Duties of the School flowing from a Decision to Exclude**

The decision to exclude a pupil by a head teacher initiates a catalogue of specific duties. Such duties include the requirement of the school to notify the parents of the pupil should the pupil be under 18 years of age<sup>144</sup> of the nature and period of the exclusion and the reasons for it without delay. For students who are excluded from Pupil Referral Units and Academies, similar duties are also expected of the head teacher.<sup>145</sup> Parents are also entitled to notification regarding their duty to ensure their child is not in a public place during school hours during the first five days of the exclusion without reasonable justification.<sup>146</sup> For those who have reached the age of 18 years of age at the time of the exclusion, they are entitled to such information in their

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<sup>141</sup> Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*, a p. 8.

<sup>142</sup> Section 9, SI 2012/1033 The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>143</sup> Section 4 Equality Act, 2010.

<sup>144</sup> Section 51A(3)(a) Education Act, 2002; School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, s (5) & Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*, para 24.

<sup>145</sup> School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, s(14) & s(23).

<sup>146</sup> Section 103 and 105 of the Education and Inspections Act 2006 and the Education (Penalty Notices) (England) Regulations 2007 (S.I 2007/1867). See also Department of Education *School Attendance Parental Responsibility Measures* (2015) at page 9.

own right. Notably however is that for children and young people, the legislative framework prioritises the exchange of correspondence between the school and the parents and not the school and the child. This is not to say that the child's parents should be made aware of the exclusion. Rather, given the fact that the child is the subject of the exclusion, they should also receive such information. As the CRC Committee has stated, children do not lose their rights once they enter a school setting and given that an exclusion will affect their education rights, they should be made aware of the circumstances underpinning their exclusion.

Parents are also entitled to challenge the exclusion and therein acquire further additional rights. Following the decision to exclude, parents have the right to make representations about the exclusion to the governing body of the school in question, and are also entitled to know how any representations should be made and, where there is a legal requirement for the governing body to consider the exclusion, the parents have a right to attend the meeting and be represented at the meeting at their own expense and to bring a friend.<sup>147</sup> Certain circumstances demand that the school's governing body consider the reinstatement of the excluded pupil within fifteen days of receiving notification of the exclusion. These include instances where the student has been permanently excluded, where the student has been excluded subject to a fixed-term exclusion but where this would result in the student being excluded for more than fifteen days in an academic term, or where the pupil would miss a public examination or a national curriculum test.<sup>148</sup> For fixed term exclusions in excess of five days, the Governing Body or Local Authority in the case of a pupil excluded from a Pupil Referral Unit, must arrange suitable full-time education for any pupil of compulsory school age. This provision must begin no later than the sixth day of the exclusion and a similar duty exists regarding permanent exclusions.<sup>149</sup> In the event of the provision of alternative educative services, the parent has the right to know the commencement of the arranged provision including the start and finish dates, the location of the provision and any information required by the pupil in terms of reporting expectations.<sup>150</sup>

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<sup>147</sup> Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*, at pages 12 – 15.

<sup>148</sup> Education Act, 2002, section 51A(3)(b); School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, Regulations 6 & 24, & Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*, 18.

<sup>149</sup> Ibid at p. 16.

<sup>150</sup> Ibid.

Upon notification of an exclusion, the Governing Body must consider, within fifteen days of receiving a notification of an exclusion, several issues. These include whether an excluded pupil should be reinstated in the case of a permanent exclusion, all fixed term exclusions exceeding fifteen school days in a term, and all fixed term exclusions which would result in the excluded pupil missing a state examination or a national curriculum test.<sup>151</sup> In the determination of a reinstatement, the governing body must invite the parents, the head teacher and a representative of the Local Authority in the case of a maintained school or Pupil Referral Unit (PRU), to the hearing.<sup>152</sup> Critically, the child themselves are not invited to the hearing. In their determinations, the governing body may hear representation from the parents, the head teacher, or the local authority representative in the case of a PRU.<sup>153</sup> The governing body may either uphold the exclusion or direct the reinstatement of the pupil immediately or on a particular date.<sup>154</sup> Further to the 2012 Regulations, the Governing Body must, in their deliberations on whether to reinstate the student excluded from a maintained school:

*“consider the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded, and have regard to the interests of other pupils and persons working at the school (including persons working at the school voluntarily)”*<sup>155</sup>

Similar considerations are expected of the management committee in charge of a PRU,<sup>156</sup> and of the proprietor in charge of an Academy.<sup>157</sup> However, while the regulations require the ‘interests and circumstances’ of the excluded pupil to be taken into account by the relevant governing body, committee or proprietor, such a requirement arguably falls well short of what is required by adhering to the child’s best interests principle pursuant to Article 3 CRC. According to the UN Committee on the Rights of the Child, the practical application of the principle “means that the child’s best interests may not be considered on the same level as all other considerations”.<sup>158</sup> This is undoubtedly connected to the express phrasing of Article 3 CRC itself which states that that the child’s best interests shall be a ‘primary consideration’ in

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<sup>151</sup> Ibid at p. 18.

<sup>152</sup> Ibid at p. 19.

<sup>153</sup> Ibid at p. 20.

<sup>154</sup> Ibid at p. 21.

<sup>155</sup> School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, Regulation 6

<sup>156</sup> Regulation 15 (3)(a).

<sup>157</sup> Regulation 24(3)(a).

<sup>158</sup> Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (art.3, para.1)(2013), para 37.

all matters which affect the child. Indeed, in his assessment of how the principle is given practical effect, Lord Kerr stated that: “It is a factor...that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them”.<sup>159</sup> Although such sentiments were expressed within an asylum context, the underlying premise regarding the operation of the principle and the manner in which decision-makers should give effect to it is of valuable transferrable importance. However, in the context of the school exclusion legislative framework, the reference within the 2012 Regulations to the ‘interests and circumstances’ of the excluded pupil, arguably amounts to a lesser deliberative framework than that mandated by Article 3 CRC. This has obvious practical and legal consequences for the child involved. Failure to follow the best interests principle means that a best interests assessment and determination are not carried out and therefore important determinative considerations evade scrutiny. In their analysis of what should be taken into account by decision-makers when assessing and determining the child’s best interests, the CRC Committee outline several factors which must be considered.<sup>160</sup> These include the child’s views, the child’s identity, the preservation of the family environment and maintaining relations, the care, protection and safety of the child, the child’s vulnerability, their right to health and their right to education.<sup>161</sup> While not all factors will be relevant in a particular case, what is clear is that within the context of a school exclusion, factors such as the child’s views, their identity, their vulnerability and their right to education are clearly engaged. Furthermore, in implementing the best interests principle, the CRC Committee has also highlighted the critical role which procedural safeguards play. In particular they state: “States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children”.<sup>162</sup> Therefore, given the quasi-judicial function which head-teachers assume in the context of school exclusion, it is contended that the decision to exclude should be underpinned by a best interests assessment and determination whereby the aforementioned factors would have to be considered. However, for

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<sup>159</sup> *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* 2011] UKSC 4, 46.

<sup>160</sup> CRC Committee, General Comment No. 14 (2013) *The right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC/C/GC/14, 29 May 2013, 13.

<sup>161</sup> *Ibid*, para’s 13 – 16.

<sup>162</sup> *Ibid*, para 87.

as long as the best interests principle remains outside the school exclusion framework, important considerations such as those listed above also remain beyond consideration.

In cases of permanent exclusions where the Governing Body decide not to reinstate the pupil, they must notify the parents that the exclusion is permanent and of their right of review by an independent review panel<sup>163</sup> (IRP) with the following information: the date by which an application for a review must be received (fifteen days from the date on which notice in writing of the governing body's decision was given to the parents), where and to whom an application should be submitted, the ground(s) on which the application is being made should be set out and the right of the parents to appoint an SEN (Special Educational Needs) expert to attend the review.<sup>164</sup>

If parents apply for an IRP within the permitted timeframe, the local authority<sup>165</sup> or in the case of an academy, the academy trust,<sup>166</sup> must arrange for a panel to review the decision of the governing body not to reinstate a permanently excluded pupil. The review must occur within fifteen school days of the date on which the local authority/academy trust received the parent's application for a review. The role of the IRP is to review the governing body's decision not to reinstate a permanently excluded pupil. In reviewing the decision, the panel must consider the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded, with regard being given to the interests of other pupils and people working at the school.<sup>167</sup> Following the review, the panel may uphold the exclusion decision, recommend that the Governing Body reconsiders its decision or quash the decision and direct that the governing body considers the exclusion again. The panel cannot direct the reinstatement of the child to their school and the decision is binding on the pupil, parent, Governing Body, Head Teacher, Local Authority or Academy Trust. Indeed, it is this particular function of the IRP which has attracted considerable commentary. This is due to the fact that, in overhauling the legislative framework governing school exclusions, the Education Act 2002 also substantially diluted the remedies available to parents and children. By replacing Independent Appeal Panels which did have the power to reinstate excluded pupils with IRPs

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<sup>163</sup> Education Act 2002, section 51A(3)(c).

<sup>164</sup> Ibid.

<sup>165</sup> SI 2012/1033 The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, Regulations 7 & 16.

<sup>166</sup> Ibid, Regulation 25.

<sup>167</sup> Ibid at p. 35.

which do not, the Act has vastly curtailed the corrective powers which this important body has in the context of school exclusions and in ensuring the authorisation of an exclusion in a fair, legal and transparent manner. Indeed, during the Acts' passage through Parliament, the Joint Committee on Human Rights expressed unequivocal concerns regarding the diminution of the powers which IRPs were to possess. In particular, through their examination of the caselaw arising under Article 6 (Right to a Fair Trial) of the European Convention on Human Rights, the Joint Committee on Human Rights (JCHR) noted that "the provisions for review panels without full appellate jurisdiction and without the power to order reinstatement are incompatible with the requirements of the Article".<sup>168</sup> In reaching their conclusions, the JCHR were heavily influenced by the work and recommendations of the Administrative Justice and Tribunal Council (AJTC) which not only noted the "life-changing"<sup>169</sup> impact which a school exclusion has on the child concerned but also the high statistical correlation between permanent exclusions on the one hand and children with SEND on the other.<sup>170</sup> In highlighting the need for robust review of school exclusions,<sup>171</sup> the AJTC recommended that permanent exclusions should be reviewed by the First-Tier Tribunal (Special Educational Needs and Disability) (FTT) in light of its existent resources and capacity and the fact that 'It must be more economic for all exclusion appeals to be head by the FTT(SEND), which already has trained judiciary with wide experience of dealing with such appeals.'<sup>172</sup>

Moreover, in his assessment of the legislative changes which effectively downgraded the powers available to an IRP, Nabil Dance stated that their current inability to direct the reinstatement of an excluded pupil, unlike its predecessor, severely limits the power of the review panel such that the question arises "whether it is worthwhile for the majority of families submitting a review application at all, when there is no prospect of a favourable outcome".<sup>173</sup> In a similar vein, Berman and Brotherton note that the removal of the reinstatement power from the IRP represented a "crucial change"<sup>174</sup> within the legislative framework, while in the first

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<sup>168</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Education Bill and other Bills* (Thirteenth Report Session 2010-11, HL 154, HC 1140), 4.

<sup>169</sup> Richard Thomas, *Education Bill - letter to the Secretary of State*, (March, 2011) <https://dera.ioe.ac.uk/11715/1/154.pdf> (last accessed 18th September 2020).

<sup>170</sup> See Chapter 7 for a fuller discussion on children's procedural rights regarding school exclusions.

<sup>171</sup> In particular the AJTC stated that: "The allegations, their seriousness and the judgments made in each case need to be examined to ensure that the decision can be justified and was correct".

<sup>172</sup> *Ibid.*

<sup>173</sup> Nabil Dance, 'Recent Legal Developments in School Exclusions' (2013) 2013 *Educ LJ* 175, 183

<sup>174</sup> Laura Berman and Michael Brotherton, 'Permanent Exclusion and the Independent Review Panel Process' (2015) 2015 *Educ LJ* 16, 17.

judicial review to come before the courts on foot on the changes introduced by section 51(A) Education Act 2002 as inserted by the Education Act 2011, Collins J., stated that “the amendments resulting from the insertion of 51A in the 2002 Act, and the new regulations are substantial, because before then a review panel had much wider powers”.<sup>175</sup> Thus, by reducing the powers of the IRP, important accountability and appellate functions have been removed from the school exclusion system, including important remedial rights for children and young people.

More recently, the all-party law reform and human rights organisation JUSTICE advanced a number of proposals which are aimed to radically overhaul the school exclusion system.<sup>176</sup> These include the recommendations for mandatory training for teachers on the law governing school exclusions,<sup>177</sup> the introduction of a new specialist “Independent Reviewer”<sup>178</sup> to replace the current role of the board of governors and the use of the First-tier Tribunal (Special Educational Needs and Disability) with full appellate powers to replace IRPs and full participatory rights for children at all stages.<sup>179</sup> Such suggestions further highlights the need to ensure children’s rights are front and centre of the school exclusion system in England.

Where the IRP directs or recommends that the governing body reconsiders its decision, the governing body must reconvene to do so within ten school days of being notified of the panel’s decision. If following a direction to reconsider, the governing body does not offer to reinstate the pupil within ten school days of being notified of the IRP’s decision, an adjustment may be made to the school’s budget in the sum of £4,000 or in the case of an academy, the school would be required to make an equivalent payment directly to the local authority in which the school is located.<sup>180</sup> All of the obligations signify the current state of legal affairs regarding school exclusions. However, any discussion of school exclusions within the context of progressively realizing children’s educational rights, and specifically their rights *in* education, must also be considered in light of the recommendations and context of the recent governmental review into school exclusions.<sup>181</sup>

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<sup>175</sup> R(CR) v Independent Review Panel of the London Borough of Lambeth [2014] EWHC 2461 (Admin), para 16.

<sup>176</sup> See JUSTICE (2019) *Challenging School Exclusion*, (JUSTICE: London)

<sup>177</sup> Ibid, Recommendation 1, p 72.

<sup>178</sup> Ibid, Recommendations 10–13, p. 73.

<sup>179</sup> Ibid, Recommendations 14–16, p. 74.

<sup>180</sup> Ibid at p.41.

<sup>181</sup> See n (60) above.



### 3.6.1. The Timpson Review of School Exclusions

Preceded by delay and guesswork, the dust has now finally settled on the recent publication of the Government's long-awaited report into school exclusions in England. This represented a pivotal opportunity to examine and address what has become an insidious blight on the English educational landscape. Commissioned in March 2018, the report was to review and explore how head teachers use their powers to exclude children from school and to ascertain why certain groups of children are more likely to be excluded than others. Although restating the troublesome reality that certain groups of children are persistently over-represented within the exclusion figures,<sup>182</sup> the report represents a missed opportunity for strengthening, developing and progressively realizing children's rights in and to education. While the report acknowledges that "systemic improvement is required"<sup>183</sup> to redress, *inter alia*, the practice of illegal and unofficial exclusions, children being "off-rolled" within schools, the capricious and inconsistent use of exclusions within schools and the lack of safe-guards which protect children against such practices,<sup>184</sup> the ultimate recommendations fail to introduce a rights-respecting culture within school where children and young people themselves are the direct proprietors of legal entitlements. Indeed, the report is itself limited in its acknowledgement of children's rights as a whole.

The recommendations are instituted on four discrete pillars. These include: the desire to deliver ambitious leadership cultures within schools which sets high expectations of every child in terms of behaviour and outcomes; better equipping schools so that they can support, identify and address the needs of their students; better incentivising schools to foster more inclusive practices whereby exclusion is used only as a last resort; and lastly, implementing stronger safeguards so that children are not being either pushed out of school or education altogether. While such overarching thematic benchmarks are objectively admirable, the thirty recommendations which ensue do not go far enough in terms of creating a rights-respecting educative model. These proposals include: updating and clarifying the statutory guidance on school exclusions,<sup>185</sup> the provision of accessible and well-evidenced training and support to school leaders to maintain positive behaviour cultures,<sup>186</sup> the designation of senior leads for

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<sup>182</sup> See Chapter One.

<sup>183</sup> See n (73) above at p. 12.

<sup>184</sup> Ibid at p 11.

<sup>185</sup> Ibid, Recommendation 1, at p. 12.

<sup>186</sup> Ibid, Recommendation 2.

both mental health and SEN needs,<sup>187</sup> the overhaul of alternative provision as an attractive place to work<sup>188</sup>, the renaming of Pupil Referral Units to reflect the reality that they are indeed schools,<sup>189</sup> the establishment of more effective oversight and monitoring of Alternative Provision,<sup>190</sup> ensuring greater accountability and monitoring of the reasons why schools exclude<sup>191</sup> and greater tracking of pupil movement between schools.<sup>192</sup> While these recommendations are to be welcomed, much scope nonetheless remains to ensure that children's procedural rights are more effectively and visibly strengthened within the exclusion framework. While subsequent chapters will explore in more detail the potential for such procedural enhancements and position them within the framework of progressive realization, the proposals set out in the Review highlight a number of children's rights anomalies. With no reference to the child's best interests principle, the child's right to be heard or the child's right to a remedy should any breach of her right occur, the Review appears to disproportionately solidify the rights of schools over the rights of children. Importantly, many children's rights irregularities contained in the current legislative framework persist.

### **3.7.Criticisms of the Exclusion System: A Children's Rights Analysis**

Although subsequent chapters will address in a more exhaustive and comprehensive manner the compatibility of the exclusion process within the English education system as against the duty of the state to progressively realize the right to education, certain indisputable and discernible anomalies emerge thus far.

Firstly, the invisibility of children from the entirety of the exclusion process is a noticeable anomaly. The existence of review rights, as opposed to formal appellate rights, which exist solely in favour of parents creates a legislative and procedural imbalance which renders the child an extraneous actor within the very system they seek to rely on. This is problematic as the law is arguably premised on the assumption that all parents will display the same level of equivalence towards their children's education. By failing to provide for independent review rights from excluded children in the case of permanently excluded children and more widely peripheralizing children in relation to the exclusion process itself, the law fails to provide a

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<sup>187</sup> Ibid, Recommendation 6, at p. 13.

<sup>188</sup> Ibid, Recommendation 10, at p. 13.

<sup>189</sup> Ibid, Recommendation 11, at p. 13.

<sup>190</sup> Ibid, Recommendation 24, at p. 15.

<sup>191</sup> Ibid, Recommendation 22.

<sup>192</sup> Ibid, Recommendation 24.

legal safety net where children's parents do not pursue their educational interests either through indifference or negligence. Indeed, as outlined earlier, the downgrading of the rights afforded to parents who seek to challenge their child's exclusion has been held to be inconsistent with Article 6 ECHR. Secondly, the invisibility of the CRC and its interpretative provisions from the legislation, regulations and accompanying statutory guidance represents a further irregularity. Such absences, despite the explicit references within the law to enduring public law standards have occasioned a children's rights deficit within the law governing school exclusions. Indeed, the failure of the legislation, regulations, or guidance to reference the best-interests principle, the child's right to education itself or to meaningfully engage with the duty of the State to progressively realize the right to education becomes apparent. Furthermore, the failure to explicitly allow for the child's right to be heard pursuant to Article 12 CRC is entirely absent from the exclusion process. This is compounded by the fact that when considering whether to exclude in the first instance, the head-teacher is only encouraged 'where practical' to consider the child or young person's side of the story. Thus, the non-existence of the established right of the child to express his or her views, coupled with her concomitant inability to personally have her exclusion reviewed and challenged results in an imbalanced procedural process which jars heavily with established children's rights principles. Indeed, they run counter to the progressive realization of the children's education rights.

### **3.8. Conclusion**

This chapter has outlined the regulatory framework underpinning the right to education and also the exclusion process in England as a reality which endures as part of that right. This analysis has centred on a children's rights approach to education and has demarcated some core legal matters. Firstly, as a human right, education must be viewed in its totality; namely, as a right which comprises rights to, in and through education and the recognition that each of these elements demand scrutiny in light of how they interact with the principle of progressive realization. Secondly, as this chapter has highlighted, in terms of its legal delivery within children's rights law, and human rights law more broadly, the right to education is instituted upon the principle of progressive realization. Therefore, the application of this principle warrants increased attention given its relationship with the realization of children's education rights. Given further that these rights straddle elements of civil and political rights, which are not subject to progressive realization, it is necessary to further our understanding of the legal application of this principle and the parameters within which it operates. However, what

exactly is meant by progressive realization and what it entails regarding the right to education and more specifically school exclusions demand an analysis of the principle's guiding features.

## **Chapter Four**

### **Progressive Realization: In Search of a Definition**

#### **4.0. Introduction**

Writing over forty years ago, Hillary Rodham stated that children's rights were, in essence, "a slogan in search of a definition".<sup>1</sup> And although children's rights has since evolved into an indisputable and visible body of law in its own right, at all levels; national, regional and international, Rodham's terminology is nonetheless constructive from the perspective of assessing the concept of progressive realization upon which many children's rights, including education, are dependent for meaning. Although resolutely anchored within the fabric of human rights law, little attention has however been devoted to the definition of progressive realization from a children's rights perspective. While attention has generally centred on elaborating the basic and perceptible contours of the principle, the aggregative result of which has been its articulation in broad-brushed and general terms, its position within, and potential effect on, children's rights scholarship has largely escaped any meaningful or systematic examination.

This chapter (and thesis more widely) argues that it is now time to reclaim 'progressive realization' as a means to direct and consolidate the responsibilities of contracting states regarding the fulfilment of their children's socio-economic rights commitments. As the key legal driver for advancing the betterment and improvement of socio-economic rights, the centrality which progressive realization enjoys within children's rights (and human rights) is beyond doubt. However, despite that centrality, children's rights scholarship has not adequately addressed this duty within its treatment of socio-economic rights. The net effect of this failure has been that progressive realization occupies a largely marginal and peripheral legal dwelling within children's rights scholarship. The task, therefore, is to reclaim its potential to successfully advance children's de jure and de facto access to socio-economic guarantees, including their right to education.

However, before this can occur, it is firstly necessary to delineate the definitional features which both underpin, and delimit, the concept of progressive realization. Such certainly is essential as an understanding of the principle's key legal attributes allows for its subsequent application and monitoring in the context of children's socio-economic rights. In examining the principle of progressive realization from a children's rights perspective, this chapter will

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<sup>1</sup> Rodham, H (1973) Children Under the Law, *Harvard Educational Review*, Vol. 43 at p. p487.

interrogate both the conceptual and normative parameters of the principle and extrapolate its core definitional features. This chapter will further argue that through its status as the *modus operandi* for the effectuation of the socio-economic rights within the CRC, progressive realization possesses the capacity to further develop and improve children's access to and enjoyment of their rights, including education, under the CRC. In concretising the definitional aspects of the principle of progressive realization within the CRC, both in its procedural and substantive capacity, it will be argued that it can assume a new identity from a children's rights perspective. It can become a more prominent fixture within children's rights scholarship.

This chapter will be divided into two sections. Section one will examine the historical genesis of the principle which will include an analysis of its position within current international human rights law. It will be argued thereafter that the principle has been largely retained a somewhat indeterminate identity, owing arguably to the ideological and political compromises which attached to its legal birth. After establishing its genesis, section two will proceed to explore the principle from a children's rights perspective and argue that its current standing within children's rights scholarship has been both marginal and insignificant. By situating the analysis within the context of school exclusions and the connected right to education, this chapter will ultimately argue that a renewed appreciation of, and engagement with, the specificities of progressive realization can bequeath a potentially reformist legacy to children's socio-economic rights and their consequential enjoyment.

## **4.1. Section One: Progressive Realization in International Human Rights Law**

### **4.1.1. Historical Antecedents**

Human rights law recognises the reality that rights of all descriptions; civil, political, economic, social and cultural, do not and cannot materialise in the absence of State support. It also recognises the fact that without State support such rights would never meaningfully materialise.<sup>2</sup> They would exist in an unreachable and inaccessible hinterland. That this is particularly true with regard to economic, social and cultural (ESC) rights is beyond doubt.<sup>3</sup> Human rights law further recognizes the unique significance which access to and enjoyment of

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<sup>2</sup> For more, see generally, Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties* (2008) Oxford University Press.

<sup>3</sup> For more, see generally Alston, P., and Quinn, G., "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Hum Rts Q 156 – 229. See also, Eide, A., Krause, C. and Rose, A., *Economic, Social and Cultural Rights*, (1995) Martinus Nijhoff Publishers for a discussion on ESC rights as both human and legal rights.

ESC rights brings. Be it in the areas of health, housing, education or social security, ESC rights offer the potential to fulfil the true promise of human dignity, equality and autonomy upon which the very existence of human rights are based.<sup>4</sup> As Beetham states:

*“A minimum agenda of economic and social rights will aim to secure those basic material conditions for human agency that modern existence has shown to be both necessary and effective”.*<sup>5</sup>

However, access to and enjoyment of ESC rights do not materialise within equivalent paradigms. Political and economic disparities both within and between states often result in the incomparable development and enjoyment of ESC rights. Therefore, their customary subjection to the principle of ‘progressive realization’, in terms of their eventual and ultimate fulfilment, reflects the multi-faceted nature of such rights. Indeed, in its most elementary form, progressive realization reflects the actuality that rights require resources and resources are ultimately finite.<sup>6</sup> Therefore States are afforded a measure of latitude and autonomy in terms of the deployment of resources required to realize their socio-economic rights commitments. While international human rights law recognizes the fiscal and material constraints which States operate within and under,<sup>7</sup> it also recognizes that States must nonetheless continuously strive to ensure that ESC rights are ‘progressively realized’.<sup>8</sup> Resource limitations *per se* so do not amount to a justifiable nor acceptable defence in relation to the non-realization of such rights, nor do such restrictions immunise states from their duties to progressively realize ESC rights.<sup>9</sup> Thus, from its conceptual genesis and subsequent inclusion in the International

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<sup>4</sup> See Shestack, Jerome J., (2000) The Philosophical Foundations of Human Rights, in Symonides, J., *Human Rights: Concepts and Standards*, (2000) Dartmouth Publishing, pp 31 – 66.

<sup>5</sup> Beethman, D., (1995) What Future for Economic and Social Rights, *Political Studies*, XLIII, 41 – 60 at p48

<sup>6</sup> See Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, 8th June 2009, Un Doc E/2009/90. See also for more general discussion on resources, Chenwi, L., Unpacking Progressive Realization, its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance, (2013) *De Jure*, 742 – 769.

<sup>7</sup> Fafuda-Parr et. al., state that “Inherent in the idea of progressive realization is that a government’s ability to fulfil rights commitments depends on the level of resources (financial and other) available in the country” in Fafuda-Parr, S., Lawson-Remer, T., and Randolph, S., (2015) *Fulfilling Social and Economic Rights*, Oxford university Press, p.11.

<sup>8</sup> O’Connell et al. (2014) state that while full realization of ESC rights in the immediate term may not be possible, there is thus a margin of appreciation accorded to the contracting state to progressively realise the right, which will vary between state to state. “In other words, the duty of ‘progressive realization’ assumes that expectations and obligations of states are not uniform or universal but rather that they are relative to the levels of development and the resources available”. O, Connell et al. (2014) *Applying an International Human Rights Framework to State Budget Allocations*, Taylor and Francis, p.67.

<sup>9</sup> In recognition of the economic disparities which exists between States, human rights law provides for States to cooperate and assist each other in the form of international aid which will contribute to the goal of rights realization.

Covenant on Economic, Social and Cultural Rights (ICESCR), the principle of progressive realization has firmly affixed itself to the enforcement and attainment of ESC rights across many international human rights instruments.<sup>10</sup> The first binding codification of progressive realization can be found in Article 2(1) of the ICESCR which states;

*“ Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to **achieving progressively** the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures ”* [emphasis added]

Accordingly, from the historical post-Cold war context from which it emerged, progressive realization, in many respects, symbolizes the compromise reached by the international community regarding the means by which and through states are to fulfil their obligations pertaining to economic, social and cultural rights. In its inherent recognition of the gradual and evolutionary nature of such rights, progressive realization encases and permits an explicit, and often necessary measure of latitude and autonomy to afford contracting states the space and time within which to progressively realize the ESC right in question. Therefore, the principle is unquestionably, both conceptually and substantially deferential to the contracting state in question. However, drilling down deeper into the legal mechanics of the principle, a legal and practical relationship of dependency emerges between ESC rights on the one hand and their method of realization on the other, with the latter very much giving effect to the former. Such a relationship captures the essence of progressive realization.

However, the universal acceptance of progressive realization is one which must be positioned within the broader historical and philosophical confines from which the concept first originated. As the mechanism towards rights achievement, progressive realization was the inescapable by-product of the ideological and historical confrontation which accompanied the international post-Cold war human rights movement. The attainment of progress, beyond the aspirational and non-binding entitlements in the UDHR,<sup>11</sup> involved the inevitable collision of political priorities and allegiances between what was perceived as the socialist ‘left’ and the capitalist ‘right’; the former embracing countries whose models of political and economic governance favoured the inclusion of rights of a more socio-economic nature (health, education, housing etc); the latter comprising countries who preferred to allot primacy to

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<sup>10</sup> For example, see Article 4(2) UN Convention on the Rights of Persons with Disabilities & Article 4 of the UN Convention on the Rights of the Child.

<sup>11</sup> The UDHR came into effect on the 10<sup>th</sup> December 1948, General Assembly Resolution 217 A.



classical civil and political rights which were traditionally associated with democratic liberty and the ‘free world’.<sup>12</sup>

Progressive realization also signified the practical and cumulative effect of the historical textual separation of human rights into two distinct legal amalgamations. This was evidenced by the partition of civil and political rights from socio-economic rights and substantiated by the subsistence of two self-determining Covenants, the International Covenant on Civil and Political Rights (ICCPR) on the one hand and the ICESCR on the other.<sup>13</sup> While this thematic division of human rights principally manifested itself in relation to the adjudication and resultant realization of ESC rights, including education,<sup>14</sup> the division also contributed to the subjugation of ESC rights as a perceived lesser and inferior body of human rights.<sup>15</sup> As Craven states;

*“The fact of separation has been used as evidence of the inherent opposition of the two categories of rights. In particular, it has led to a perpetuation of excessively monolithic views as to the nature, history and philosophical conception of each group of rights and has contributed to the idea that economic, social and cultural rights are in reality a distinct and separate group of rights”.*<sup>16</sup>

This developmental discrepancy can be traced back to the doctrinal and notional classifications which accompanied the emergence and development of both sets of rights. Tinta observes that civil and political rights were traditionally regarded as ‘law’ owing to their ‘immediate applicability’, best achieved through policies of State abstention while ESC rights were viewed as ‘needs’, requiring positive actions and interventionist policies<sup>17</sup> by the State. Similarly, in his uncompromising rebuke of the fundamental legality of socio-economic rights, Vierdag

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<sup>12</sup> For more, see generally, Craven, M., *“The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development”* (1995) Clarendon Press.

<sup>13</sup> UN General Assembly Resolution, Preparation of Two Drafts International Covenant on Human Rights, 5<sup>th</sup> February 1952, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/067/98/IMG/NR006798.pdf?OpenElement>

endorsed the division of human rights into two separate classifications. See also Liebenberg, S., (1995) *The International Covenant on Economic, Social and Cultural Rights*, 11 *S. Afr. J. on Hum. Rts.* 359.

<sup>14</sup> For more on the history on the separation of the two treaties see Craven (footnote 12 above) at pages 16–22.

<sup>15</sup> Macklem states that “The prominence that civil and political rights enjoy in international human rights law is in no small measure due to the fact that most of the field’s foundational instruments and institutions came into existence in the wake of wartime atrocities and were consciously designed to protect interests associated with civil and political freedom from the raw exercise of collective State power” Macklem, P., *The Sovereignty of Rights*, (2015) Oxford University Press, at p 11.

<sup>16</sup> See n (12) above at p 9.

<sup>17</sup> Tinta, Monica Feria (2007) *Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights Beyond Traditional Paradigms and Norms* *Human Rights Quarterly*, Vol, 29 No. 2 at page 432.

argued that civil and political rights were ‘directly enforceable’ with no requirement for special legislation or special funding measures to finance their implementation<sup>18</sup> while ESC rights were, conversely, devoid of an enforceable legality, lacking legal definition and were “of such a nature as to be legally negligible”.<sup>19</sup> Indeed, Wiles observed that the distinction between both sets of rights emerged from the classifications of such rights as either ‘positive’ or ‘negative’ in nature, with the former representative of ESC rights which involved the expending of State resources to effect realization while the latter epitomized civil and political rights wherein non-interference by the state with individual liberty sufficed to realize the right.<sup>20</sup> This was further recognised and elaborated upon by Young who argued that the:

*“reported distinctions between civil, political and economic, cultural and social rights, have created a discourse around human rights that treats the legalization of economic and social rights as uniquely challenging for our current constitutional democratic systems”.*<sup>21</sup>

Such distinctions she argued have resulted in the development of ‘the more privileged category of civil and political rights.’<sup>22</sup> Thus, the dominant arguments sustaining the legal and conceptual separation as articulated above is that both sets of rights and entitlements are fundamentally dissimilar in nature. ESC rights are perceived as progressive, positive in nature, resource-intensive, vague and non-justiciable as opposed to the negative, cost-free and immediately justiciable nature of civil and political rights. However, this legal dissonance jars heavily with the repeated assertions pertaining to the indivisibility of all human rights<sup>23</sup>; an interrelatedness which “reflects the fact that the two sets of rights can neither logically nor practically be separated in watertight compartments”.<sup>24</sup> Indeed, such perceptions are further compounded by concerns pertaining to questions of resource allocation, democratic legitimacy, institutional competency and the functional capacity of the judicial system regarding the adjudication of ESC rights. While these issues will be addressed in more detail in subsequent chapters, they

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<sup>18</sup> Vierdag, E.W (1978) *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, *Netherlands Yearbook of International Law* Vol. 9 at page 78.

<sup>19</sup> *Ibid* at page 105.

<sup>20</sup> For more see Wiles, E., (2006) *Aspirational Principles or Enforceable Rights: The Future of Socio-Economic Rights in Natural Law* 22 *American University International Law Review* 35 at page 45.

<sup>21</sup> Young, Katherine G (2012) *Constituting Economic and Social Rights* Oxford University Press at page 4.

<sup>22</sup> *Ibid* at page 5.

<sup>23</sup> According to the World Conference on Human Rights in Vienna in 1993 “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.

<sup>24</sup> Steiner, Henry, J, Alston, P., Goodman, R., *International Human Rights in Context: Law Politics Morals*, 2008, p 275.

have nonetheless converged to curtail, in some states and instances, the meaningful realization of such rights.<sup>25</sup> Indeed, Nolan argues that the concerns deriving from the separation of human rights as outlined above are ostensibly misplaced, even unfounded; stating that

*“the growing inclusion of justiciable socio-economic rights in the constitutions of states with a wide variety of different economic systems...have effectively rendered claims about the ideological nature of socio-economic rights moot”*<sup>26</sup>

Indeed, Nolan further argues that while the realisation of socio-economic rights including education requires greater state intervention and action for their realisation, “this difference separates the two sets of rights more in terms of degree than kind”<sup>27</sup> while Christiansen further contends that many of the alleged differences advanced between the two categories of rights “are historical and descriptive rather than inherent and normative”.<sup>28</sup> Thus, while the legal and normative differences between both sets of rights have been subject to much scrutiny and their perceived distinctions rendered discredited, the question nonetheless persists pertaining to the specific and ascertainable obligations which accompany the duty to progressively realize these rights. As O’Connell et. al. have argued: “...the content of the duty to realize progressively is not just about the positive actions that have to be taken but also about the process through which decisions regarding those actions are taken. Effectiveness, participation, accountability and equality are identified principles that are aspects of the duty to progressively realise ESC”<sup>29</sup> rights.

Thus, in opening up the parameters within which progressive realization resides, O’Connell et.al., offer an important recalibration of the principle’s operability to include not just the principle’s oft-cited substantive dependency on resources, but also its inseparability from the application of wider procedural duties. This identification of the principle’s substantive and procedural facets further offers an important and indeed a powerful legal frame against which to assess whether states are in fact complying with the duties thereunder. This is significant when holding states to account for delivering on their right to education commitments and specifically in the context of school exclusions as the legal alignment of progressive realization with the procedural requirements of transparency, equality, effectiveness, and participation offer an additional avenue to hold states accountable for their ESC rights commitments. The

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<sup>25</sup> See also Langford, M., (2009) Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review, *International Journal on Human Rights* 91.

<sup>26</sup> Nolan, A., (2014) *Children’s Socio-Economic Rights, Democracy and the Courts*, Hart Publishing, at page 23

<sup>27</sup> Ibid at page 28.

<sup>28</sup> Christiansen, Eric, C (2007) Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Courts, 38 *Columbia Human Rights Law Review*, 321 at page 343.

<sup>29</sup> See n (8) above at p. 69.

utility of this resides in the fact that ensuring states comply with procedural duties ensures they cannot exclusively rely on resource limitations as a pretext for non-realization of such rights.

In their examination of procedural justice in the context of European Human Rights adjudication, Brems and Lavrysen, in drawing on the famous Chicago based 1980's study by Tyler into people's perceptions of procedural justice from their interactions with the courts and police, recount the four reinforcing principles which Tyler suggested that courts should take into account when dealing with people.<sup>30</sup> These include participation; meaning that everyone should have the opportunity to tell their side of their story, neutrality; which broadly correlates with the requirement that judges and decision-makers act independently, impartially and in transparent manner, respect; which means that people should be treated with dignity and have their concerns taken seriously by the legal process and finally, trust, which corresponds with the fundamental requirement for decision-makers to act professionally, listen to everyone's concerns and act in the interests of the parties and not to be motivated by subjective biases and beliefs.<sup>31</sup> Thus, their reiteration of Tyler's principles serve as a useful guide within which to position procedural justice, and the broader issues of fairness, lawfulness, transparency and participation which are fundamental requirements of any justice system. Indeed, as this thesis will later argue, adherence to procedural duties represent a critical safeguard for ensuring children's educational rights and specifically their rights within the school exclusions system are progressively realized. However, what exactly constitutes progressive realization has elided any sustained definitional engagement within current human rights law.

#### **4.1.2. Progressive Realization in Current Human Rights Law**

Described as a 'necessary contextualisation device, reflecting the constraints of the real world and the difficulties involved for any country in ensuring the full realisation of economic, social and cultural rights'<sup>32</sup> progressive realization has established itself as an inseparable factor in the realization of such rights. The principle has further been embedded within current human rights law through the espousal of various guidelines including the Limburg Principles<sup>33</sup>, the

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<sup>30</sup> See Brems, E & Lavrysen, L., (2013) Human Rights Adjudication: The European Court of Human Rights, *Human Rights Quarterly*, Vol. 35, pp. 176 – 200.

<sup>31</sup> *Ibid* at pp 180 – 182.

<sup>32</sup> Nolan, et.al., (2014), Two Steps forward, no steps back? Evolving Criteria on the prohibition of retrogression in economic and social rights, in Nolan, A (ed.) *Economic and Social Rights after the Global Financial Crisis*, (2014) Cambridge University Press at p122.

<sup>33</sup> See the Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987).

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>34</sup>, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights<sup>35</sup> and the Voluntary Guidelines to support the Progressive Realization of the Right to Food in the Context of National Food Security.<sup>36</sup> Additional also to such principles and guidelines has been the elaboration of the concept, through ‘soft-law’ mechanisms such as General Comments<sup>37</sup> issued through the work of the UN treaty monitoring bodies.<sup>38</sup> Indeed, in its very first General Comment<sup>39</sup>, the Committee on Economic, Social and Cultural Rights attached particular importance to the concept of ‘progressive realization’ by stating that contracting parties to the ICESCR should include within their periodic reports, both quantitative and qualitative information, pertaining to the realization of the rights within the ICESCR. According to the Committee on Economic, Social and Cultural Rights:

*“The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time”.*<sup>40</sup>

Moreover, in relation to the obligations which flow from progressive realization, states are expected to take “deliberate, concrete and targeted”<sup>41</sup> measures towards the “achievement of the full scope and content of the right”<sup>42</sup> in question. In this regard the principle acts as a mechanism to substantively convert ESC rights from their conjectural acceptance as human rights into accessible and attainable entitlements. Further to this, states are accorded a measure of latitude and autonomy pertaining to this purpose. Similarly, Kalantriy, Getgen and Koh

<sup>34</sup> Adopted on the 10<sup>th</sup> anniversary of the Limburg Principles on January 22 – 16 Maastricht University.

<sup>35</sup> Adopted on 28 September 2011 by International Commission of Jurists and International Experts in International Law and Human Rights Law at Maastricht University.

<sup>36</sup> Adopted by the 127<sup>th</sup> Session of the FAO Council, November 2004.

<sup>37</sup> See International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, (Presented at the Berlin Conference 2004: International Human Rights Law and Practice) paragraphs 15 – 28. See also, Gerber et al. (2013) General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect? *Melbourne Journal of International Law* Vol.14 at page 101.

<sup>38</sup> In particular the work of the Committee on Economic, Social and Cultural Rights Committee, pursuant to their mandate under the ICESCR, is instructive in this regard. The Committee on Economic, Social and Cultural Rights was established under ECOSOC Resolution 1985/17 of the 28<sup>th</sup> May 1985 to carry out the monitoring functions of the United Nations Economic and Social Council in Part IV of the Covenant, namely the International Covenant on Economic, Social and Cultural Rights. See also, O’Flaherty, M., (2006) The Concluding Observations of United Nations Human Rights Treaty Bodies, *Human Rights Law Review* 6, pp.27 - 52

<sup>39</sup> Committee on Economic, Social and Cultural Rights (1989) General Comment No.1 Reporting by States Parties.

<sup>40</sup> Committee on Economic, Social and Cultural Rights (ComESCR) (1990) General Comment No.3 *The Nature of State Parties Obligations* at para 9.

<sup>41</sup> Ibid at paragraph 2.

<sup>42</sup> O’Connell, R., Nolan, A., Harvey, C., Dutschke, M., and Rooney, E., *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources*, (2014) Taylor and Francis, at p 67.

observe that progressive realization essentially permits the State to ‘incrementally progress’<sup>43</sup> the fulfilment of human rights over time; an argument further examined by Young who argues that progressive realization ‘introduces a relative standard for the discharging of duties owed by the state’.<sup>44</sup> Essentially, the progressive realization of such rights, owing in part to the recognition of the inability of developing countries to immediately or instantaneously guarantee such rights, allots States a margin of appreciation<sup>45</sup> and flexibility within which to realize such rights. This flexibility is however not open-ended in nature and States are bound by fixed and defined obligations. As Asher observes;

*“Progressive realization allows for a degree of variation in how states fulfil their duties. However, governments must not regard this flexibility as an excuse for not fulfilling their international human rights obligations; they must move as expeditiously and effectively as possible towards the full realization of the right...”*<sup>46</sup>

Furthermore, in their contribution to the elaboration of what progressive realization involves, the Maastricht Guidelines state that;

*“the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the “progressive realization” provisions ... as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds”*.<sup>47</sup>

Therefore, common to all guidance regarding the principle is the overt appreciation that ESC rights require state resources and succeeding targeted engagement with these resources to realize such rights.<sup>48</sup> However, despite the various assertions regarding the broader requirements underpinning the principle of progressive realization, it has very much escaped definitional precision. Rather, existent human rights treaties and their concomitant monitoring

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<sup>43</sup> Kalantry, S., Getgen, Jocelyn E. & Koh, Steven Arrigg (2010) Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR *Human Rights Quarterly* 253 at page 256.

<sup>44</sup> See footnote 21 at page 101.

<sup>45</sup> Arai-Takahashi states that the margin of appreciation enjoyed by the State “refers to the latitude a government enjoys in evaluating the factual situation and in applying the provisions enumerated in international human rights treaties” Arai-Takahashi, Yukata (2002) *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* Intersentia at page 2.

<sup>46</sup> Asher, J (2004) *The Right to Health: A Resource Manual for NGO’s Commonwealth Medical Trust* at page 23

<sup>47</sup> Maastricht Guidelines (1997) No.8.

<sup>48</sup> See n(40) above.

bodies have advanced an inchoate conceptualisation of progressive realization. Rather than defining the concept first, they situate it within a textual and legal chasm which juxtaposes the concept alongside the overriding qualification that the duty is dependent on resources. As chapter three demonstrated, this is particularly evident in the context of education where the requirement to deliver and uphold the right is positioned within an overarching acceptance that the right, and specifically secondary education and upwards, be achieved ‘progressively’ or by ‘all appropriate means’. Such an approach fails to consider nor account for the underlying procedural components which accompany all human rights; socio-economic or otherwise, and which were alluded to earlier. Indeed, such an approach also fails to appreciate that all human rights require resources and positive action by the State regarding their realization, including many classical negative rights such as the right to life<sup>49</sup>, vote<sup>50</sup> and the right to a fair trial<sup>51</sup> amongst others<sup>52</sup>, all of which require state expenditure. Rather, such an approach disproportionally privileges the substantive resources required for socio-economic rights realization to the detriment of the procedural facets which also accompany such rights. The result of this is that the progressive realization of ESC rights is viewed almost exclusively in terms of both quantified and quantifiable outcomes. While such metrics are important for the overall and strategic determinations regarding the enjoyment of socio-economic rights,<sup>53</sup> they neglect the equally important procedural and qualitative determinants necessary, also, for rights realization. For example, many sections of society, often the more vulnerable and dependant, such as children, and the disabled, require an active and ongoing input into the realization of their rights. Indeed, human rights law demands such an approach with O’Connell et. al stating that:

*“...Measuring the extent of progressive realization requires information on the extent to which obligations are realized in relation to specific groups”*<sup>54</sup>

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<sup>49</sup> For example, the right to life also imposes the positive obligation on the state to carry out an effective investigation into deaths which have been occasioned by state forces. See *McCann and Ors. V The United Kingdom*, (Application No. 18984/91) 27 September 1995.

<sup>50</sup> For discussion on the obligations imposed within the context of the right to vote and adhering to democratic principles and freedoms, see O’Connell, R., (2010) Realising Political Equality: The European Court of Human Rights and Positive Obligations, *Northern Ireland Legal Quarterly*, Vol. 61, No. 3, pp. 263-279.

<sup>51</sup> For example, the right to a fair trial under Article 6 ECHR has also been held to include the right to legal aid. See *Airey v Ireland* (Application No. 6289/73).

<sup>52</sup> See generally n (2) above.

<sup>53</sup> See chapter six for further discussion on the measurement of human rights.

<sup>54</sup> See n (8) above at p.69.

Similarly, when dealing with the question of resource availability of which progressive realization is contingent, the Maastricht Guidelines also notes that such “scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights”.<sup>55</sup> This in many respects constitutes a reiteration of what the preceding Limburg Principles stated with regard to the concept.<sup>56</sup> However, common to all guidance, commentary and principles which are of significance to progressive realization is the recognition of the need for States to take purposeful and continuous steps forward towards the full realization of ESC rights.

While subsequent chapters will address the methods by which progressive realization is achieved, monitored and subject to legal scrutiny including the duty to avoid retrogressive steps, it is perhaps noteworthy to recollect that the principle does not endure within concrete nor defined boundaries. This is perhaps unsurprising given that it operates within a structural chasm as outlined above whereby contracting states are allotted the autonomy and space to self-determine and govern the progressive realization of ESC rights within their respective jurisdictions. However, the lack of a definition is problematic for two reasons. The first is that the absence of the identification of the exact and specific requirements contained within the legal duty to progressively realize ESC rights is such that it is rendered, *ipso facto*, potentially ineffectual. The second is that the absence of a definition and the consequential legal vastness which it can and does cause is detrimental to the ability of vulnerable and disadvantaged groups to realize and access their ESC rights. This is particularly true from a children’s rights perspective as will be discussed below.

## 4.2. Section Two: Progressive Realization and Children’s Rights

From a children’s rights perspective, the duty to progressively realize socio-economic rights is first captured within Article 4 CRC which states;

*“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties*

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<sup>55</sup> See n (47) above at No. 10.

<sup>56</sup> Principle 21 states “The obligation “to achieve progressively the full realization of the rights” requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant”.



*shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation”*

In setting out in clear terms the responsibilities incumbent on Contracting States to realize and secure the rights and freedoms expressed in the Convention, Article 4 aligns the concept of progressive realization with the availability of State resources. As will be discussed later, this alignment is most problematic in nature and practice. The first sentence of Article 4 is clear in its assertion that contracting states are under wide-ranging obligations to ensure that all the appropriate means are adopted to ensure the realization of the rights contained in the convention. Rishmawi observes that;

*“The implementation of Article 4, which is at the heart of States Parties obligations, requires that detailed plans are made, and attention is given to evaluation of plans, review of legislation, assessing ways of measuring progress, as well as involving various sectors in the planning and implementation process”.*<sup>57</sup>

Indeed, this has further been elaborated upon by the CRC Committee in General Comment No.5<sup>58</sup> which states that the assumption of the appropriate legislative, administrative and other measures should include, *inter alia*; reviewing existing domestic legislation, ensuring visible cross-sectoral coordination between all levels of government and between government and civil society, adopting comprehensive and cohesive rights-based national strategies which are embedded in the convention, and awareness raising and training and through the development and expansion of appropriate policies, services and programmes establish real and achievable targets which transcend abstract statements of policy and practice. The second sentence of Article 4 is most important with regard to the realization of socio-economic rights, including education. However, from a children’s rights perspective, several issues arise when examining the intersection of the CRC and the principle of progressive realization. Firstly, the CRC itself only makes two explicit textual references to the principle. These include Article 24(4) which, in the context of the right to health, mandates that states “promote and encourage international co-operation with a view to achieving *progressively* the full realization of the right”<sup>59</sup> and Article 28(1) which obligates states to achieve the child’s rights to education “*progressively*”. And although expressly omitted from the wording of Article 4 CRC unlike its counterpart in Article 2(1) ICESCR, progressive realization has nonetheless been accepted as integral to its

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<sup>57</sup> Rishmawi, M., (2006) *Article 4 The Nature of States Parties Obligations*, Martinus Nijhoff Publishers, at p56.

<sup>58</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

<sup>59</sup> CRC, Article 24(4)

operation with the CRC Committee stating that Article 4's alignment of socio-economic rights with the issue of resources (financial and otherwise) "introduces the concept of "progressive realization" of such rights".<sup>60</sup> By extension therefore, the principle logically applies to all socio-economic rights within the CRC. However, this has not escaped scrutiny. In her analysis of the drafting history of Article 4 CRC, Nolan underscores the lack of attention which the principle of progressive realization received during the CRC's drafting process in comparison to the issue of resources which she recalls was a "consistent preoccupation with the CRC drafters".<sup>61</sup> In highlighting further the "heavy reliance"<sup>62</sup> which the Committee have placed on the work of the Committee on Economic, Social and Cultural Rights in their delineations of the obligations flowing from Article 2(1) ICESCR, despite the linguistic differences between both treaties, a fact recently endorsed by Tobin,<sup>63</sup> Nolan's concerns prompt a deeper interrogation of the legal and practical consequences which flow, from a children's rights perspective, from the principle of progressive realization. .

Indeed, a closer analysis of all the various conditions attached to socio-economic rights within the CRC exposes the multi-dimensional nature of progressive realization. While the rights to health and education refer to the principle directly, Article 29 makes no reference to the principle despite its intimate correlation with children's educational rights. With regard to the right to social security, the CRC states that contracting states "shall take the necessary measures to achieve the full realization of this right in accordance with their national law"<sup>64</sup> while in relation to the highest attainable standard of living, the CRC asserts that: "States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right".<sup>65</sup> Therefore, when assessing these provisions in conjunction with Article 4 CRC, they reinforce the principle of progressive realization regarding the fulfilment of children's socio-economic rights. However, the make-up of the principle lacks obvious definitional clarity, and this creates the conditions whereby its precise application remains unclear. This consequently generates difficulties in holding states to account for their human rights obligations. Therefore, isolating its components is fundamental in establishing concrete definitional parameters within which to locate the

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<sup>60</sup> CRC Committee n (56), para 7.

<sup>61</sup> Nolan, A., 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) *The International Journal of Children's Rights*, 248-277, 259.

<sup>62</sup> *Ibid*, 254.

<sup>63</sup> Tobin, J (2019). *The UN Convention on the Rights of the Child: A Commentary*. (OUP).

<sup>64</sup> CRC, Article 26(1).

<sup>65</sup> CRC, Article 27(1).

obligation and to ensure it has a sufficient and ascertainable legal bite. Indeed, when one examines the core aggregative features which comprise the progressive realization of the various provisions as listed above, in addition to the broad phrasing of Article 4 CRC and its counterpart in Article 2(1) ICESCR, a number of identifiable and distinct elements present themselves. These include the legal obligation of states to (a) take steps, (b) the maximum availability of their resources and (c) within the framework of international cooperation and assistance (where necessary) to ensure the enjoyment of the rights within the CRC. However, as chapter five will elucidate, the principle of progressive realization is also subject to the full and immediate compliance with the principle of non-discrimination and by its progressive nature, prevents against any deliberate retrogressive measures which undermine the realization of such rights.

However, as a mechanism for rights realization, its operation has neither been noticeably fluid nor consistent. Quantifying and assessing the level of progression towards the full realization of any ESC right is not a straightforward task. Rishmawi observes that this not only includes the evaluation of existent programmes and practices but also a determination on whether the State is moving expeditiously towards the full attainment of the right, which is further compounded by the difficulty in measuring violations of social-economic rights in general.<sup>66</sup> Indeed, Chapman goes further and expresses the difficulty attached to progressive realization as a monitoring instrument for ESC rights and argues that it is ‘inexact’ in nature and renders such rights ‘difficult to monitor’.<sup>67</sup> Chapman argues the need for a departure from the current standard of progressive realisation and proposes the adoption of a ‘violations approach’ to ESC rights measurement, based on the tripartite assessment of violations resulting from actions and policies on the part of governments<sup>68</sup>, violations related to patterns of discrimination<sup>69</sup> and violations related to a state’s failure to fulfil the minimum core obligations<sup>70</sup> of enumerated

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<sup>66</sup> “The difficulty also arises in measuring violations of economic, social and cultural rights, partly because of the progressive nature of these rights and partly in deciding the minimum core content below which conditions should not be allowed to fall, and therefore deciding the threshold for violations”.

<sup>67</sup> Chapman, A., (1996) *A ‘Violations Approach’ for monitoring the International Covenant on Economic, Social and Cultural Rights* Human Rights Quarterly, Vol. 18 No. 1 at page 23.

<sup>68</sup> Chapman conceptualises such violations as comparable to breaches of civil and political rights with such breaches emanating from State action or through the creation of policies or laws which are hostile to the realization of ESC rights. Ibid at page 43

<sup>69</sup> Chapman states that the duty to ensure the realisation of ESC rights on a non-discriminatory basis includes both positive and negative components and may subsume ‘a affirmative action-type’ initiatives which will end both *de jure* and *de facto* forms of discrimination. Ibid at page 44

<sup>70</sup> The minimum core obligations pertaining to ESC rights represent the minimum accepted baseline for the enjoyment of a right which is incumbent on every states party.

rights<sup>71</sup>. This approach is based on Chapman's assessment of the very concept of progressive realization, namely its predication on the assumption of the *bona fides* and determination of contracting states to fulfil their commitment to the realization of ESC rights<sup>72</sup>, a commitment which she argues 'reflects the optimistic belief of the early post-World War II period'<sup>73</sup>.

While the question of measuring progressive realization will form the basis of subsequent chapters,<sup>74</sup> Chapman's comments are noteworthy as they highlight the imprecision which has attached to the concept since its founding. This imprecision has undoubtedly manifested itself within children's rights and has been arguably been accelerated by the failure of the Committee on the Rights of the Child to adequately or meaningfully engage with the principle of progressive realization.

#### **4.2.1. The Failure of the Committee on the Rights of the Child to Adequately Engage with Progressive Realization**

The failure by the Committee on the Rights of the Child to adequately engage with progressive realization has further contributed to its under-development as a multi-dimensional duty within children's socio-economic rights law. As the CRC's treaty monitoring body, the Committee's influence lies along three principal lines. It can issue general comments, convene days of General Discussion on a particular subject matter and review the compliance of states regarding their children's rights commitments by issuing concluding observations on their performance. Occupying a position of much influence and authority, their work on children's rights issues has undoubtedly shaped and guided the development of children's rights since the entry into force of the CRC in 1989.<sup>75</sup> However, while the work of the Committee is to be welcomed, caution must be exercised pertaining to their engagement with the principle of progressive realization.

A review of the twenty-four general comments thus far issued by the Committee reveals that their engagement with progressive realization is in fact negligible. Of the five which

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<sup>71</sup> Chapman argues that a 'violations approach' will entail a review process pertaining to the evaluation of compliance with the adoption of ESC rights. Ibid at page 36

<sup>72</sup> Ibid at page 38

<sup>73</sup> Ibid at page 38

<sup>74</sup> See Chapter Six for discussion on the measurement of the principle of progressive realization.

<sup>75</sup> For example, in the Committee's concluding observations on Ireland's third and fourth combined periodic report, published on the 4<sup>th</sup> February 2016, the Committee expressed deep concern regarding the restrictive parameters wherein abortion was permitted by the State and further recommended that Ireland "Decriminalise abortion in all circumstances" (Para 58 (a) ), Such recommendations, amongst others, were a central part of the campaign to decriminalise abortion in Ireland in the lead up to referendum to repeal the 8<sup>th</sup> Amendment to the Irish Constitution in May 2018.

substantively address socio-economic rights, three are devoted to health (General Comments No's 2, 14 & 15), one addresses the aims of education (General Comment No. 1) and the remainder centres on the right to rest, leisure, play, culture and the arts (General Comment No. 17). In all five, minimal reference is made to progressive realization. Indeed, the Committee's engagement with the procedural aspects of state obligations, which directly flow from the principle of progressive realization, as mentioned above, within its general comments, such as meaningfully ensuring child participation across all socio-economic areas, further fails to connect such important duties to the overarching obligation of contracting states to progressively realize children's socio-economic rights. Indeed, in its General Comment on Public Budgeting<sup>76</sup> and in the recommendations issued after the Day of General Discussion on the issue of resources and the responsibility of States,<sup>77</sup> their engagement with progressive realization was nominal. While both documents do refer to the concept of 'progressive realization', the former does so in a cursory and superficial manner; effectively restating that the rights contained within the CRC are contingent on progressive realization in certain circumstances. The latter, while acknowledging that the concept is often misunderstood, reasserts that progressive realization requires States to take targeted and specific measures towards the realization of socio-economic rights with duties such as non-discrimination taking immediate effect.<sup>78</sup> In its General Comment on the General Measures of Implementation<sup>79</sup> the Committee again fail to engage with progressive realization. Although outlining the need for policies and practices to bring Contracting States into line with their obligations, the Committee's *singular* reference to progressive realization<sup>80</sup> exists as a peripheral reflection. Indeed, in its General Comment on Implementing Children's Rights in Early Childhood<sup>81</sup> the Committee is entirely silent on progressive realization. Although they outline detailed recommendations, on the need for States to develop national strategies rooted in the Convention and to encourage cross departmental coordination of children's rights in addition to ensuring the collection and assessment of sufficient and reliable quantitative and qualitative data regarding the realization of children's rights, such recommendations, though important, are bereft of any meaningful connection with the duty to progressively realize the rights

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<sup>76</sup> See Committee on the Rights of the Child, (2016) *General Comment No. 19 on public budgeting for the realization of children's rights (art.4)*.

<sup>77</sup> Committee on the Rights of the Child, "Day of General Discussion on "Resources for the Rights of the Child – Responsibility of States", 21 September 2007.

<sup>78</sup> Ibid at para 47.

<sup>79</sup> See n (58) above.

<sup>80</sup> Ibid at para 7.

<sup>81</sup> See Committee on the Rights of the Child, (2005) *General Comment No. 7 on implementing child rights in early childhood*.

contained within the CRC. This is significant as such guidance relates to the establishment of the overarching structures necessary to achieve an adequate rights-supporting infrastructure within contracting states and in many respects reflect the obligation ‘to take steps’ which punctuate the rights contained within CRC. However, they are not in and of themselves tantamount to the progressive realization of children’s socio-economic rights.

The result, therefore, of the Committee’s failure to engage with progressive realization is that it ultimately generates a legal and practical disconnection between the right itself and its subsequent means of realization. In its very first general comment on the quality and purpose of education<sup>82</sup>, no reference was made to addressing the progressive realization of the right to education in all of its facets, procedural and substantive, despite Article 28 CRC stipulating that states must achieve the right “progressively”. The Committee failed to provide guidance as to how States might expressly ensure children have a right to, first, access education and, consequently, how their rights are respected within the education system, and, lastly, the mechanisms and options available to children should they be denied their rights both *to, in and through* education.<sup>83</sup> While outlining the significance of good quality education for child development, the Committee positions their comments and guidance almost exclusively within the context of Article 29 CRC which explicitly expounds the purpose of education. It does not comprehensively address the requirements of Article 28 CRC which first guarantees the right to education and its innate three-fold character. Aside from their recommendation for states to establish national actions plans to monitor and promote the objectives contained within Article 29(1) and the consideration of establishing a ‘review procedure’<sup>84</sup> to determine objections to practices which are allegedly inconsistent with Article 29, the Committee fails to address the means and methods with which States are to progressively realize the right to education. No attention is accorded to the issue of disability or for states to compile adequate statistical data on all service users who access education within contracting states. Similarly, no attention or consideration was allotted to the constituent elements underpinning progressive realization. Although the committee do refer to the principle of non-discrimination, they do not engage with nor amplify the connected requirements for states to ‘take steps’ to realise the right, to use their ‘maximum available resources’ in so doing and to ensure that children do not suffer any regression or backsliding in the enjoyment of their rights. Rather, the currency of their remarks

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<sup>82</sup> See UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1.

<sup>83</sup> See chapter three for earlier discussion on this three-fold distinction.

<sup>84</sup> See n (77) above at para 25.

is diluted by the fact that they operate within a structural vacuum. For children to benefit from good quality education, they must first be able to access educational facilities. They must occupy a position within and against which they can avail of their right to education and also exercise their rights *within* their educational setting.

The failure to engage with progressive realization can also be seen in the Convention's reporting system, the culmination of which is the Committee's concluding observations. Treaty monitoring bodies have previously been described as standing "at the heart of the international human rights protection system as engines translating universal norms into social justice and individual well-being".<sup>85</sup> From a children's rights perspective, Article 44 CRC prescribes the function of the CRC's reporting system which is "to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned".<sup>86</sup> This process has further been elaborated by Lansdown as intending "to promote social mobilisation and encourage government officials, non-governmental organisations (NGOs) and others to work collaboratively to realise children's rights".<sup>87</sup> Furthermore, through its detailed reporting guidelines, the Committee have delineated the format of such reports, with considerable attention unsurprisingly accorded to the CRC's general measures of implementation.<sup>88</sup> However, despite the wide-ranging nature of the guidance which falls under the general measures of implementation, no reference is made to progressive realization, despite the Committee having previously stated that the second sentence of Article 4 CRC introduces the principle. While the guidance contains important directions pertaining to the need for states to evidence legislative conformity with the CRC, the delineation of governmental control for matters relating to children's rights, whether a national children's strategy has been implemented and the extent to which domestic budgetary allocations relate to the implementation of children's rights, amongst others, the failure to allude to progressive realization deprives the CRC Committee of an important investigative and evidential standard against which to monitor and track state compliance regarding children's socio-economic rights.

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<sup>85</sup> UN Office of the High Commissioner for Human Rights (OHCHR), Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights, June 2012, 7.

<sup>86</sup> CRC, Article 44(2).

<sup>87</sup> G Lansdown, "The Reporting Process Under The Convention On The Rights Of The Child" in Alston, P. and Crawford, J. (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 114.

<sup>88</sup> UN Committee on the Rights of the Child (2015) Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, (3 March 2015) CRC/C/58/Rev, para 18–21.

Unsurprisingly, the absence of clear guidance on the operationalisation of progressive realization dilutes the quality of the reporting system and the strength of scrutiny which the Committee can exert over states regarding their progressive realization duties. The ongoing dialogue between the United Kingdom and the Committee on the Rights of the Child in the area of education illustrates this omission very clearly. In its very first assessment of the UK's compliance with the CRC, the Committee, in its concluding observations in 1995, noted its concern that the child's best interests principle was not reflected in areas such as health and education<sup>89</sup> and, furthermore, that the practice of school exclusions did not include the right of children to express their views pursuant to Article 12 CRC.<sup>90</sup> Further to this the Committee suggested that "children's right to appeal against expulsion from school be effectively ensured"<sup>91</sup> and "that procedures be introduced to ensure that children are provided with the opportunity to express their views on the running of the schools in matters of concern to them".<sup>92</sup>

In its second report in 1998, the UK government accepted "that it will often be appropriate for the child to address the governors' discipline committee or the appeal panel about his or her exclusion from school".<sup>93</sup> but gave no evidence or commitment that they would enshrine such a right or progressively move towards its realization. Similar recommendations were again made by the Committee in its 2002 review which were consequently followed by a government commitment in its combined third and fourth report in 2008 that guidance would be "strengthened" so that children and young people "should be encouraged and allowed to state their case at all stages of the exclusion process".<sup>94</sup> In its follow up recommendations in late 2008, the Committee reiterated its previous position from 1995 and 2002 regarding the certification of a right to appeal for children against school exclusions. Such repeated assertions were again ventilated in 2016 by the Committee following its review of the UK's submission of its fifth periodic report in 2014.<sup>95</sup> In sum, over the course of a near twenty-year exchange of information regarding the development of children's education rights and the specific inclusion of a right to appeal against a school exclusion, itself a critical component of ensuring

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<sup>89</sup> Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, 15<sup>th</sup> February 1995, CRC/C/15/Add.34

<sup>90</sup> Ibid at p.14.

<sup>91</sup> Ibid at p.32.

<sup>92</sup> Ibid.

<sup>93</sup> See Consideration of reports submitted by states parties under article 44 of the convention, Periodic reports of States parties due in 1998, 25<sup>th</sup> February 2002 – CRC/C/83/Add.3 at para 9.25.1.

<sup>94</sup> See Third and fourth periodic reports of States parties due in 2007, CRC/C/GBR/4, 25 February 2008 at para 472.

<sup>95</sup> See Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 12 July 2016, CRC/C/GBR/CO/5, at para 73.



children's rights *in* education are progressively realized, the response has amounted to little more than vacuous commitments with the result that no progressive, substantive or identifiable change regarding children's rights within the school exclusion framework has occurred. Indeed, the evidence from the Agenda Days within this thesis and which will be alluded to in subsequent chapters will further corroborate the underdevelopment of children's rights in education in England.

### **4.3. Conclusion**

In conclusion, this chapter has examined the legal and historical development of the principle of progressive realization. Born out of legal and political compromise, the principle has largely remained within tentative legal definitional parameters. However, drilling down into the principle's definitional foundation a number of core distinct elements emerge. Thus, in bringing all the disparate and unique elements which comprise progressive realization together, one can construct a definition for the principle which legally unites all such elements and provides it with a little more definitional clarity. In essence, and from the foregoing analysis, progressive realization can be said to amount to the legal obligation for states to take steps to the maximum availability of their resources, and within the framework of international assistance and cooperation when necessary, to ensure the non-discriminatory and non-retrogressive enjoyment of economic, social and cultural rights, with such measures subject to quantitative and qualitative assessment.

Thus, it is by re-asserting the centrality of progressive realization in relation to ESC rights fulfilment that offers children and young people the ability to truly access and enjoy the full range of rights enshrined in the CRC. By engaging with the principles multi-dimensional elements, contracting states can be held to account for delivering on their commitments pursuant thereunder. For children's educational rights, this includes holding states to account for progressively realizing all facets of the right and in the context of school exclusions this includes the progressive realization of their rights within the education setting itself. Indeed, it is only by establishing full definitional clarity that the principle's full potential can be reclaimed and as assessment of how it is achieved can be undertaken.

## **CHAPTER FIVE**

### **Progressive Realization: How is it Achieved?**

#### **5.0.Introduction**

Thus far, the analysis has affirmed the connection between the child's education rights and the principle of progressive realization. The analysis has also revealed the negligible treatment which the principle has received, to date, within children's rights scholarship and specifically by the Committee on the Rights of the Child. While the preceding chapter concluded that although the principle operates within opaque definitional parameters, a number of identifiable legal elements nonetheless underpin its operation. This chapter will build on the preceding analysis by stripping the principle back to these core constituent elements and examining how they can become the supporting legal pillars underpinning the operation and achievement of progressive realization. By exposing the principle as a multi-dimensional concept, this chapter will examine how progressive realization can be achieved in practice. This is necessary if the principle is to become a more durable and persuasive legal tool to track and monitor the progress of states in how they fulfil their socio-economic rights obligations towards children. It is also necessary as before we can measure such progress, it is essential to ascribe the obligations which flow from the principle with definitional clarity so as to understand how these obligations are in fact achieved in the first instance.

Indeed, in their analysis of the principle of progressive realization, Chapman and Russell,<sup>1</sup> although writing in the context of the principle's genesis in the ICESCR, though equally pertinent from a children's rights perspective, state that progressive realization arguably "provides a loophole large enough in practical terms to nullify the Covenant's guarantees".<sup>2</sup> Therefore, to give the principle legal bite and avoid it becoming a passing or superficial concept, it is necessary to engage with how it can be achieved (and ultimately enforced) in practice.

However, it is also important to recollect that any examination of progressive realization should not just amount to an overly doctrinal or technocratic exercise in legal formalism. Rather, arriving at an understanding of how the principle is achieved must and should incorporate the

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<sup>1</sup> Chapman, A., and Russell, S., (2002) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Internsetia (Antwerp – Oxford – New York).

<sup>2</sup> Ibid at p 5.

on-the-ground realities, and the subjective experiences of the rights-holders themselves. This allows for a deeper and a more authentic insight into whether the methods and strategies deployed by the state are in fact achieving the progressive realization of the right in question. Therefore, assessing the achievement of progressive realization necessitates a more thorough understanding and elaboration of its constituent parts, namely, the obligation to take steps to the maximum availability of a state's resources to ensure the non-retrogressive and non-discriminatory access to and realization of socio-economic rights and where necessary, within the framework of international cooperation and assistance.

This chapter will firstly set out the importance of engaging with progressive realization and the way it is achieved. Following on from this, this chapter will subsequently delineate the key legal elements which comprise the achievement of progressive realization and position them within the context of children's educational rights and the associated phenomena of school exclusions in England. By drawing on the empirical evidence adduced within this thesis, this chapter will argue that the United Kingdom is not progressively realizing children's educational rights in the context of school exclusions and, further, is not complying with the principle's multi-dimensional components.

### **5.1. The Importance of Achieving Progressive Realization**

Despite being “of pivotal importance in defining obligations of economic, social and cultural rights as set out in the United Nations human rights treaties”<sup>3</sup> the principle of progressive realization has largely escaped systematic engagement with its distinct constituent components from a children's rights perspective. Indeed, in comparison to other children's rights principles such as the best interests principle,<sup>4</sup> the right of the child to participate,<sup>5</sup> or the recognition of the evolving capacities of the child,<sup>6</sup> progressive realization has not endured a comparable level of academic engagement from a children's rights perspective. This has caused it to lack not only definitional clarity but also a diminution of its conceptual, practical and legal potential. As such, it should come as no surprise that the principle has been described as

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<sup>3</sup> UN Economic and Social Council, Report of the UN High Commissioner for Human Rights, 25 June 2007, E/2007/82, at para 2.

<sup>4</sup> For example, see Zermatten, J., (2010) The Best Interests of the Child Principle: Literal Analysis and Function, *The International Journal of Children's Rights*, Vol. 18, Issue 4, at pp. 483–499 & Committee on the Rights of the Child (2013) General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art.3)

<sup>5</sup> See generally, discussion in chapter two.

<sup>6</sup> See Varandan, S., (2019) The Principle of Evolving Capacities Under the United Nations Convention on the Rights of the Child, *The International Journal of Children's Rights*, Vol. 27., Issue 2., at pp. 306–338. See also, Lansdown, G., (2005) *The Evolving Capacities of the Child*, UNICEF, Innocenti Research Centre.

“misunderstood”.<sup>7</sup> Given also that progressive realization underpins the delivery of all socio-economic rights, including children’s educational rights, its function and role within children’s rights law, and human rights law more broadly, should command more detailed scrutiny.

Such scrutiny assumes increased significance in light of the renewed international focus on socio-economic rights more generally. Once again at the centre of international legal and developmental governance, the adoption of the Sustainable Development Goals (SDG’s) in September 2015<sup>8</sup> and their associated Agenda 2030 targets have injected a timely energy into the debate and efforts surrounding the vindication of socio-economic rights generally and children’s rights specifically.<sup>9</sup> In establishing clear targets across a range of socio-economic areas including education, health, equality, poverty elimination, hunger eradication, the provision of food, clean water and energy, the SDGs affirm the clear link between socio-economic rights on the one hand and human dignity on the other. In anchoring the goals within the language of equality, human rights and international development, coupled with its preambular pledge to “*leave no one behind*”<sup>10</sup> the SDGs reflect a global commitment to the full realization of many socio-economic rights.<sup>11</sup> Such efforts at the international level have also been matched at the regional level with the European Union advancing key policy priorities and strategic commitments across a range of socio-economic areas including living conditions, education and favourable working circumstances.<sup>12</sup> Thus with momentum at regional and international level developing pace, the time is upon those working within children’s rights law and practice to confront head-on the deep-seated legal, structural and practical challenges which children’s socio-economic rights faces or what Wills and Warwick more broadly call “the problems with the normative architecture of international socio-economic rights law”.<sup>13</sup> One of those problems has been the failure by children’s rights

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<sup>7</sup> See n (3) above at para 2.

<sup>8</sup> See United Nations, Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development

<sup>9</sup> See Arts, K., (2019) ‘Children’s Rights and the Sustainable Development Goals’ in Kilkelly, U., and Liefwaard, T., (eds.) *International Human Rights of Children*, (Springer: Singapore) pp. 537 – 563.

<sup>10</sup> See n(8) above in Preamble.

<sup>11</sup> See also statement by Committee on Economic, Social and Cultural Rights (2019) *The Pledge to Leave no one Behind: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development*, E/C.12/2019/1, (5 April 2019).

<sup>12</sup> See for example, European Parliament, Director General for External Policies (2018, *Enhancing EU actions on economic, social and cultural rights within its human rights policy*, ([http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603838/EXPO\\_STU\(2018\)603838\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603838/EXPO_STU(2018)603838_EN.pdf)) (last accessed 6<sup>th</sup> July 2019). See also for broader discussion on role of the Court of Justice of the European Union in its adjudication of socio-economic rights, see Gerstenberg, O., (2014) *The Justiciability of Socio-economic Rights, European Solidarity, and the Role of the Court of Justice of the EU*, *Yearbook of European Law*, Volume 33, Issue 1, pp 245–276.

<sup>13</sup> See Wills, Joe J and Warwick, Ben TC., (2016) ‘Contesting Austerity: The Potential and Pitfalls of

scholarship to thoroughly unpack the principle of progressive realization, both in terms of understating the legal obligations which flow from it but also in activating and developing the principle's innate promise. As Felner argues, "circumventing the standard of progressive realization has severely constrained the ability of the human rights movement to hold governments accountable for policies and practices that turn millions of people into victims of avoidable deprivations such as illiteracy, malnutrition, preventable diseases, and homelessness".<sup>14</sup>

Broadly synonymous with the generation, management and disbursement of domestic state resources to fulfil the effective realization of rights such as health, education, housing and social security - rights whose realization demand a fundamental and identifiable investment of resources - progressive realization essentially "requires that States expand their promotion and protection of economic and social rights over time to the fullest extent possible within their available resources".<sup>15</sup> Therefore, isolating the components which make up the principle of progressive realization is critical in establishing concrete definitional parameters within which to locate the obligation and to ensure states are actually meeting and achieving their obligations thereunder. What follows will be an examination of the various elements which underpin how states achieve the progressive realization of socio-economic rights. Each element will be divided into a two-fold discussion. The first aspect will focus on establishing the broader legal and contextual nature of their obligations while the second aspect will position those obligations within the context of school exclusions and children's educational rights in England by drawing on the evidence gathered from the Agenda Days as part of the thesis.

## **5.2.The obligation to "take steps"**

The first discernible obligation for states to take in furtherance of their duty to achieve the progressive realization of their socio-economic rights commitments is 'to take steps' towards that end.<sup>16</sup> States are expected to "move as expeditiously and effectively"<sup>17</sup> as possible and take

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Socioeconomic Rights Discourse' Vol. 23(2) *Indiana Journal of Global Legal Studies* 629 at p. 632.

<sup>14</sup> Felner, E., (2009) Closing the "Escape Hatch": A Toolkit to Monitor the progressive Realization of Economic, Social and Cultural Rights, *Journal of Human Rights Practice*, Vol.1, Issue 3, pp. 402–435 at p. 402.

<sup>15</sup> See Warwick, Ben TC., 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Crisis' in Gillian MacNaughton and Diane Frey (eds), *Economic and Social Rights in a Neoliberal World* (CUP, 2018) at p. 133.

<sup>16</sup> See generally, Sepúlveda, M. Magdalena., (2003) *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Antwerp: Intersentia) See also, Craven, M., (1995) *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, (Oxford: Oxford University Press).

<sup>17</sup> Committee on Economic, Social and Cultural Rights, (1990) *General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* at para 10.

“deliberate, concrete and targeted”<sup>18</sup> measures towards what O’Connell et.al. state is the “achievement of the full scope and content of the right”<sup>19</sup> in question. And while the CRC does not expressly refer to the obligation to ‘take steps’, its counterpart in Article 2(1) of ICESCR clearly does. Given the conceptual and legal overlap between Article 4 CRC and Article 2(1) ICESCR, coupled with the negligible consideration which progressive realization received during the CRC’s drafting process, a reasonable inference can be made that the taking of steps is a necessary and inferred element of Article 4 CRC. Indeed, it is axiomatic that progressive realization would become ineffectual in the absence of such a duty. As Tobin states: “Anything less would undermine the substantive content of the obligation to take appropriate measures”<sup>20</sup> pursuant to Article 4 CRC. As the subsequent sections will outline, such steps are to be taken in line with the maximum availability of resources within the state and must ensure the non-retrogressive and non-discriminatory enjoyment of the right in question. Furthermore, depending on the level of existent resources or the resource generating capacity of the state in question, taking steps may also necessitate requesting assistance through the framework of international assistance and cooperation.<sup>21</sup>

This first requirement of states to take steps in fulfilling their socio-economic rights commitments represents a critical starting point as the assumption of such steps, be they legislative, budgetary, procedural, administrative or otherwise, will invariably differ between different rights. Thus, the nature and delivery of these steps requires sustained engagement by states with both the substantive and procedural aspects of the right in question. The right to education clearly illustrates this. As chapter three outlined, education is multi-faceted in nature and comprises rights *to* education, rights *in* education and rights *through* education. Unpacking these elements further, the legal requirements to fulfil each component become more nuanced. As chapter three demonstrated, each of these conceptualisations and sub-divisions of the right necessitate their own progressive realization. Thus, fulfilling rights *to* education will require the adoption of ‘steps’ which will differ enormously from those that are necessary to progressively realize rights *in* education.<sup>22</sup> This also highlights the fundamental importance of appreciating the internal nuances which exist within the right to education and furthermore how

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<sup>18</sup> Ibid at para 2.

<sup>19</sup> See O’Connell et.al., (2014) *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources*, Routledge, at p. 67.

<sup>20</sup> J Tobin, *The UN Convention on the Rights of the Child: A Commentary*. (Oxford University Press, 2019) 141.

<sup>21</sup> See for discussion, Karimova, T., (2014) The Nature and Meaning of ‘International Assistance and Cooperation’ under the International Covenant on Economic, Social and Cultural Rights, in Riedel, E., et. al., (eds.) (2014) *Economic, Social, and Cultural Rights in International Law*, (Oxford University Press) pp. 163 – 193.

<sup>22</sup> See chapter three for earlier discussion on this.

such degrees of difference affect the obligations expected of the state in meeting their obligations to progressively realize the right.

Closely connected with the concept of taking steps to fulfil the requirements of a given right is the notion of the *minimum core content* of socio-economic rights. The minimum core represents the identification and satisfaction of those minimum essential levels – the baseline position – to ensure each socio-economic right is realized.<sup>23</sup> As Chapman & Russell state, the minimum core comprises “the nature or essence of a right ... without which [the right] loses its substantive significance”<sup>24</sup> or what Fisher calls “a quantitative and qualitative floor ... that must be immediately realized by the state as a matter of top priority.”<sup>25</sup> Similarly, in its emphatic endorsement of adopting a minimum core approach pursuant to the ICESCR, the Committee on Economic, Social and Cultural Rights stated that: “If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.”<sup>26</sup> Indeed, any consideration of children’s socio-economic rights must also recognise the legal intersection between the labour of the Committee on Economic, Social and Cultural Rights and the outputs of the Committee on the Rights of the Child. Despite their distinct legal mandates, much synergy exists between them.<sup>27</sup> Therefore, any legal or conceptual development(s) by either could arguably have a cross-fertilising effect and potentially influence the work of the other.

Moreover, in his assessment of the literature relating to the minimum core approach, Tasioulas identifies four principle features which he argues underpin its operation.<sup>28</sup> These include: *immediacy*, meaning the minimum core must be immediately satisfied by all states; *special content*, meaning its justification is closely connected to some other high priority value such as human dignity or some other fundamental value necessary for human survival; *non-*

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<sup>23</sup> See United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties obligations (Art 2, para 1) (1990).

<sup>24</sup> See Russell, S., and Chapman, A., (2002) Core Obligations: Building a Framework for Economic, Social and Cultural Rights, (Intersentia, 2002) at p. 9.

<sup>25</sup> See Fisher, A., (2017) Minimum Core and the Right to Education, (World Bank, Washington, DC. © World Bank) <https://openknowledge.worldbank.org/handle/10986/29142> License: CC BY 3.0 IGO, at p.1.

<sup>26</sup> See note (22) above at para 10.

<sup>27</sup> See Nolan, A. 2013, Economic and Social Rights, Budgets and the Convention on the Rights of the Child. *The International Journal of Children’s Rights*, 21(2), 248-277.

<sup>28</sup> Tasioulas, J., (2017) Minimum Core Obligations : Human Rights in the Here and Now. (World Bank, Washington, DC. © World Bank) <https://openknowledge.worldbank.org/handle/10986/29144> License: CC BY 3.0 IGO.

*derogability*, meaning it must always be adhered to; and, finally, *justiciability*, meaning it should be enforceable before domestic and supra-national courts.

Although much academic treatment has focused on establishing either the minimum core content of each right<sup>29</sup> or the utility of adopting such an approach<sup>30</sup>, it is important not to conflate a right's minimum core with its progressive realization. In its most reductionist form, the minimum core directs the establishment of an identifiable starting point for any given right while progressive realization mandates the taking of steps from this starting point. In the context of education, baseline minimum standards dictate that primary schooling should be made freely available to all with secondary, vocational and higher education subject to progressive realization.<sup>31</sup> However, the baseline entry point at primary level for children with special educational needs (SEN), will vary enormously from their non-SEN peers. Their minimum core prerequisites may require the provision of special needs assistants, the adaption of the educational premises to meet the needs of the children and/or the modification of both the content and delivery of the curriculum to meet their specific educational requirements. Thus, as Leckie argued: "Identifying minimum core contents, as well as the minimum core obligation of states to secure such rights, must be seen as only the first step, rather than the conclusion of a process."<sup>32</sup> In other words, a right's minimum core does not satisfy the obligation to progressively realize it. Rather, properly assessed, it provides a starting point from which to progress from.

Thus, from the foregoing analysis, what we can deduce is that the right to education demands an appreciation of the intricacies and gradations which attach to each of its subcomponents. What we can also deduce is that states are under a continuous obligation to take concrete and targeted steps towards the full realization of each of these aspects of the right in question,

### **5.2.1. The Obligation to 'Take Steps' and School Exclusions**

The foregoing analysis has revealed that taking steps demands a thorough appreciation of the right in question, in all its facets. However, as the previous chapters have also highlighted, the

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<sup>29</sup> See generally, Eide, A., et.al., *Economic, Social and Cultural Rights* (1995) Martinus Nijhoff Publishers & Young, Katherine, G., *Constituting Economic and Social Rights*, Oxford University Press, 2012.

<sup>30</sup> See generally, Shields, K., 2017. The Minimum Core Obligations of Economic, Social, and Cultural Rights: The Rights to Health and Education. World Bank, Washington, DC. © World Bank &

<sup>31</sup> See Article 28 CRC.

<sup>32</sup> See Leckie, S., (1998). Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights. *Human Rights Quarterly*. 20. pp. 81-124, at p. 102.



obligation to take steps equips the state with a broad array of options to pursue, which as contained in Article 4 CRC, may include legislative, budgetary, administrative, procedural, or other measures to achieve the progressive realization of the right in question. No singular prescribed formula is laid down. Rather, states are allotted the space and scope within which to determine for themselves what options they can and should pursue. However, central to such determinations is the need for a robust evidence-base which provides any future legal and/or policy developments with an explanatory and justificatory basis. Indeed, evidence adduced from the Agenda Days reveal a number of steps which the state could take to further improve and embed children's rights within the school exclusion system in England. Such steps, as will be outlined below, highlight the indivisibility of all human rights. This demonstrates how the immediate realisation of some rights are important steps which can and should be taken, and which render the exclusion system more compatible with the CRC. These will be considered in turn.

#### **5.2.1.1. The Lack of Informational Rights**

One of the key distinct findings within this study was that the children and young people unanimously expressed a complete unawareness and unfamiliarity with their school's exclusion policy itself and the rules underpinning it. On the issue of whether they were aware of the exclusion policy or code, the evidence from the Agenda Days was unequivocal in its rejection of such awareness. The evidence documented in the Agenda Days by the facilitators included:

*"They don't know the exclusion policy code and those who have been excluded before never got told it or shown it"*

*"None of them know the policy"*

*"They don't know the exclusion policy"*

(Caitlin & Jasmin, Spennymoor report)

*"Also, the exclusion code was a big thing we wanted to see if people knew about and not one person out of the 41 people we asked knew what the exclusion code was or had even heard of it"*

(Leah & Ali, Room 14 Pelton)

*“They have never seen or heard of the exclusion code”*

(Chloe & Caitlin, Bishop Aukland)

The above findings are significant and clearly signify the existence of a clear informational gulf regarding the school exclusion code. In view of the prevalence of school exclusions within the English education system and its impact on children's lives, all relevant information regarding school exclusions and the rules surrounding it should be imparted to every child and young person. Indeed, on a basic legalistic level, children have a right to information pursuant to Article 17 CRC which in many respects is inseparable from their expression rights under Article 13 CRC. Given also that the right to information is a critical gateway to enable the activation of children's broader participatory rights<sup>33</sup>, no logical reason exists why such information should not be given to children. Indeed, Koren argues that in view of the criticality which information plays in the physical, emotional, social and cognitive development of the child: “It is important that all children have access to information and can benefit from such information processes, regardless of the place and time in which they live”.<sup>34</sup> Moreover, an awareness of the rules within which school exclusions operate may also determine the future behaviour of children within the school and may possibly act as a preventative brake on any disruptive behaviour which may bring the child within the remit of the exclusion framework itself.

However, it is important to recollect that the right to information is one of immediate application. Falling as it does under the classification of rights known as civil and political rights, the right to information is not subject to progressive realization. This highlights the seamless nature of the indivisibility of all human rights and the fact that the realisation of one right often impacts the realisation of others. This is particularly true in the context of the right to education which straddles all human rights. However, equally important is the fact that although children's education rights, as a subcategory of wider socio-economic rights, are typically viewed as subject to progressive realization, a deeper examination of the right and its

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<sup>33</sup> See generally, Stalford et.al., (2017) Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information, *Social Inclusion*, Volume 5, Issue 3, pp 207–218

<sup>34</sup> See Koren, M., (2001) Human Rights of Children: Their Right to Information, *Human Rights Review*, Vol. 2, Issue.4, pp. 54 – 76, at p. 59.

application in practice reveals how civil and political rights such as the right to information underpin the realisation of education rights. Therefore, in the context of school exclusions, the child's right to information must be immediately realised. One step that schools can take to comply with this is to fully provide children, in a child-friendly manner, with the rules and procedures which surround school exclusions. In practical terms this could be part of an information pack given to children and young people at the start of the school year, or indeed as part of an assembly lecture, as a less cost-intensive way, to impart the key rules and policies surrounding school exclusion. Either way, both represent methods which are not excessively cost-intensive, but which immediately realise the child's information rights and concurrently represent a step along the way in which their broader education rights are upheld.

#### **5.2.1.2. The Absence of Post – Exclusion or Return Meetings**

Another key finding from the Agenda Days was that the children and young people expressed a negative feeling upon their return from a school exclusion. Feelings of differential treatment, increased surveillance and monitoring and a general lack of opportunities within the school were all outlined by the children and young people. Evidence from the Agenda Days included:

*“The students that we talked to said that they do not have return from exclusion meetings, therefore they do not get to talk about their rights when they get back”*

*“The students we had talked to said that they do not have return from exclusion meetings, therefore they did not get to talk about their rights when we got back”*

*“Your labelled and watched all the time don't forget what you've done”*

*“He didn't have a meeting he get put in isolation”*

*“Didn't have a meeting”*

(Caitlin & Jasmine, Spennymoor Report)

*“Never get a say in a return meeting from exclusion. Treat you completely different after exclusion”*

*“After exclusion – you get no opportunities”*

*“Get treated differently in school if you have been excluded”*

*“After exclusion you have no incentives. Get to go on no trips or last weeks”*

*“No chance to speak in meetings in return to school after exclusion”*

(Leah & Ali, Room 14 Pelton)

The above findings illustrate the need for an improved sense of integration upon a return to school after exclusion. This could be implemented by means of a mandatory post-exclusion meeting which would be relatively cost-free to implement but which could possibly remediate or reduce any feelings of disconnection among the students. This is important also to ensure that an exclusion from school does not disengage the child from future education and also to show that they are a valued and welcome part of the school and wider education system. Indeed, in the recent governmental review on school exclusions, Edward Timpson stressed: “We must also take the necessary steps to ensure exclusion from school does not mean exclusion from education, so that all children are getting the education they deserve”.<sup>35</sup> Thus, in ensuring that children who have become excluded from school do not end up on a conveyor belt of re-exclusions, post exclusion return meetings should take place where the child and young person is fully supported and encouraged to express their view on issues which are relevant to them.

And although the statutory guidance regarding school exclusions states that: “Schools should have a strategy for reintegrating a pupil who returns to school following a fixed-period exclusion and for managing their future behaviour”,<sup>36</sup> the guidance fails to substantively outline what is expected of the school and/or head teacher within these meetings. Significantly, Appendix B to the statutory guidance which contains the non-statutory advice states that schools should have a process in place for such reintegration meetings but again fails to elaborate on what is expected of the educational provider in question.<sup>37</sup> This is significant because although reference is made to these reintegration meetings, such reference is minimal in nature, skeletal in substance and ultimately devoid of legal enforceability. Indeed, neither the Education Act 2002 nor the 2012 Regulations make any reference to the need for such meetings.

Given the recent governmental data which indicates that in the preceding academic year 2017/8, around 78,900 students had two or more fixed term exclusions recorded,<sup>38</sup> the need to

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<sup>35</sup> Department of Education (2019) Timpson Review of School Exclusions, at p. 5.

<sup>36</sup> Department of Education (2017) *Exclusion from maintained schools, academies and pupil referral units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*, 6.

<sup>37</sup> *Ibid*, 50 & 54.

<sup>38</sup> See Department of Education (2019) *Permanent and fixed period exclusions in England: 2017 to 2018*. (25 July

prevent children and young people falling into a slumber of educational disaffection and subsequent disengagement becomes apparent and necessary. One way to potentially assist in getting to grips with the reality of such multiple exclusions and the reasons underpinning them is to ensure post-exclusion meetings take place. This should be placed on a statutory footing to ensure that it possesses the necessary legal base. This could further ensure that children with SEN, which itself ranges in complexity, and who comprise the largest excluded cohort, are given the necessary time and space within which to adjust after a period of exclusion. Indeed, the benefits of such a meeting extend beyond the child herself and benefit the school also. Given the evidence of the school's disinterest in the child after an exclusion, in conjunction with the earlier evidence of a rights respecting deficit within schools, it is important also that schools continuously strive to hold themselves up as a place where children feel valued and respected. In the absence of such an ethos, it is foreseeable that a negative attitude amongst the excluded student body could potentially take hold. Indeed, the Australian model of "enabling spaces" which centres around the establishment of a sense of positive meaning and belonging within students at risk of exclusion is illustrative of the successes which can ensue when schools re-orientate their ethos and approach to enable and assist students maintain a meaningful connection with their education.<sup>39</sup> Thus, post-exclusion meetings could act as a way to restore relations between both the excluder and the excludee in a positive and mutually beneficial way and also act of a step along the continuum to progressively realize children's rights.

### **5.3. "Maximum Available Resources"**

Any discussion on the principle of progressive realization must also appreciate the legal and indeed resource constraints within which it operates.<sup>40</sup> Human rights law recognises this by precluding an absolutist approach to the principle of progressive realization by recognising that states are under a requirement to use the "maximum extent of their available resources" to realise their socio-economic rights commitments. This is an important obligation as it very

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2019)

<sup>39</sup> See generally, O'Donovan, R., Berman, N., & Wierenga, A., (2015) How schools can move beyond exclusion, *International Journal of Inclusive Education*, 19:6, 645-65.

<sup>40</sup> Kendrick, A., "Measuring compliance: social rights and the maximum available resources dilemma", 2017 *Human Rights Quarterly* 2017 (39(3)).

much acts as the legal backdrop against which states take steps in the first instance. In his conceptualisation of the phrase, Robertson asserts that it represents:

*“two warring adjectives describing an undefined noun. “Maximum” stands for idealism; “available” stands for reality. “Maximum” is the sword of human rights rhetoric; “available” is the wiggle room for the state”.*<sup>41</sup>

Robertson further outlines what he identifies as the “most important resources”<sup>42</sup> in achieving socio-economic rights as: “financial, natural, human, technological, and informational.”<sup>43</sup> And although these conceptualisations were advanced some twenty-five years ago, they retain some currency in today’s endeavours to secure socio-economic rights realization, specifically those of children and young people. In one of its earliest general comments, the Committee on Economic, Social and Cultural Rights stated that the phrase ‘maximum available resources’ referred to “both the resources existing within a State and those available from the international community through international cooperation and assistance.”<sup>44</sup> This broad construction, and the extra-territorial dimension to resources has further been elaborated through the 1987 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights and the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, all of which assert that states have a direct obligation to mobilize existent resources, both within and outside the state, in furtherance of their socio-economic commitments.

States’ deployment of financial resources is perhaps the most obvious signal of a commitment to a particular socio-economic initiative. Indeed, it is the intersection of finance and human rights which has generated particular academic scholarship.<sup>45</sup> Central to that work has been the recognition that given the limited nature of resources, and specifically financial resources, the application of a human rights framework to budgetary decisions can direct much needed resources into high-priority and high-risk areas. From a children’s rights perspective, such an intersection culminated in the Committee on the Rights of the Child in 2016 issuing a general

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<sup>41</sup> See Robertson, Robert, E. (1994) Measuring State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ to Realizing Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 16, No. 4, pp. 693 – 714, at p. 694.

<sup>42</sup> Ibid at p. 697.

<sup>43</sup> Ibid.

<sup>44</sup> See n (22) above at para 23.

<sup>45</sup> See N (19) above. See also Balakrishnan, R., et.al. (2011) *Maximum Available resources & Human Rights*, (Centre for Women’s Global Leadership: New Jersey, 2011) & Murphy, M P., 2017. “Maximising available resources: Equality and human rights proofing Irish fiscal policy,” *Administration, Sciendo*, vol. 65(3), pp. 59-80.

comment on the specific topic of public budgeting for the realization of children’s rights. In particular, the Committee noted that despite the significant efforts made by contracting states in aligning their domestic policies and procedures with the rights enshrined therein, “such legislation, policies and programmes cannot be implemented without sufficient *financial resources* being mobilized, allocated and spent in an accountable, effective, equitable, participatory, transparent and sustainable manner.”<sup>46</sup> [emphasis added]. In the specific context of utilizing all ‘maximum available resources’, the Committee outlines that states must not only demonstrate that they have adopted all relevant and appropriate measures to mobilize, generate, allocate and spend budget resources in furtherance of children’s socio-economic rights but also that they have avoided any deliberate retrogressive steps in persistence of such an objective.<sup>47</sup>

For instance, spending on education in the UK was around £90 billion in 2017 -18 (approximately 4.3% of national income) – second only to health in terms of quantity.<sup>48</sup> Spending on English schools specifically totalled around £42 billion.<sup>49</sup> However, recent analysis by the Education Policy Institute<sup>50</sup> confirms that over the last seven years, there has been an increase in the percentage of maintained primary, secondary and special schools—those which are funded and regulated by the Local Authority – which are in a financial deficit, increasing from 5.8% in 2011 to 10% in 2018.<sup>51</sup> Notwithstanding this increase, the evidence further suggests that the majority of maintained schools in England are experiencing a financial surplus. Therefore, despite the overall macro-financial commitment to educational spending, the evidence at the local and ground level suggests huge internal financial inequalities between English schools. Andrews additionally highlights that one way to ease such fiscal anxieties would be to re-distribute the finances more equally between schools but ultimately contends that, in light of the increased autonomy which schools operate under, any move by local authorities to manage and/or control their finances would prove problematic and also disclose the extent to which some schools would oppose rewarding other ‘poorly managed’ or ‘inefficient schools’.<sup>52</sup> However, Andrew’s recommendations would arguably carry more

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<sup>46</sup> See Committee on the Rights of the Child, (2016) *General Comment No. 19 on public budgeting for the realization of children’s rights (art.4)*

<sup>47</sup> Ibid at para’s 28 – 35.

<sup>48</sup> See Belfield, C. et.al., (2018) *2018 Annual Report on the Education Spending in England*, The Institute for Fiscal Studies.

<sup>49</sup> Ibid at p.7.

<sup>50</sup> Andrews, J., (2019) *School revenue balances in England*, Education Policy Institute.

<sup>51</sup> Ibid at p. 4.

<sup>52</sup> Ibid at p.12.

persuasive and explanatory force if framed in the language of progressive realization. Rather than capitulating to the perceived fears or institutional difficulties which may arise between school or local authority, situating such policy proposals within the parameters of progressive realization and the legal obligations which flow from it would render such fears secondary to the legal obligation of states progressively realize children's educational rights. This would further demonstrate that using 'maximum available resources' is not a simplistic macro-statistical quantitative exercise. Rather, as these figures exemplify, states must demonstrate that there are no regressive results from their investments in socio-economic areas and further that such expenditure is progressively realizing the rights of those most in need and in high priority areas. This may necessitate, for example, the equitable redistribution of financial resources to ensure that all children and young people are equally benefiting from state resources.

In her analysis of how best to use 'maximum available resources', Sigrun Skogly argues that the current approaches largely follow a quantitative financial schema; namely, what money and how much of it is directed towards a particular public service or facility.<sup>53</sup> In calling for a shift towards a more qualitative approach, Skogly calls not only for a more thorough understanding of what is meant by 'resources' but also, critically, for a fundamental re-imagination of the manner in which those resources are administered and implemented. By examining the means of implementation, and in particular the policies and procedures which guide them, she argues that "much can be achieved without necessarily requiring a significant increase in funding".<sup>54</sup> Thus, Skogly's call for administrative ingenuity is important for two reasons. First, as resources are often limited, new approaches and methodological designs for their disbursement are significant as they can enhance the widest possible benefits. For example, the use of children's rights impact assessments (CRIAs), which seek to foreground children's rights within regulatory decision-making about how best to distribute limited resources, provides a robust foundation to justify investment in a particular socio-economic area.<sup>55</sup> For example, recent governmental figures in the UK show that children in receipt of free school meals, a proxy for poverty, are 23% less likely to be in sustained employment by the time they reach 27 years of age when compared to their peers who are not in receipt of free school meals.<sup>56</sup> Similarly,

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<sup>53</sup> See Skogly, S (2012) The requirement of using the "maximum available resources" for human rights realisation: a question of quality as well as quantity? *Human Rights Law Review*, 12, 3, pp. 393 – 420.

<sup>54</sup> Ibid at p.405.

<sup>55</sup> See UNICEF (2013) *Children's Rights Impact Assessments: A guide for integrating children's rights into impact assessments and taking action for children*, UNICEF (Geneva) and the Danish Institute for Human Rights, Copenhagen.

<sup>56</sup> See Department of Education (2018) *Outcomes for pupils eligible for free school meals and identified with special educational needs*, Ad-hoc statistics.



children with special education needs (SEN) are 25% less likely to be in sustained employment by the age of 27 in comparison to their non-SEN peers (ibid). Accordingly, resources should be targeted into priority areas where the empirical and statistical evidence clearly indicates the need for investment and support. This may include increasing expenditure and investment in schools with a higher percentage of children either with a SEN or who are in receipt of free school meals. More fundamentally, however, the progressive realization of children's education rights necessitates bolder and more targeted interventions, which may require the redistribution of school finances to meet these needs. Should this require legislative intervention to provide the local authority with the legal basis to do so, the end result of progressively realizing children's rights undeniably outweighs any ideological dictums the school may possess regarding their institutional autonomy or their competitive edge. The use of the states 'maximum available resources' should not be subsidiary to any such claims.

Second, by moving away from purely fiscal approaches to what is meant by using 'maximum available resources', children's socio-economic rights can still be progressively realized by the adherence to principles such as participation, non-discrimination, accountability, transparency and the child's best interests. Such principles can not only inform and frame the disbursement of such resources but also bring a procedural legitimacy to such actions. With figures disclosing an increase in the number of children who have been excluded from school, both permanently and on a fixed term basis, the question arises as to how their rights can be better protected and (better) progressively realized. Using 'maximum available resources' can and should include the enactment of regulations and guidance whereby such principles are central considerations when decisions affecting children are taken. Adhering to these principles would also foster a richer children's rights-compliant culture. The recent enactment of the Children and Families Act (CFA) 2014, which accorded increased procedural educational rights for children and young people with disabilities, pursuant to Part 3 thereof, demonstrates the importance of legislative measures for securing children's rights.<sup>57</sup> In particular, section 19 thereof mandates local authorities when carrying out their functions to 'have regard' to the views, wishes and feelings of the child or young person concerned and further to provide them with the necessary support and information to enable such participation in the decisions which will ultimately affect them. Unsurprisingly, therefore, it has been described by Harris and Davidge as a

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<sup>57</sup> See generally, Harris, N & Davidge, G., (2019) The practical realisation of children and young people's participation rights: special educational needs in England, *Child and Family Law Quarterly*. 31, 1, pp. 25-45.

“pivotal provision”<sup>58</sup> in advancing a culture of engagement with children and young people. However, in the context of school exclusions, an examination of the revised statutory guidance which governs the approach to removing children from school reveals that schools do not have to undertake a best interests assessment of their projected decision nor does the child have an explicit statutorily established right to appeal under the age of 18.<sup>59</sup> Indeed, the statutory guidance is entirely silent on the issue of the child’s best interests, the “normative axis around which decisions relating to children revolve”.<sup>60</sup> Moreover, the recent government review on school exclusions carried out by Edward Timpson also failed to advocate the need for a rights-based approach to exclusion. Although highlighting the ingrained and persistent patterns of over-representation among particular groups of children within the exclusion system in England, the report failed to advocate for an individual right of appeal for children against their exclusion nor did it recommend the introduction of a best interests assessment to be carried out prior to the decision to exclude. This could include the need for the head teacher to weigh up whether the exclusion would actually be in the child’s best interests in light of factors such as the age of the child, their proximity to examinations and also what other sanctions other than exclusion could be imposed. The recommendation and incorporation of such measures would arguably bring the procedural dimensions of children’s rights *in* education into concert with established children’s rights principles such as participation and the best interests principle. Such measures also evidence the fact that adherence to the ‘maximum available resources’ principle also involves engaging with other non-fiscal measures, including procedural protections, to progressively realize children’s socio-economic rights.

### **5.3.2. Maximum Available Resources and School Exclusions**

Much of the forgoing analysis on the subject of the state’s maximum available resources has highlighted that resources should not just be considered in a purely narrow and quantitative manner. Rather, opening up the parameters of what is meant by resources, we can see that states can enact legislation and/or introduce administrative measures which ensure that the principles of accountability, participation and transparency, amongst others, are complied with and

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<sup>58</sup> Ibid.

<sup>59</sup> See, Department of Education (2017) *Exclusion from maintained schools, academies and pupil referral units in England, Statutory guidance for those with legal responsibilities in relation to exclusion*.

<sup>60</sup> See Stalford, H. E. (2017) ‘The broader relevance of features of children’s rights law The ‘best interests of the child’ principle’, in Brems, E., Vandenhoe, W., & Desmet, E., (Eds.), *Children’s rights in the global human rights landscape: isolation, inspiration, integration?* Routledge., at p. 37.

upheld in the context of delivering their socio-economic rights commitments. Indeed, one method of truly ensuring that states fulfil their children's socio-economic commitments is by enacting legislation for their progressive realization. Placing the principle on a statutory foothold provides it with a compellable legislative force with concomitant enforceable requirements. It makes it also amenable to judicial scrutiny.

Recent legislative developments in Canada illustrate this potential. The first reading of Bill C – 97 of 8 April 2019 which came before the Canadian House of Commons, and which introduced a *National Housing Strategy Act* pursuant to Division 19 section 313, explicitly stated that “a national housing strategy would support ***the progressive realization of the right to adequate housing*** as recognized in the International Covenant on Economic, Social and Cultural Rights, to which Canada is a party” [emphasis added].<sup>61</sup> The proposed Act states in section 4(C) that the Housing Policy of the Government of Canada is to “further the progressive realization of the right to adequate housing” and in support of this, proposed the establishment of a National Housing Council<sup>62</sup> to oversee the strategy and a National Housing Advocate<sup>63</sup> with direct responsibilities for engaging with vulnerable groups, the homeless and civic society to carry out research on issues of homelessness and housing need and participate in the work of the Council. The Advocate must submit an annual report to the Minister every year on the systemic housing issues facing vulnerable groups which then must be tabled before parliament and responded to by the Minister.<sup>64</sup> The Minister must also publish a triennial report outlining whether the desired outcomes of the strategy have been achieved and the initiatives related to its implementation.<sup>65</sup> Although framed in the context of the right to housing, this type of proposed legislation demonstrates how the language of progressive realization can be included within domestic legislative schemas to frame the obligations and requirements of national authorities to progressively realize their socio-economic commitments. For states which do not have strong constitutional guarantees protecting children's socio-economic rights, legislation can fill an important lacuna regarding the enforcement of socio-economic rights. And for states who do possess robust constitutional socio-economic protections, legislation can provide the detailed guidance for the operationalization of those rights.

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<sup>61</sup> Preamble.

<sup>62</sup> Section 6.

<sup>63</sup> Section 13.

<sup>64</sup> Section 16.

<sup>65</sup> Section 17.

In the context of school exclusions in England, two key children's rights principles are conspicuously absent from the school exclusion framework. These include the child's right to be heard pursuant to Article 12 CRC and the best interests principle pursuant to Article 3 CRC. These will be considered in turn.

#### **5.3.2.1. The Right to be Heard**

Firstly, in relation to the child's right to be heard, and as stated in chapter three, both the legislation, the 2012 regulations and statutory guidance which provide for school exclusions do not permit the child a direct opportunity to have a say in that process. However, beyond the formalised review structures which deny the child a right to participate and which will be considered in chapter seven, the evidence adduced as part of the Agenda Days exemplified a much more embedded rights-deficient culture as regards children's right to be heard within the schools the children and young people attended.<sup>66</sup> On the issue of whether children and young people have a say in the punishments they receive within schools; the unanimous response was overwhelming negative.<sup>67</sup> Responses from the Agenda Days included:

*"No, Because they are usually punished before they get told why and if they ask the teacher, says you should know"*

(Chloe & Caitlin, Bishop Auckland Report)

*"No contribution – think you should be able to say what punishments should be"*

*"Depends on the circumstances. If you done wrong and apologise it wont make the punishments any easier"*

*"No chance to speak in meetings in retune to school after exclusion"*

*"Get no say in the school punishments. Depending on the circumstances, you should get a say in punishments"*

(Lean & Ali, Room 14 Pelton Report)

*"We found out that the young people don't get a say in their rights and they don't question their teachers"*

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<sup>66</sup> See also generally, Munn, P & Lloyd, G., (2005) Exclusion and Excluded Pupils, *British Educational Research Journal*, Vol. 31, No.2, pp. 205 – 221.

<sup>67</sup> See also Cairns et.al. (2019) Children's Rights to Education – Where is the Weight for Children's Views?, *The International Journal of Children's Rights* Vol. 26 pp. 1 -23.

*“The young people don’t have a say in punishment”*

*“No because teachers just issue punishments straight away. Don’t give warnings.  
Always look back on things done in past”*

(Caitlin & Jasmin, Spennymoor Report)

The issue of the right to be heard within the context of school punishments raises a number of important issues. Firstly, any behaviour which warrants a punishment within school, if persistent, can eventually, if not automatically, lead to either a fixed term or permanent exclusion. Indeed, the most recent governmental statistics on this issue reveals that persistent disruptive behaviour accounted for 34% of all fixed term exclusions and 30% of all permanent exclusions from school in the preceding academic year.<sup>68</sup> Therefore, when considered in light of the fact that children do not even know what the exclusion policy and the related rules stipulate, the right to be heard becomes a critical safeguard in ensuring a sense of context and fairness when considering what punishment should be given to the child for her offending behaviour. Secondly, Article 12 CRC is very clear itself on the issue that *any matter*, which includes educational issues, which affect the child, should permit an opportunity for the young person to express his or her views. Thirdly, on a deeper and more mature level, allowing the young person to have a say in their punishments and perhaps time to reflect on their actions, offers a more restorative and responsible approach which gives the young person themselves time to consider their actions and perhaps even alter their current and future behavioural patterns.<sup>69</sup> Given also that a zero-tolerance disciplinary policy has been recognised as key contributor in the School-to-Prison pipeline,<sup>70</sup> allowing children a say when it comes to dispensing punishments offers a more holistic approach to remediating their offending behaviour. Whilst restorative justice practices within English and Welsh schools have received a somewhat lukewarm reaction by the Youth Justice Board for England and Wales in their National Evaluation of the Restorative Justice in Schools Programme, the report did conclude nonetheless that it “may be a useful resource that improves the school environment and enhances the learning and development of young people”.<sup>71</sup> Indeed, in their review of the use

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<sup>68</sup> See Department of Education (2019) *Permanent and fixed period exclusions in England: 2017 to 2018*. (25 July 2019).

<sup>69</sup> See Payne, Alison A., & Welch, K., (2018) The Effect of School Conditions on the Use of Restorative Justice in Schools, *Youth Violence and Juvenile Justice*, Vol.16(2), pp. 224–240.

<sup>70</sup> See generally, Nussbaum, L., (2018) 'Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform' 69 *Hastings Law Journal* pp. 583–646.

<sup>71</sup> See Youth Justice Board for England and Wales (2004), *National Evaluation of the Restorative Justice in Schools Programme*, at p. 65.

of restorative practices within Scottish schools, McCluskey et.al., noted that within the primary schools which were examined: “The atmosphere in most of the schools became identifiably calmer and pupils generally more positive about their whole school experience; they described staff as fair and listening to “both sides of the story”.<sup>72</sup> While the results were not identical within the secondary schools, they did not however note that most schools were increasingly adopting the language of restorative practices to address conflict between pupils and between pupils and staff. However, they ultimately concluded that for restorative practices to take hold within schools, what was needed “was visible commitment, enthusiasm and modelling by the school management team and where the school had invested in significant staff development”.<sup>73</sup> Moreover, within the specific context of school exclusions, evidence from a 2008 review of the use of restorative approaches (RA) within primary schools in the London Borough of Barnet revealed that within those schools which deployed such approaches, there was a 51% reduction in fixed term exclusions while in the schools which did not use such approaches, the fixed term exclusion rate increased by 65%.<sup>74</sup> Indeed, drilling down deeper into the review, the evidence suggested that 47% of the staff within the RA trained schools felt that pupils were much more willing and able to take responsibility for their actions<sup>75</sup> while 41% stated that the atmosphere within the school was much more calmer following the involvement of the restorative interventions.<sup>76</sup> Such evidence indicates that restorative practices can work, have been shown to wield positive results and can result in positive transformative changes within institutional practices within schools.

However, central to any move towards the success of such practices is the necessity to listen to the children and young people concerned. The evidence adduced from the Agenda Days indicates that this does not occur within the schools attended by the children and young people concerned. Indeed, on the issue of children’s interaction with the disciplinary process, the concerns and points raised by the children in this study very much align with the previous research carried out by Cairns et.al.,<sup>77</sup> where the young people also felt that schools needed to

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<sup>72</sup>See McCluskey, G, Lloyd, G., Kane, J, Riddell, S Stead, J & Weedon, E, (2008) Can restorative practices in schools make a difference?, *Educational Review*, 60:4, 405-417, DOI: 10.1080/00131910802393456, at p. 410.

<sup>73</sup> Ibid at p.410.

<sup>74</sup> See Barnet London Borough (2008) Restorative Approaches in Primary Schools An Evaluation of the Project Co-ordinated by The Barnet Youth Offending Service, available at <https://restorativejustice.org.uk/sites/default/files/resources/files/Restorative%20Approaches%20in%20Primary%20Schools%20An%20Evaluation%20of%20the%20Project%20Co-ordinated%20by%20the%20Barnet%20Youth%20Offending%20Service.pdf> (last accessed 24<sup>th</sup> September 2019)

<sup>75</sup> Ibid at p. 8.

<sup>76</sup> Ibid at p. 9.

<sup>77</sup> See n (63) above.

display more empathy in the context of dispensing punishments. The findings further correlate with research by Knipe et.al., who found that schools should resort to less punitive punishments such as giving students additional homework or lines to mark the offending behaviour and also that schools should take a more proactive and compassionate approach to dealing with so-called problem pupils. Recommendations advanced by the young people therein included not only the suggestion that schools run anger management and/or discipline classes, but also more fundamentally, that they simply spend time talking to the students in an attempt to uncover the root of the offending behaviour in an effort to overcome them.<sup>78</sup> Such proposals further evidence the fact that to fundamentally progressively realize children's education rights, their immediate right to participate must be complied with. This further highlights the fact that participation, in addition to the wider principles of effectiveness, accountability, transparency and equality "are identified principles that are aspects of the duty to progressively realise"<sup>79</sup> socio-economic rights. And whether or not a school adopts a formalised restorative model to resolve conflicts between the children themselves or between the children and staff, children's rights, in and of themselves, dictate that children should have a say in any matter which affect them.

### **5.3.2.2. The Best Interests Principle**

Although the best interests principle was not specifically addressed within the Agenda Days, the cumulative consequence of the forgoing analysis demonstrates that many of the current practices are inconsistent with the child's best interests principle. Given further, and as outlined in chapter three that the statutory framework, the 2012 regulations and the accompanying guidance is bereft of any allusion to the principle, one measure the state could adopt within its available resources is to incorporate a best interests determination which would form part of the head teacher's decision to exclude or not. Two reasons underpin this. Firstly, the decision to exclude constitutes a direct interruption, and at times a partial cessation, of the child's right to education and as such should not be immune from a best interests assessment. Secondly, the power to exclude, residing as it exclusively does with the head teacher, is further underpinned by an appreciation and application of the enduring judicial standards of rationality, proportionality, reasonableness and fairness. Thus, when taken together, both issues crystallise and accord the head teacher with what can only be described as a quasi-judicial power; which,

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<sup>78</sup> See generally, Knipe, D, Reynolds, M & Milner, S (2007) Exclusion in schools in Northern Ireland: the pupils' voice, *Research Papers in Education*, 22:4, 407-42.

<sup>79</sup> See O'Connell et.al., (2014) *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources*, Routledge, p. 69.

when exercised, can immensely impact the life chances of the young person involved. Thus, such power should neither be separate to, or immune from, a best interests determination. Indeed, the absence of the application of the child's best interests principle within the context of school exclusions is legal reality which Harris and Eden have previously noted amounts to a "gap in domestic law"<sup>80</sup> which needs to be filled to ensure compliance with the CRC. Furthermore, as discussed in chapter three,<sup>81</sup> although reference is made within the 2012 regulations for Governing Bodies and Review Panels to consider the 'interests and circumstances' of the excluded pupil, such a consideration falls well short of the legal requirements which arise under the best interests principle pursuant to Article 3 CRC. In that regard the difference between a child's interests and their best interests is one which carries significant and consequential differences. Given further that no reference is made within the Education Act 2002, the 2012 Regulations or the statutory guidance to the need for the head-teacher who dispenses the exclusion in the first instance to consider the child's interests, let alone their best interests, the absence of the best interests principle represents a rights-based anomaly within the exclusion framework.

Indeed, looking at the right to health as a comparable socio-economic area, the General Medical Council Ethical Guidance contains explicit directions which are expected of doctors in assessing the best interests of children.<sup>82</sup> Specifically, the best interests is considered a 'guiding principle' in all matters which affect them<sup>83</sup> and includes an obligation on doctors to consider "which choice, if there is more than one, will least restrict the child's or young person's future options".<sup>84</sup> In mandating doctors to consider the child's future opportunities, the guidance in many respects aligns with what Joel Fienberg called the child's right to an open future, the aggregate contention of which is that decisions made on behalf of children should least restrict or limit their future options and life chances.<sup>85</sup> However, returning to the educational context, although the best interests principle is absent from the school exclusion framework in England, it has however influenced the state's revised approach to special educational needs and

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<sup>80</sup> Harris, N & Eden, H, (2000) *Challenges to School Exclusion*, RoutledgeFalmer, (London and New York) at p. 12.

<sup>81</sup> See Chapter Three for earlier discussion on the best interests principle.

<sup>82</sup> See General Medical Council (2018) *Protecting Children and Young People: The responsibilities of all doctors*, ([https://www.gmc-uk.org/-/media/documents/protecting-children-and-young-people---english-1015\\_pdf-48978248.pdf](https://www.gmc-uk.org/-/media/documents/protecting-children-and-young-people---english-1015_pdf-48978248.pdf)) (last accessed 7<sup>th</sup> August 2019)

<sup>83</sup> Ibid at Appendix 2.

<sup>84</sup> Ibid at 1 (f).

<sup>85</sup> See Feinberg, J., (1980) The child's right to an open future, in Aiken, W & Lafolette, H (eds.) *Whose Child?*, Totowa, Littlefield Adams and Co, pp. 124 – 153.



disability (SEND) provision. For instance, the most recent SEND Code of Practice<sup>86</sup> enacted to meet the requirements of Part 3 of the Children and Families Act 2014, makes specific reference to the principle in a number of areas including guaranteeing that the child's best interests is central to agreeing his/her education, health and care plan [EHCP] outcomes<sup>87</sup>; that the recipient of social care payments use such finance for the child's best interests<sup>88</sup>; that any reduced level of education for children in alternative provision complies with their best interests<sup>89</sup> and that decisions taken on behalf of children and young people who lack capacity adheres to their best interest.<sup>90</sup> This, in the area of disability and education, we see the centralization of the best interests principle as a key determinative marker in upholding children's educational rights.

While such references are of course welcome, all facets of education law and policy should include specific requirements which integrate the best interests principle within decision-making structures. Indeed, in its most fundamental form, progressively realizing children's educational rights should mean that states avoid any disjunctive or asymmetrical approaches when incorporating the principle within socio-economic law and policy. Moreover, the recent Timspon review on education further failed to incorporate the need for a rights-based approach to exclusion. Although highlighting the ingrained and persistent patterns of over-representation among particular groups of children within the exclusion system in England, the report failed to recommend the introduction of a best interests assessment to be carried out prior to the decision to exclude. This could include the need for the head teacher to weigh up whether the exclusion would actually be in the child's best interests in light of factors such as the age of the child, their proximity to examinations, whether they have a disability, the impact an exclusion would have on their home life, and also what other sanctions other than exclusion could be imposed. The recommendation and incorporation of such measures would arguably bring the procedural dimensions of children's education rights into concert with established children's rights principles. Such measures also evidence the fact that adherence to the 'maximum available resources' precept also involves engaging with other non-fiscal measures, including procedural protections, to progressively realize children's socio-economic rights.

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<sup>86</sup> See Department of Education & Department of Health (2015) *Special educational needs and disability code of practice: 0 to 25 years Statutory guidance for organisations which work with and support children and young people who have special educational needs or disabilities*.

<sup>87</sup> Ibid at para 163.

<sup>88</sup> Ibid at para 184.

<sup>89</sup> Ibid at para 216.

<sup>90</sup> Ibid at para 273.

## 5.4. Non-Retrogression

The third “major component”<sup>91</sup> of progressive realization is the implied principle of non-retrogression. Acting as a legal backstop, it aims to prevent against any deliberate reversion in existent levels of rights enjoyment. The Committee on Economic, Social and Cultural Rights has stated that any such retrogressive measures “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.<sup>92</sup> Moreover, in their examination of the principle, Nolan et.al., identify two distinct dimensions underpinning its operation, namely a normative and an empirical dimension.<sup>93</sup> The former, they argue, pertains to the prohibition of regressive measures in terms of “legal de jure guarantees”<sup>94</sup> which examines whether there has been a diminution or reversion in the level of entitlement given by a specific legal norm. The latter relates to “de facto, empirical backsliding in the effective enjoyment of rights”<sup>95</sup> which examines the actual enjoyment of the right in question. They further argue that establishing whether retrogression has occurred requires an “evidential link between particular state conduct on the one hand and the factual outcome of decreased rights enjoyment on the other”<sup>96</sup> supported by “sophisticated statistical and other information”.<sup>97</sup> However, the principle is not absolute and regressive measures are permissible, albeit within constricted parameters.<sup>98</sup> Such measures must be temporary in nature, necessary and proportionate, reasonable and non-discriminatory; they must not disproportionately impact the rights of marginalized groups and protect the minimum core content of rights.<sup>99</sup> Ascertaining whether the de jure or de facto ‘backsliding’ has occurred, however, requires ongoing monitoring by contracting states. Indeed, Nolan et.al. have argued that: “Measuring the extent of progressive realization requires information on the extent to which obligations are realized in relation to specific groups”.<sup>100</sup>

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<sup>91</sup> See Wills, Joe J and Warwick, Joe J., ‘Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse’ *Indiana Journal of Global Legal Studies* (2016) 23(2), 629–664, at p. 654.

<sup>92</sup> See n (22) above at para 9.

<sup>93</sup> See Nolan, A., et. al., Two steps forward, no steps back? Evolving Criteria on the prohibition of retrogression in economic and social rights, in A. Nolan (ed.) *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press, 2014).

<sup>94</sup> *Ibid* at p.123.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid* at. p.128.

<sup>97</sup> *Ibid*.

<sup>98</sup> See Chairperson of the CESCR, ‘Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW.

<sup>99</sup> *Ibid*.

<sup>100</sup> See n (93) above at p.69.

In the context of children's educational rights, one can see clearly how the principle of non-retrogression assumes particular significance. The 2018 report by the UK National Children's Bureau entitled *Children Missing Education* revealed that in the year 2016 -17, some 49, 187 children were reported as missing from education in England alone. Of these 22% were in receipt of free school meals while 15% were known to social services.<sup>101</sup> Similarly, a recent study by Gill evidenced a growing practice of children being illegally excluded from schools in England, with the author stating: "Still more exclusions are being hidden, and children are lost from government oversight. Tens of thousands of pupils leave school rolls in what appear to be instances of illegal exclusion".<sup>102</sup> Such data demonstrates clear evidence of circumstances where children and young people are suffering a clear regression, on both a de jure and de facto level, of their right to education. Such regression is all the more significant in view of the statutorily compulsory nature of education in England and also of the fact that both school and local authorities, themselves an emanation of the state, are directly implicated in such regressive (and illegal) practices. Therefore, any regressive practices which negate or reverse the de facto or de jure enjoyment of socio-economic rights must be carefully scrutinized and considered against the principle of progressive realization.

#### **5.4.1. Non-Retrogressive Measures and School Exclusions**

At the heart of the principle of non-retrogression is the prevention of any de jure or de facto backsliding in the level of enjoyment of the right in question. In this regard, it represents a critical safeguard to ensure the continued betterment of children's socio-economic rights. Indeed, the foregoing children's rights anomalies as outlined above represent clear de jure regressive realities within the context of the English school exclusion system. Taken together in their cumulative context, they constitute a serious assault on the very fabric on children's educational rights. When considered also that such regressive measures are subject to well-defined caveats in term of duration and necessity, amongst other considerations, no logical reason exists why the school exclusion framework in England is impervious to, and uninformed by, the established children's rights principles as referred to above. Drilling down deeper into such a reality, the fundamental compatibility of our education system with children's rights becomes acutely apparent. Indeed, beyond questions of compatibility, the fundamental issue of

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<sup>101</sup> See Ellison, R & Hutchinson, D (2018) National Children's Bureau, UK, *Children Missing Education*.

<sup>102</sup> See Gill K (2017) Making The Difference: Breaking the link between school exclusion and social exclusion, IPPR. <http://www.ippr.org/publications/making-the-difference.at.p.15>.

whether children and young people themselves, who are the principal beneficiaries of education, are in fact considered de jure and/or de facto rights-holders within a system where they spend the majority of their developmental years becomes a significant factor. Further evidence from the Agenda Days indicated a clear rights-respecting deficit amongst the subjective experiences recounted by the children and young people therein.

#### **5.4.1.1. A Rights-Respecting Deficit in Schools**

Clear evidence of a rights-deficit culture which both dilutes and diminishes the de jure and de facto enjoyment of the right to education was evident in abundance from the Agenda Days. The evidence which was adduced included:

*“The young people think that they should have their say and think that the teachers should respect and listen to them more. Another thing they said was that they should have their own opinions and there should be different levels of discipline. By thus they mean that instead of excluding pupils, they should find different levels of punishment and explain it to the students”*

*“They always feel like their rights are unheard”*

(Caitlin & Jasmin, Spennymoor Report)

*“In all three agenda days, it was said that staff totally abuse the rights they have and 99% of people we spoke to said that if teachers treated them with respect then they would behave which would a significant decrease on the exclusion rates”*

*“Teachers totally abuse rights – everyone’s individuals. People been excluded by arguing back with teachers”*

(Leah & Ali, Toom 14 Pelton Report)

Such evidence, when taken in conjunction with the previous findings, denote a clear lack of respect for the child as an individual rights-holder in her own right. While caution must of course be exercised, the unanimous feeling of not being respected within the school jars heavily

with the notion that children should not lose their rights once they traverse the school doors threshold.<sup>103</sup>

### 5.5.Non-Discrimination

Although not directly a constituent element underpinning the progressive realization of socio-economic rights *per se*, progressive realization is subject to full compliance with the principle of non-discrimination.<sup>104</sup> As the Committee on the Rights of Persons with Disabilities recently stated: “Equality and non-discrimination are among the most fundamental principles and rights of international human rights law. Because they are interconnected with human dignity, they are the cornerstones of all human rights”.<sup>105</sup> Similarly, the ubiquity of non-discrimination and equality clauses at both supra-national and regional level attest to the fact that it underpins and unites the operation and delivery of all classification of rights; civil, political, economic, social and cultural.<sup>106</sup> For example, the 1960 UNESCO Convention Against Discrimination in Education defines discrimination as “any distinction, exclusion, limitation or preference which, being based on race, colour, sex, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education”.

Moreover, from a children’s rights perspective, the principle of non-discrimination occupies an elevated position in that, as a general principle, all rights contained within the CRC must be delivered in an equal non-discriminatory manner, and non-discrimination also amounts to an individual compellable entitlement in its own right.<sup>107</sup> Within an educational context in the UK, one can see how the principle of non-discrimination could play a critical role in ensuring the progressive realization of children’s educational rights. A review of the exclusion figures reveals noticeable, repeated trends. These include the higher likelihood of boys becoming permanently excluded than girls, children with a disability (SEN) accounting for nearly half of

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<sup>103</sup> UN Committee on the Rights of the Child, General Comment No. 1, para. 8

<sup>104</sup> See generally, n (1) above.

<sup>105</sup> See UN Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, at para 4.

<sup>106</sup> See also, Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) & MacNaughton, G. & Frey, D., (eds), *Economic and Social Rights in a Neoliberal World* (CUP, 2018).

<sup>107</sup> See Abramson, B., (2008) *A Commentary on the United Nations Convention on the Rights of the Child, Article 2 The Right of Non-Discrimination*, Martinus Nijhoff Publishers & Besson, S., (2005) The Principle of Non-Discrimination in the Convention on the Rights of the Child, *The International Journal of Children’s Rights*. 13: 433-461.

permanent exclusions, black Caribbean pupils possessing a permanent exclusion rate nearly three times higher than the ordinary school population, and the disproportionate level of exclusion of Roma and traveller children. Such figures, which are consistent with previous years<sup>108</sup> engage the issue of discrimination across multiple points and necessitate a direct response to identify the reasons why particular children are particularly vulnerable to a disruption or cessation in their right to an education. And while the government have recently completed their review into school exclusions, no identifiable reasons were adduced as to why certain children were more susceptible to exclusion than others. Accordingly, assessing the principle of non-discrimination within the context of progressive realization demands a deeper interrogation of why certain children suffer disproportionately negative educational experiences than others. And although de jure legal guarantees may exist in terms of everyone's right to education, progressive realization demands an assessment of whether the actual de facto application of such guarantees themselves mask discriminatory practices.

#### **5.5.1. Non-Discrimination and School Exclusions**

One of the key cornerstones of both children's rights and human rights law more broadly, the principle of non-discrimination acts as a necessary legal restraint on the adoption of rules and practices which would otherwise unjustifiably directly or indirectly impact specific groups of individuals. Within the context of school exclusions and the right to education more broadly, the principle of non-discrimination assumes particular importance. Indeed, a cursory examination of the rudimentary statistics surrounding school exclusions in England engage the issue of discrimination across multiple referential points. Be it the continued over-representation of boys, children with special educational needs, children in receipt of free school meals, or children of Gypsy/Roma, Irish Traveller heritage or black Caribbean descent; issues of gender, disability, poverty and ethnicity have established themselves as inseparable markers in the context of school exclusions. Evidence from one of the Agenda Days which was comprised almost exclusively of children from an Irish Traveller background highlighted the subjective feelings they felt about how their background marked them out within their school.

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<sup>108</sup> For comparable treatment of exclusion figures, see Department of Education (2017), *Permanent and Fixed Period Exclusions in England: 2015- 2016*, Department of Education (2016), *Permanent and Fixed Period Exclusions in England: 2014- 2015* & Department of Education (2015), *Permanent and Fixed Period Exclusions in England: 2013- 2014*.

#### 5.5.1.1. Identity as a barrier in school

Although the issue of identity was not the central point of inquiry as part of this thesis, it did nonetheless emerge as an issue which was of concern to the children and young people who took part in the Bishop Auckland Agenda Day specifically. Largely made up of children from an Irish Traveller background, they felt that their background was a direct contributory factor for their exclusion from school. On the question of why they get excluded, it was noted that:

*“They get excluded because of their **background life** and expressing themselves”*  
[emphasis added]

(Chloe & Caitlin, Bishop Auckland Report)

Similar sentiments were further expressed concerning the children’s background on the question of whether they felt their rights went unmet and unheard within the school.

*“Yes because we got wrong for expressing our feelings”*

(Chloe & Caitlin, Bishop Auckland Report)

Such expressions also aligned with the findings in another one of the Agenda Days where it was noted that:

*“Yes – Sexism and Racism are very bad”*

(Caitlin & Jasmin, Spennymoor Report)

On the issue of whether they suffered differential treatment on their return from an exclusion, the young people noted that such treatment also extended to other siblings and family members.

*“Yes and so do family members”*

(Chloe & Caitlin, Bishop Auckland Report)

The responses as outlined above provoke further questions regarding the treatment of children from minority backgrounds within our education system. It also engages the issue of whether their *de jure* entitlement to equal treatment and not to be unfavourably ill-treated on account of their background and heritage is being complied with. While the responses must be treated with a degree of caution as no further detailed information or elaboration was given on how such ‘racism’ manifested itself or how their “background life” was the cause of their human rights going unmet within their schools, these micro-responses from children and young people in the North East of England nonetheless reveal a spontaneous and reflexive negative association

between their backgrounds on the one hand and the delivery of their right to education on the other. On a more profound level, such responses further speak to an interconnected set of socio-economic, socio-cultural and socio-political variables which centre around the very treatment of those from a traveller background within our education system. Indeed, writing as far back as 1996, Cullingford and Morris in their examination of the educational experiences of twenty-five youth offenders cautioned against schools creating “a deep sense of not belonging”<sup>109</sup> among young people which they argued not only triggered the activation of truant behaviour but also, more critically, what they said was a form of subjective “psychological exclusion”<sup>110</sup> where the young people themselves felt no stake or share within the school itself. Though not situated within the context of traveller’s educational experiences, their research nonetheless possesses an important transferrable strength in that it should act as an absolute caution against the creation of unwelcome and unwanted educational spaces for children and young people. Furthermore, research by Biggart et.al.,<sup>111</sup> on the experiences of traveller children, in addition to other minority groups including Chinese/Asian and European migrant children, aged between 7 – 12 years from twelve schools in Northern Ireland revealed that traveller children’s educational experiences were the most negative across a range of fronts. These included “a lack of sense of belonging to school, higher levels of bullying low self-perceptions and participation in clubs and were least likely to aspire to attend university”.<sup>112</sup> On the whole, the study concluded that traveller children experienced “a much greater sense of exclusion than the other minority ethnic children”.<sup>113</sup>

In view further of the sustained and well-documented educational disadvantage and under-achievement which traveller children endure,<sup>114</sup> schools should promote a culture of openness and inclusivity towards all children, irrespective of their background. Indeed, the very notion of progressively realizing children’s educational rights demands such an approach. Moreover,

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<sup>109</sup> Cullingford, C., & Morris, J., (1996) Who Excludes Who? The personal Experience of Exclusion, in Blyth, E., & Milner, J., (eds.) *Exclusion from School: Inter-Professional Issues for Policy and Practice*, Routledge, London, at p. 136.

<sup>110</sup> Ibid.

<sup>111</sup> Biggart et.al., (2013) A need to belong? The prevalence of experiences of belonging and exclusion in school among minority ethnic children living in ‘White hinterlands’, *Irish Educational Studies*, Vol. 32, No.2, pp. 179 – 195,

<sup>112</sup> Ibid at p. 187.

<sup>113</sup> Ibid at p. 189.

<sup>114</sup> See Cemlyn et.al., (2009) *Inequalities Experienced by Gypsy and Traveller Communities: A Review*, Equality and Human Rights Commission, Manchester. See also, Mulcahy, E., et.al., (2017) *The underrepresentation of Gypsy, Roma and traveller pupils in higher education: A report on barriers from early years to secondary and beyond*. Kings College London, and Allen, D, D. & Riding, S., (2018) *The Fragility of Professional Competence: A Preliminary Account of Child Protection Practice with Romani and Traveller Children in England*, European Roma Rights Centre, Budapest, Hungary.



recent evidence adduced by the House of Commons Women and Equalities Committee further highlights and indeed corroborates the “severe”<sup>115</sup> educational difficulties faced by gypsy and traveller children within our education system. In noting early drop-out rates, comparably inferior attainment rates, incidents of off-rolling and the existence of an assumption “that there is little point in educating Gypsy and Traveller children”<sup>116</sup>, the embryonic subjective feelings of difference and distinction noted by the children and young people in this study on the basis of their identity alone strikes right at the heart of the twin connected issues of non-discrimination and equality. However, positioning such realities within the framework of progressive realization adds an additional legal support towards compelling the state to fulfil its obligation to progressively realize children’s educational rights.

### **5.6. International Assistance and Cooperation and School Exclusions**

The final component which comprises the legal make-up of progressive realization is the notion of international assistance and cooperation. In its most elemental form, the duties which flow from the obligation to provide international assistance and cooperation reflect the reality that the realization of socio-economic rights, on a universal level, cannot and will not happen without international bi-lateral or multilateral support.<sup>117</sup> This also reflects the fact that such assistance is also necessary to address the many entrenched global inequalities which exist and which are frequently delineated along the North/South developmental axis. Within such a context, assistance and cooperation, and the degree thereof expected of states will invariably differ between them on account of their economic development.<sup>118</sup> Clearly encapsulated within Article 4 CRC, the duties flowing from ‘international assistance and cooperation’ have been further been elaborated upon by the Committee on the Rights of the Child who have stated that: “when States ratify the Convention, they take upon themselves obligations not only to implement within their jurisdiction, but also, to contribute, through international cooperation, to global implementation”.<sup>119</sup> Moreover, in their discussion on the intersection between rights

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<sup>115</sup> House of Commons, Women and Equalities Committee (2019) *Tackling inequalities faced by Gypsy, Roma and Traveller communities*, Seventh Report of Session 2017–19, (5 April 2019) at para 54.

<sup>116</sup> Ibid at para 58.

<sup>117</sup> For more on international assistance and cooperation, see generally, Karimova, T., (2014) The Nature and Meaning of ‘International assistance and cooperation’ under the International Covenant on Economic, Social and Cultural Rights, in Riedel, E., Giacca, G., & Golay, G., (eds.) *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, Oxford University Press, pp. 163–193.

<sup>118</sup> For more, see Sepulveda, M. (2006), ‘Obligations of international assistance and cooperation in an optional protocol to the international covenant on economic, social and cultural rights’, *Netherlands Quarterly of Human Rights*, 24(2), 271-304.

<sup>119</sup> See Committee on the Rights of the Child, General Comment No.5 (2003), General Measures of Implementation of the Convention on the Rights of the Child (arts, 4, 42, and 44, para. 6), at para 7.

and resources, the Committee further stated that “children’s rights are a shared responsibility between the developed and the developing countries”.<sup>120</sup> Thus, from the foregoing, the task of socio-economic rights realization does not endure within narrow territorial confines. Rather, states must ensure that, where needed, they must assist with and cooperate with other states, to ensure that all children, wherever they are, have their socio-economic rights realized.

With comparable duties located in Articles 55 and 56 in the UN Charter, Article 2(1) of the ICESCR and Article 4(2) of the Convention on the Rights of Persons with Disabilities, the duty to provide international assistance and cooperation has a firm legal foothold within international human rights law. However, from a children’s rights analysis, Vandenhoe provides a comprehensive analysis of the treatment which the Committee on the Rights of the Child has given to the notion of ‘international assistance and cooperation’.<sup>121</sup> In his examination of the outputs of the Committee, Vandenhoe concludes that the CRC Committee have abstained from establishing a general duty in the area of providing development cooperation but given that such cooperation does however take place, they have established a number of obligation which should be adhered to within such a framework. These include the need for countries to use the CRC as an overarching evaluative guide when providing assistance and to mainstream a child-rights based approach in the adoption and implementation of developmental programmes and plans.<sup>122</sup>

However, from a domestic perspective, the English economy in forming the largest out of the home countries of the UK is a relatively wealthy one. As a developed country, the United Kingdom is not likely to seek international assistance and cooperation from third countries in an effort to either cultivate or improve its domestic education system. Rather, by comparison, its educational sector is well developed. The task, therefore, is how to progressively realize the rights of children and young people who are attending schools in England (and the other regions) and how to ensure that the various frameworks which govern the disparate aspects of schooling, including school exclusion, are consonant with, and adopt, a children’s rights approach. Given that any international cooperation and assistance between states is expected to either follow or mainstream a children’s rights approach, so too should domestic approaches in relation to the delivery of rights. Thus, in the context of children’s rights *in* education in

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<sup>120</sup> Committee on the Rights of the Child, General Discussion on “Resources for the Rights of the Child – Responsibility of States”, 46<sup>th</sup> Session, 21 September 2007, paras. 50 – 51.

<sup>121</sup> See Vandenhoe, W., (2009) Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development, *The International Journal of Children’s Rights*, Vol. 17, pp. 23 – 63.

<sup>122</sup> *Ibid* at p. 46 – 47.

England, much work remains in terms of amending, updating and consolidating children's rights within the exclusion system. In addition to the forgoing analysis, subsequent chapters will further highlight additional areas where this should occur.

### **5.7. Conclusion**

The foregoing examination of the ways and methods in which the progressive realization of children's socio-economic rights is achieved has exposed the need to engage with the principle in all of its distinct elements. Such engagement is necessary to not only give the principle itself an identifiable legal frame and avoid it being reduced to a fleeting legal expression, but it is also necessary in terms of assessing whether contracting states to the CRC, and indeed other conventions too, are actually achieving, in practice, the progressive realization of their socio-economic rights commitments.

From the preceding analysis, in terms of examining both the legal framework which surrounds both the right to education and school exclusions and the understandings of the children and young people who experience it, it has become clear that very many issues exist which cast a long shadow over the right to education and the legal structures surrounding school exclusions. From the existence of informational gaps to the perception of one's identity as a barrier in their education, there are a number of ways in which the state can move to progressively realize children's educational rights. The analysis has exposed that children's rights are not being progressively realized with clear identifiable evidence of regressive practices, both on a de facto and de jure level, where children's rights are not being upheld. Rather, the evidence is indicative of demonstrable breaches of children's rights across a multiplicity of areas where the state is clearly not achieving the progressive realization of children's educational rights.

## CHAPTER SIX

### *Measuring Progressive Realization – A Game of Numbers*

#### 6.0 Introduction

*First they said they needed data  
about the children  
to find out what they're learning.  
Then they said they needed data  
about the children  
to make sure they are learning.  
Then the children only learnt  
what could be turned into data.  
Then the children became data.<sup>1</sup>*

This chapter examines the methods by which the progressive realization of children's socio-economic rights is measured. In building on the previous chapter which outlined the multi-dimensional nature of the principle and the various elements which underpin it and guide its application in practice, this chapter will interrogate whether the current mechanisms that exist within children's socio-economic rights law are sufficient to accurately capture the true extent to which contracting states to the CRC are actually progressively realizing children's rights. Following on from this, this chapter will focus on how the right to education is being progressively realized with specific attention accorded to the issue of school exclusions in England. In view of the correlative obligations which directly flow from the duty to progressively realize children's rights, described by Lundy as "an overriding principle of the CRC"<sup>2</sup>, this chapter investigates the extent to which these duties have been, or are being complied with regarding the framework which currently governs school exclusions in England.

Ultimately, this chapter argues that while much progress has been made in the collection and disaggregation of valuable information and data regarding specific groups of children within the school exclusion system, the current mechanisms do not go far enough and fail to accurately depict the individual and subjective experiences of children. Put another way, they do not measure children's individual experiences in schools. For instance, as the previous chapter concluded, children and young people's rights are being denied across a number of fronts from

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<sup>1</sup> Rosen, M., (2018) (available at <http://michaelrosenblog.blogspot.com/2018/02/the-data-have-landed.html>) (last accessed 11th August 2019)

<sup>2</sup> See Lundy, L (2013) The United Nations Convention on the Rights of the Child and Well-Being, in *Handbook of Child Well-Being: Theories, Methods and Policies in Global Perspective*. Ben Arieh, A., Casas, F., Frones, I. & Korbin, J. (eds.). Springer, p. 2439-2462 at p. 2453.

the denial of important information to the absence of a rights-respecting culture within their schools. And although from a purely objective standpoint it would appear that their right to education is being upheld by the fact of their enrolment and attendance at school, engaging with them on a deeper empirical level has revealed a number of issues which evidence clear children's rights concerns across a number of areas, which otherwise an examination of the net school attendance level, would not pick up. This further demonstrates that engaging with children and young people's direct and personal experiences of education can expose inadequacies and ultimately lead to more positive rights-fulfilling outcomes for them.

This chapter will further argue that much of the existent measurement tools within the field of socio-economic rights law are insufficient to determine the extent to which children's education rights, and specifically their procedural rights therein, such as participation and whether their best interests are taken in account, are being progressively realized. It will firstly set out the function and importance of measuring the progressive realization of human rights fulfilment. This is necessary as an understanding of the foundations of human rights measurement, the importance attached to it and its position within socio-economic rights law and scholarship enables us to more clearly appreciate the limitations, and indeed opportunities, which measuring human rights entails. Following on from this, the key mechanisms which are routinely deployed to assess and measure the enforcement of children's socio-economic rights, including indicators, mainstreaming, children's rights budgeting and children's rights impact assessments (CRIAs) will be examined in order to understand the extent to which they accurately capture children's rights *in* education. By drawing further on the empirical evidence generated by this thesis, it will be argued that a more sustained engagement with the principle of progressive realisation is necessary to overcome the shortcomings of the procedures which currently exist to ensure children's rights are being upheld and delivered. Therefore, new conceptualisations are needed if progressive realization is to remain faithful to its legal and conceptual promise.

### **6.1. Measuring Human Rights - Why we do it?**

Measuring state compliance with their human rights obligations is a critical function in holding them to account for their human rights commitments.<sup>3</sup> Post hoc in nature and part of the wider

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<sup>3</sup> For a comprehensive exposition on the measurement of human rights, see Landman, T., & Carvalho, E., (2010) *Measuring Human Rights*, Routledge, New York.

legal and infrastructural apparatus which comprises human rights mainstreaming, measuring and monitoring human rights plays a significant role in highlighting the human rights experiences of certain population groups and can expose possible inadequacies, or even indirect discriminatory practices, which may impede the enjoyment of such rights by those groups. Prior to engaging with the legal and practical features which comprise human rights measurement however, it is firstly necessary to contextualise it as part of the broader mainstreaming family.

Described as the “conscious, systematic and concrete integration of certain values and standards into policies, plans, programmes, priorities, processes and results of the work of an organisation”<sup>4</sup> the concept of mainstreaming has gathered increased national<sup>5</sup> and international prominence since the 1997 communiqué issued by the then UN Secretary-General Kofi Annan, wherein he identified and designated human rights as a ‘cross-cutting’ issue for the UN and its agencies and departments thereunder.<sup>6</sup> Since then, human rights ‘mainstreaming’ has become a powerful tool within the structural and operational framework of the UN and indeed wider intergovernmental<sup>7</sup> and regional organisations<sup>8</sup> as a means of integrating human rights values into their governance and productivity structures. From a children’s rights perspective, the task of mainstreaming has also gathered considerable momentum. Drywood offers cause for optimism at EU level regarding the integration of children’s rights within Union law and policy by highlighting that fact that within the immigration and asylum arena for example, “young people are successfully embedded in the conscience of the institutions, with the result that frequent references to their needs and rights are found within legislation”.<sup>9</sup>

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<sup>4</sup> See Sissay Alemahu Yeshanew (2014) Mainstreaming Human Rights in Development Programmes and Projects: Experience from the Work of a United Nations Agency, *Nordic Journal of Human Rights* (2014) Vol. 34, No.2, 372 – 386, at p. 372.

<sup>5</sup> For example, see section 75 Northern Ireland Act and section 19 Human Rights Act 1998.

<sup>6</sup> See United Nations General Assembly, (1997) Renewing the United Nations: A Program for Reform, Report of the Secretary-General, A/51/950, 14<sup>th</sup> July 1997, at para 78.

<sup>7</sup> See for example, Fujita, S., (2011) The Challenges of Mainstreaming Human Rights in the World Bank, *The International Journal of Human Rights*, Vol.15, No.3, March 2011, 374 – 396 & Mason Meier, B., and Ayala, Ana S., (2014) The Pan American Health Organisation and the Mainstreaming of Human Rights in Regional Health Governance, *Journal of Law, Medicine & Ethics*.

<sup>8</sup> For example, from an EU perspective, the Treaty of Amsterdam (1997) amended the Treaty of European Union (TEU) by promoting gender equality between men and women (Art 3(2)).

<sup>9</sup> See Drywood, E., (2011) ‘Child-Proofing’ EU law and policy: interrogating the law-making processes behind European asylum and immigration provision, *International Journal of Children’s Rights*, Vol. 19, issue 3, p 405 – 428, at p. 425. For more on mainstreaming children’s rights at EU level, see European Commission Recommendation of 20/2/2013, *Investing in children: breaking the cycle of disadvantage*, (2013/112/EU) which explicitly outlines that mainstreaming children’s rights is a central feature to combat child poverty and social exclusion through Union policies.

Indeed, in her development of a model for mainstreaming children's rights into EU law and policy, Mieke Schuurman highlights that the 'most important reason for effective mainstreaming of children's rights in EU policies and legislation is that this would lead to better compliance with the CRC'.<sup>10</sup> Schuurman's model embraces seven interlinking steps which she contends are necessary prerequisites for the effective mainstreaming of children's rights. She argues that such a model would ensure that children's rights and the CRC would be at the heart of the EU's policy and legislative processes. Although expressed in the context of EU law and policy, Schuurman's model is important as the steps she outlines explicitly relate to the mainstreaming of children's rights and therefore possess important transferable qualities. The first of these steps is the need for political will and leadership. In this regard, she refers to the Rights of Children and Young Persons (Welsh) Measure 2011 as an example of political commitment to strengthening children's rights within a given region. While a comparable legislative schema was introduced in Scotland pursuant to the Children and Young People (Scotland) Act 2014, no comparable provisions have however been introduced in either England or Northern Ireland. The second step Schuurman alludes to is the need for awareness, capacity and resources in the services responsible. By this she means that political will on its own does not equate to successful mainstreaming. Rather, officials and politicians need to be trained on children's rights. The third step is the need to instil the commitment to use the CRC as the starting point. She argues that evidence shows that placing the CRC at the centre of primary law facilitates inclusion of a children's rights perspective within secondary legislation and budgetary instruments. Schuurman invokes the examples of Austria and Ireland as examples where the re-centralisation of the CRC within the primary legislative framework has embedded children's rights within those respective countries. The fourth step outlined is the need for mainstreaming to be comprehensive and apply equally to legislation, policy and funding, and throughout the policy cycle. This should ensure that mainstreaming applies not only to traditional legislative enactments but also to 'soft-law' and policy measures, funding and programming and judicial proceedings. The fifth step outlined is the need for the systematic application of impact assessments. Although these will be discussed later, Schuurman states that that impact assessment should be both *ex ante* and *ex post* in nature. The sixth step outlined is the necessity for all relevant stakeholders to be consulted and involved in the decision-making process. Citing the French Child Protection Act as an example where mainstreaming

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<sup>10</sup> See Schuurman, M., (2016) Developing a Model for Mainstreaming Children's Rights into EU Law and Policy, in Stalford, H., & Iusmen, I. (2015). *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions* (1 ed.). H. E. Stalford (Ed.), Opladen: Barbara Budrich Publishing at p. 54.

contributed to the Act, in that all relevant sectors were involved in the development of the legislation, Schuurman argues that all interested parties should be involved in the process of agreeing on a law or policy. Lastly, Schuurman states that the views and experiences of children and young people should be sought and taken seriously. In acknowledging that children are best placed to define what problems they have and what solutions work for them, Schuurman reiterates that while children have a right to express their views on all matters which affect them pursuant to Article 12 CRC, listening to children is not a policy at the heart of the EU project.<sup>11</sup> Thus, in sum, human rights and children's rights mainstreaming operates as an overarching objective in which the primary aim is to better rights-proof the actions and activities of a particular organisation or institution. Monitoring and measuring the success of such policies plays a critical role in those efforts.

In their assessment of the purpose of human rights measurement, Langford and Fukada-Parr outline three principal reasons underpinning their objective.<sup>12</sup> The first relates to human rights monitoring to ensure states are actually complying with their legal obligations. The second is advocacy and the potential to build on the monitoring process to advocate for policy and practice changes. The third purpose is what they broadly describe as "explanatory"; namely the ability of such information to help us understand better the connection "between human rights and other social and political processes".<sup>13</sup> In the same vein, Clair Apodaca argues that such measures "are critical in obtaining an overall picture of the realization of these rights and in assessing their progress over time",<sup>14</sup> while Sally Engle Merry concedes that there "has clearly been a turn to measurement in human rights monitoring".<sup>15</sup> However, the historical legal and political debates which centred around the validity of socio-economic rights as outlined in chapter four, and which ultimately delayed their legal recognition, has also arguably impeded the development and refinement of the methods established to monitor them.<sup>16</sup> For example,

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<sup>11</sup> Ibid, at p. 70.

<sup>12</sup> Lanford, M., & Fukada-Parr, S., (2012) The Turn to Metrics, 30 *Nordic Journal of Human Rights*, pp. 222 – 238 at p. 225– 227.

<sup>13</sup> Ibid at p.227.

<sup>14</sup> See Apodaca, C., (2007) Measuring the Progressive realization of Economic, Social Rights, in Hertel, Shareen and Minkler, L., (eds.) *Economic Rights: Conceptual, Measurement and Policy issues*, Cambridge University Press at p.165.

<sup>15</sup> See Merry, Sally, Engle (2014) Human Rights Monitoring and the Question of Indicators, in Goodale, M. (ed.) *Human Rights at the Crossroads*, (Oxford University Press at p. 142.

<sup>16</sup> For example, Porter states that "Up until the mid-1990's or so, the unique provision of progressive realization of ESC rights was seen by many as proof that ESC rights should be understood as aspirational goals of social and economic policy in contrast to obligations of immediate application, subject to judicial remedy, as civil and political rights were characterised". See Porter, B (2015) *Rethinking Progressive Realization: How Should it be Implemented in Canada?* Background Paper for a Presentation to the Continuing Committee of Officials on Human Rights, (Social Rights Advocacy Centre).



the ICESCR did not have its own treaty monitoring body until 1985<sup>17</sup>, some 19 years after its entry into force, despite the fact that its sister convention, the International Covenant on Civil and Political Rights, was credited with its own distinct monitoring body from the outset.<sup>18</sup> Playing a form of legal catch-up, it was not until the late 1980s that the international community began to meaningfully engage with the realization of socio-economic rights by asking, in a preliminary report on the realization of such rights in 1989: “what are the specific legal features of economic, social and cultural rights and of the means of their realization.”<sup>19</sup> In a follow up progress report in 1990,<sup>20</sup> the UN had begun to build on their somewhat tentative engagement with socio-economic rights realization by aligning the principle of progressive realization with the use of indicators<sup>21</sup> such that by the Rapporteur’s final report in 1992,<sup>22</sup> the connection between both had solidified. This culminated in the Rapporteur stating that “indicators probably provide the most effective means of measuring the progressive achievement of the rights found in the Covenant”.<sup>23</sup> Widely considered as the predominant method of human rights measurement, the use of indicators will be considered below.

In his contribution, Landman argues that measuring human rights possess four key significant functions. Firstly, they provide a contextual description of the information upon which measures of human rights are based.<sup>24</sup> Secondly, measurement enables the classification of human rights into differentiated groups, including rights which fall into either civil and political rights or socio-economic rights. Thirdly, it allows for mapping to take place which provides further evidence of patterns of violations (or indeed, compliance) both across and within states. Lastly, measuring human rights allows for secondary analysis to take place which consequently facilitates inferences to be drawn, theories about violations to be tested, and for recommendations to be made which can be fed into policy formulation processes.<sup>25</sup> Indeed, in her assessment of the challenges of measuring the realization of children’s rights specifically,

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<sup>17</sup> The Committee on Economic, Social and Cultural Rights was established under ECOSOC Resolution 1985/17 of 28 May 1985.

<sup>18</sup> See work of the UN Human Rights Committee for their work on the ICCPR.

<sup>19</sup> See UN Economic and Social Council, *Realization of Economic, Social and Cultural Rights*, Preliminary report prepared by Mr. Danilo Turk, E/CN.4/Sub.2/1989/19, at para 28.

<sup>20</sup> See UN Economic and Social Council, *Realization of Economic, Social and Cultural Rights*, Progress report prepared by Mr. Danilo Turk, E/CN.4/Sub.2/1990/19.

<sup>21</sup> “Indicators can provide one means of assessing progress over time towards the “progressive realization” of these norms” *ibid* at para 7.

<sup>22</sup> See UN Economic and Social Council, *Realization of Economic, Social and Cultural Rights*, Final report prepared by Mr. Danilo Turk, E/CN.4/Sub.2/1992/16.

<sup>23</sup> *Ibid* at para 63.

<sup>24</sup> See Landman, T., (2004) *Measuring Human Rights: principle, Practice and Policy*, 26 *Human Rights Quarterly*, pp 906 – 931, at p. 907.

<sup>25</sup> *Ibid*, generally, at page 9.

Carvalho<sup>26</sup> highlights not only the challenge presented by the dilution of states' commitment to implement their obligations pursuant to the CRC by "depositing sweeping reservations to one or many provisions"<sup>27</sup> but also of the failure both within and without academia to systematically engage with "mapping the operationalisation of children's rights by States at the international, national and regional level".<sup>28</sup> Central to that mapping and within the context of children's socio-economic rights, is the need to ascertain the level of progressive realization of each of the rights in question. And central to such efforts is the need to engage with the obligations which flow from those rights so that all their aspects, both substantive and procedural, are being progressively realized. As Lundy argues: "A crucial factor in the success of a strategy of progressive realization is a set of enforcement mechanisms which ensure that there is a process for identifying progress so that there is sustained international pressure to advance".<sup>29</sup> In the context of the right education, this would mean that children's rights to, in and through education are not only being progressively realized, but also the level and extent of that realization being subject to adequate tracking and monitoring.

As Apodaca further argues, the importance of measuring the progressive realization of socio-economic rights resides in the fact that such measures "are essential to reveal the extent to which economic and social rights are or are not enjoyed in practice".<sup>30</sup> In this regard, the task of measurement plays an important accountability function, but also, more critically, for challenging what Landman calls the "continuing disparity between official proclamation and actual implementation of human rights protection".<sup>31</sup> In the context of socio-economic rights specifically, their legal and conditional connection on the principle of progressive realization could, if left unmonitored, potentially enable states to fall back on the inherent latitude which the principle permits to justify either non-realization or delayed or denied realization. Therefore, to avoid the principle's legal implosion, or self-capitulation, it must be capable of measurement and enforcement. It must have bite and states must be held to account in terms of their compliance with the principle as failure to do so would potentially weaken, if not fatally undermine, the realization of such rights. However, from a children's rights perspective, the principle has assumed a rather muted status and has not underpinned in any significant or

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<sup>26</sup> Carvalho, E., (2008) Measuring Children's Rights: An Alternative Approach, *The International Journal of Human Rights*, 16, pp. 545 – 563.

<sup>27</sup> Ibid at p. 546.

<sup>28</sup> Ibid.

<sup>29</sup> See n (2) above at p. 2453.

<sup>30</sup> See n (12) above at p. 173.

<sup>31</sup> See n (24) above at p. 907.

influential manner, the work or guidance of the CRC Committee. Relatedly, in their examination of the status of human rights in the globalized world, Hafner - Burton and Tsutsui<sup>32</sup> argue that the international institutionalization of human rights has been “a double-edged sword” which has generated a “paradox of empty promises”.<sup>33</sup> This, they argue has been triggered by weak treaty monitoring systems which on the one hand embolden treaty ratification but on the other, lack the mechanisms to enforce the commitment to implement the human rights obligations expected of states. Indeed, their warning underscores the criticality of the issue of enforcement. In his recent contribution to children’s rights scholarship, Doek argues that: “The major challenges for the State Parties to the CRC has been and will continue to be the progressive and full implementation of the CRC”.<sup>34</sup>

However, central to the process of assessing the extent of the progressive realization of children’s socio-economic rights is the need to obtain what Chapman and Russell call “good quality data and statistical sophistication”.<sup>35</sup> The importance of this has been highlighted by the Committee on the Rights of the Child who have stated that the: “Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation.”<sup>36</sup> That importance was further echoed by the Dutch children’s charity KidsFoundation, who stated that the disaggregation of data “collected on the situation of (particular groups of) children in a (particular) country, are important drivers of decisions on the development of children’s rights. Better collection and analysis of data can assist in realizing and protecting the rights of all children as decisions can be taken on the specific needs of particular groups of children, for example based on income, sex, age, race or ethnicity”.<sup>37</sup> Such articulations further reflect what Ennew and Miljeteig wrote in 1996 when they argued that the effective monitoring of the CRC demanded knowledge of whether “specific groups of children are having their rights violated

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<sup>32</sup> Hafner-Burton, E., & Tsutsui, K., (2005) Human Rights in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology* Vol. 110, No. 5 pp. 1373-1411.

<sup>33</sup> Ibid at p. 1378.

<sup>34</sup> See Doek, J., (2019) The Human Rights of Children, in Kilkelly, U., & Liefwaard, T., (eds.) *International Human Rights of Children*, (Springer) at p. 23.

<sup>35</sup> Chapman, A and Sage, R. (2002) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* Intersentia: Antwerp, at p. 5.

<sup>36</sup> Committee on the Rights of the Child, General Comment No.5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 2, 42, and 44, para 6), CRC/GC/2003/5 at para 48.

<sup>37</sup> See <https://www.kidsrightsindex.org/Portals/5/KRI%202019/The%20KidsRights%20Index%202019%20Report.pdf?ver=2019-05-09-150422-647> last accessed 2/7/2019)

or not met”.<sup>38</sup> Further to this, they argued that such knowledge required “disaggregation according to social factors affecting children’s lives, such as gender, geographical location, ethnicity, religion, caste and socio-economic group”.<sup>39</sup> Although expressed over twenty years ago, their arguments retain much force in today’s climate regarding school exclusions where the statistical evidence clearly indicates the increased probability of certain children becoming excluded from school over others.<sup>40</sup>

However, as will be outlined below, much of the current mechanisms which monitor and track the progressive realization of children’s socio-economic rights do not adequately or sufficiently engage with its multi-dimensional elements. They do not assess the extent to which children’s rights within the educational setting are in fact being upheld. They do not use the language of progressive realization either in its overarching generalist formulation or with its identifiable and distinct elements. On a more profound level, and specifically within the context of the right to education, they do not examine the extent to which education is being realized in terms of the 4A framework as outlined in chapter three nor are the CRC’s four guiding principles central considerations within the measurement of educational rights. Rather, the overwhelming common thread which underpins socio-economic rights emphasises and privileges the quantitative and macro-statistical account of human rights realization and does not place equal weight on, nor accord sufficient attention to, the qualitative and subjective enjoyment of those rights. This is overtly problematic as determining whether states are in fact progressively realizing their children’s socio-economic rights commitments demands such evidence. Indeed, the absence of such evidence could arguably mask or conceal regressive, discriminatory or even illegal practices. Take for example the increasing phenomena of home education in the UK as an illustration of this. In her 2019 report on how children disappear from English schools,<sup>41</sup> the Children’s Commissioner for England highlighted several issues which directly undermine the progressive realization of children’s educational rights. In her focus on home education, which is itself entirely lawful,<sup>42</sup> though subject to much debate<sup>43</sup> the Commissioner

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<sup>38</sup> Ennew, J., & Miljeteig, P., (1996) Indicators for Children’s Rights: Progress report on a Project, 4 *The International Journal of Children’s Rights*, pp. 213–236 at p. 222.

<sup>39</sup> Ibid.

<sup>40</sup> See chapter three.

<sup>41</sup> See Children’s Commissioner for England (2019) *Skipping School: Invisible Children, How children disappear from England’s Schools*,

<sup>42</sup> Home education is permitted under section 7 of the Education Act 1996 which states that parents must educate their children at school “or otherwise”.

<sup>43</sup> See for example, Fineman, M.A., & Shepherd, G. B., (2016) Homeschooling: Choosing Parental Rights over Children’s Interests, [University of Baltimore Law Review, Vol. 46, No. 1.](#) & Monk, D., (2004) Problematising Home Education: Challenging “Parental Rights” and “Socialisation” *Legal Studies* (2004) Vol 24(4): 568-598.

noted the complete lack of reliable statistical data on children being home educated, owing to a lack of formal registration requirements.<sup>44</sup> This presents multiple difficulties in determining their level of educational progress. This becomes even more problematic given the evidence that some parents are educating their children in either illegal or unregistered schools.<sup>45</sup> However, the issue of home education is more nuanced and multi-layered than the simple parental withdrawal of the child from school. As the Commissioner notes, “clear indications”<sup>46</sup> exist which show schools are either not meeting the needs of children, specifically those with disabilities, or are deliberately making it harder for them to succeed, which consequently result in parents resorting to home education. Further evidence exists of ‘off-rolling’, described by OFSTED, the state body responsible for the inspection of educational institutions, as the practice “of removing a pupil from the school roll without a formal, permanent exclusion or by encouraging a parent to remove their child from the school, when the removal is primarily in the interests of the school rather than in the best interests of the child”.<sup>47</sup> Such a practice is, disturbingly, often accompanied by the threat of either exclusion or financial penalties for the child’s non-attendance. And again, while no official figures exist in relation to off-rolled children, the practice has become increasingly synonymous with the school’s desire to improve their attainment results and subsequent positioning on educational league tables at the expense of the child’s right to education.<sup>48</sup> Similarly, with an abundance of evidence concerning illegal school exclusions as outlined in chapter three mounting, the necessity for qualitative evidence regarding the actual and subjective on-the-ground realities becomes apparent.

While the examples so far have centred on the child’s right to education, similar rights-respecting deficits regarding children’s rights in education were adduced within the investigation herein. Indeed, one of the key findings emanating from the research and as outlined in the previous chapter was that children and young people felt that their rights were not respected within the schools. Similar feelings were further recounted in a recent study by the English Children’s Commissioner into children excluded from mainstream schools in

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<sup>44</sup> See n (41) above at p. 7.

<sup>45</sup> *Ibid* at p.14.

<sup>46</sup> *Ibid* at p.7.

<sup>47</sup> OFSTED (2018) *The Annual Report of Her Majesty’s Chief Inspector of Education, Children’s Services and Skills 2017/18* at p. 50. See also chapter three for discussion of this.

<sup>48</sup> See Long, R and Danechi, S (2019) *House of Commons Library briefing paper: number 08444, 11 April 2019: Off-rolling in English schools. [ Briefing paper (House of Commons Library)]*.

England where clear evidence of a rights – deficient culture within such schools was evident.<sup>49</sup> Such a reality was despondently summed up by one 15 year old girl who stated:

*“..the only reason I had an attitude against them is because my mums always told me you respect people who respect you, if they don't respect you don't respect them back, they don't deserve it and they never respected me from day one, ever.”<sup>50</sup>*

(15 year old girl)

In the context of measuring the progressive realization of children's rights, the above finding raises a number of questions. Firstly, the issue of how one can track and monitor whether children's rights are being upheld within schools becomes a concern. This requires data beyond mere net enrolment, attendance or drop-out figures. It requires data itself from the school and/or the local authority concerning what specific steps, and a comprehensive breakdown of those steps, were taken to progressively realize children's rights within the school. It requires engagement also with the remaining elements which comprise progressive realization including an assessment of whether all maximum available resources were used and whether such measures were non-discriminatory and non-retrogressive in their application. In practical terms, this could include for example the provision of evidence regarding the number of schools that have signed up to UNICEF UK Rights Respecting Schools initiative<sup>51</sup> which fosters and rewards the adherence to children's rights within schools. It could also include, more broadly, a breakdown of the percentage of schools, at both primary and secondary level within the specific local authority area, that are engaging with the UNICEF scheme. This in many respects would complement the national statistical data regarding the overall measurement of the realization of the right to education. Secondly, the issue of progressively tracking the enjoyment of the right to education necessitates the combination of both quantitative and qualitative data and an examination of that information over time to assess levels of improvement or regression. Combining both sets of information provides a more holistic and accurate account of the true extent of the realization of the right in question. In the government's most recent submission to the Committee on the Rights of the Child regarding

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<sup>49</sup> See Office of the Children's Commissioner for England, (2019) *Exclusions: Children excluded from mainstream schools*, (May 2019).

<sup>50</sup> Ibid.

<sup>51</sup> See <https://www.unicef.org.uk/rights-respecting-schools/the-rresa/about-the-rresa/> (last accessed 26<sup>th</sup> September 2019).

their performance under the CRC,<sup>52</sup> they outlined much progress regarding the delivery of education in England including the increased rates of child participation within schools through the school council system<sup>53</sup> and their reiteration of the statutory guidance concerning school exclusions that excluded children should be “supported to participate at all stages of the exclusion process”.<sup>54</sup> However, what the submission does not tell us is whether these student councils are representative of the student body as a whole or furthermore to what extent do schools and local authorities support and enable children and young people participate within the exclusion process itself. Indeed, such evidence would require direct engagement with young people themselves on these issues and as chapter two affirmed, the progressive realization of children’s socio-economic rights necessitates this engagement. However, this is not overly unsurprising as an examination of the Committee on the Rights of the Child’s reporting guidelines,<sup>55</sup> which demarcates the content and form of the submission by national authorities to the Committee, reveals that in the specific area of education, the guidelines very visibly emphasise the measurement of the quantifiable aspects of the right. This includes the obligation on states to provide for example, information of budgetary allocations on delivering education, existent levels of literacy within the state, the provision made for indigenous education, the steps taken to secure primary, secondary and higher education and the steps taken to encourage school attendance, amongst others.<sup>56</sup> In sum, the requirements specify, and favour, a macro-statistical account of the extent to which states are realizing the right to education. And while the overarching macro-statistical evidence provides us with a broad based picture of a particular human rights situation and can highlight issues such as net enrolment, net-completion, net-exclusion rates or the amount of children in receipt of free school meals, they do not provide us with any evidence as to whether children’s rights are being progressively realized within the education system itself. The task therefore is to consider how, in terms of moving forward, can the measurement of the progressive realization of education (and other socio-economic rights more broadly) be fully and accurately captured.

In the context of education and without placing a substantial burden on the state, measures could be taken to enhance the role and capability of the student councils themselves. Given that

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<sup>52</sup> See Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Fifth periodic reports of States parties due in 2014, United Kingdom, 6 March 2015.

<sup>53</sup> *Ibid* at para 187.

<sup>54</sup> *Ibid* at para 204.

<sup>55</sup> Committee on the Rights of the Child, General guidelines for periodic reports: 20/11/96. CRC/C/58. (Basic Reference Document) Adopted by the Committee at its 343rd meeting (thirteenth session) on 11 October 1996.

<sup>56</sup> *Ibid* at para’s 106–111.

95% of English schools possess a student council,<sup>57</sup> their functions could be extended and if properly resourced, could result in the establishment of a valuable channel through which children's subjective views and experiences concerning their education could be ventilated. More joined up thinking could result in such views being transmitted to the local authorities, regional ombudspersons and ultimately the Department of Education. Enhancing these councils would not necessitate the investment of huge resources but rather would involve taking practical steps to strengthen the capacity of existent structures which would clearly have a positive and rights-fulfilling outcome. This would also result in the incorporation of direct qualitative evidence into educational matters and bring about a change in the way in which the progressive realization of education is measured.

## **6.2. Measuring Education**

Measurement is a fundamental aspect of educational law and policy at both international and domestic level. In relation to the former, this is best exemplified by the OECD's triennial Programme for International Student Assessment (PISA) which assesses children globally in reading, mathematics, and science. With results from the 2018 PISA due for release in December 2019,<sup>58</sup> an examination of the 2015 results reveals some common issues regarding socio-economically disadvantaged children. For example, PISA 2015 results demonstrated that socio-economic and immigrant status were associated with significant differences in student performances with disadvantaged students scoring 88 points lower in science than advantaged students, across OECD countries.<sup>59</sup> The results further highlight that children falling into these categories, and specifically the former, were also more likely to have repeated a grade<sup>60</sup> and to have skipped school.<sup>61</sup> However, while the results provide an overarching snapshot of the level of assessment across three subjects at OECD level, they do not tell us about the nature of state compliance regarding the delivery of educational commitment's, nor do they provide any detail on the individual experience of children and young people themselves.

Likewise, at the domestic level in England, the measurement of educational performance is a key aspect of the educational infrastructure. An examination of some recent governmental data highlights persistent inequities in the level and extent of educational attainment by specific

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<sup>57</sup> See n (53) above.

<sup>58</sup> See <http://www.oecd.org/pisa/> (last accessed 19<sup>th</sup> July 2019).

<sup>59</sup> See <http://www.oecd.org/pisa/pisa-2015-results-in-focus.pdf> (last accessed 19<sup>th</sup> July, at p. 6).

<sup>60</sup> Ibid at p. 10.

<sup>61</sup> Ibid.



groups of children. For example, for children from either a Roma Gypsy or Irish Traveller heritage (who already suffer from a higher rate of school exclusions than others), their educational attainment is comparably lower than their non-gypsy or non-traveller counterparts. In 2017 for instance, 61% of all pupils in England attained the expected educational standard for English reading, writing and mathematics while, within these figures, only 16% who identified as Gypsy/Roma attained these standards while the figures for those identifying as Irish travellers was 20%.<sup>62</sup> Such figures correspond with the 2016 attainment data which shows that of the 53% of pupils who attained the expected educational outcomes across these subjects, Gypsy/Roma children were the lowest performing group with only 13% achieving the expected standard while the attainment rate among those identifying as Irish traveller was 19%.<sup>63</sup> For these groups of children, we see an attainment gap which has not progressively improved, but rather flatlined. Likewise, attainment levels for GCSE achievement was comparably lower for such children in comparison to the national average. In 2017, 10.7% of children identifying as Roma/Gypsy achieved GCSE's in English and Math at grade 4/C or above while 22% of children of Irish traveller descent achieved similar grades. Both figures pale in comparison to the national average of 64% for non-Roma/Gypsy and Traveller children.<sup>64</sup> Such disparities in educational attainment emerges in relation to representation at third and higher-level education with both groups consistently among those underrepresented within tertiary education.<sup>65</sup> However, the educational disadvantage which both groups suffer have been well-documented within the literature with both enduring segregation and outright racial discrimination persisting.<sup>66</sup> More recent evidence shows that, from 2017, there was a 400% increase of children from Irish traveller heritage and a 933% increase in Roma children living in state care in England in comparison to the 2009 figures.<sup>67</sup> While the causes of such an increase are of course complex and deep-seated, they cannot be divorced from the wider and almost consistently negative life experiences that such children endure by virtue of their ethnic identities. In the context of measuring the outcomes of excluded children, the evidence is

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<sup>62</sup> See Department of Education (2018) *National curriculum assessments at key stage 2 in England. 2017 (revised)*.

<sup>63</sup> Department of Education (2016) *National curriculum assessments at key stage 2 in England. 2017 (revised)*.

<sup>64</sup> Department of Education (2018) *Key Stage 4 and multi-academy trust performance 2018 (revised)*.

<sup>65</sup> Mulcahy, E., et.al., (2017) *The underrepresentation of Gypsy, Roma and traveller pupils in higher education: A report on barriers from early years to secondary and beyond*. Kings College London.

<sup>66</sup> See Peleg, N., (2018) Marginalization by the Court: The case of Roma children and the European Court of Human Rights, *Human Rights Law Review*, vol.18, pp. 111 – 131 & Harris, N, Ryffe, D, Scullion, L & Stendahl, S., (2017), 'Ensuring the Right to Education for Roma Children: An Anglo-Swedish Perspective', *International Journal of Law, Policy and The Family*, vol. 31, no. 2, pp. 230-267.

<sup>67</sup> See Allen, D, D. & Riding, S., (2018) *The Fragility of Professional Competence: A Preliminary Account of Child Protection Practice with Romani and Traveller Children in England*, European Roma Rights Centre, Budapest, Hungary.

equally compelling with the recent Timpson Review confirming that just over one third of children who complete Key Stage 4 in an alternative provision centre, where excluded children naturally end up in, go on to be NEET (Not in education, employment or training).<sup>68</sup>

The emphasis on educational attainment has also driven key legislative and policy developments regarding children's education in England such that educational attainment and a consequential results-driven culture has arguably become the dominant ideology underpinning the delivery of education.<sup>69</sup> This is further evident in the government's vision for the future trajectory of English education as contained in the white paper *Educational Excellence Everywhere*<sup>70</sup> where the emphasis on academic attainment is firmly interwoven within the state's educational plans. Further aligned with the notion of attainment has been the role of parents as the ultimate "consumers"<sup>71</sup> of their children's education within a wider marketized environment<sup>72</sup> where schools are measured, ranked and judged according to attainment results. In his examination of the development of parental consumerism within the field of education, Harris argues that the intensification of such a trajectory has, from the 1980s onwards, hindered "the development of the child's independent rights in this field in contrast to the progress which has been made in other fields, most notably under the Children Act 1989".<sup>73</sup> Similarly, according to the Centre for Longitudinal Studies at the Institute of Education at the University of London: "Since the 1980's, governments of both parties have shared a common core of education policy, consisting of the two principles of accountability (League tables) and competition".<sup>74</sup> These league tables published annually, and which constitute "a fundamental component of the Government's school accountability by results

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<sup>68</sup> See Department of Education, (2019) Timpson Review on School Exclusions, (May 2019) at p. 8.

<sup>69</sup> For more, see Harris, N (2012), "Local Authorities and the Accountability Gap in a Fragmenting Schools System." *Modern Law Review*, vol. 75, no. 4, pp. 511-546.

<sup>70</sup> See Department of Education (2016) *Educational Excellence Everywhere*, (March 2016).

<sup>71</sup> See Harris, N. (2005) "Empowerment and State Education: Rights of Choice and Participation." *Modern Law Review*, vol. 68, no. 6, pp. 925-957.

<sup>72</sup> Writing shortly after the enactment of the Education Reform Act in 1988, Deem and Davies argued that it represented 'a galaxy of New Right ideas about education, including a desire to introduce more competition, choice and diversity and a concern to establish a free market within the state education system'. See Deem, R., & Davies, M (1991) Opting Out of Local Authority Control -Using the Education Reform Act to Defend the Comprehensive Ideal: a case study in educational policy implementation, *International Studies in Sociology of Education*, 1:1-2, 153-172.

<sup>73</sup> See Harris, N., (2000) Education Law: excluding the child, *Education and the Law*, Vol.12. No1, at p. 43.

<sup>74</sup> Connelly et al (2014) *Primary and Secondary Education and Poverty Review*, Centre for Longitudinal Studies, University of London, at page 10.

regime”<sup>75</sup> both influence and underpin parental educational decisions as they allow inferences to be drawn about school performance and positioning.<sup>76</sup>

However, such findings cannot (and should not) be viewed in isolation from how schools apply, or even manipulate, the school exclusion policy. As far back as 2003, Macrae et.al, argued that a culture of school targets and performance outcomes were clear realities when it came to the decision to exclude children from school.<sup>77</sup> This was confirmed by Gazeley who stated that English educational policy “had made measurement of performance a central preoccupation in schools”.<sup>78</sup> Taken together with the mounting recent evidence of schools off-loading and/or illegally excluding pupils as discussed in chapter three, the very question of children’s de jure and de facto access to, and enjoyment of, education becomes a critical concern.

Those concerns were ominously summarised in Ofsted’s most recent annual review which showed that between January 2016 and January 2017, some 19,000 pupils were dropped off school rolls between Years 10 and 11 – which represented around 4% of all pupils.<sup>79</sup> More worryingly around half of those children did not reappear on the roll of any other state-funded school<sup>80</sup>, with Ofsted further uncovering what they call “exceptional levels”<sup>81</sup> of off-rolling in around 300 schools. Further evidence of off-rolling was again uncovered in a 2018 YouGov survey of 1,002 teachers; 360 of which were from the primary sector and the remaining 642 from the secondary school system.<sup>82</sup> Of the responses received, 66% of teachers confirmed they were aware of the practice while 21% confirmed they had witnessed it happen. Building on the 2017 statistical evidence adduced by the Education Data Lab which led to their conclusions that “in some cases, pupils are being ‘managed out’ of mainstream schools ... with

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<sup>75</sup> See Leckie, G and Goldstein, H., (2017) The evolution of school league tables in England 1992 – 2016: ‘Contextual Value Added’, ‘expect progress’ and ‘progress 8’, *British Educational Research Journal* Vol 43, No. 2, April 2017, pp. 193–212, at p. 193.

<sup>76</sup> Leckie and Goldstein argues that: “One of the principal aims of publishing these tables is to inform parental school choice for pupils who are just about to start secondary schooling (age 11 years)” See Leckie, G and Goldstein, H., (2009) The limitations of using school league tables to inform school choice, *Journal of the Royal Statistical Society*, 172, Part 4, pp.835–851, at p. 836.

<sup>77</sup> See Macrae, S., Maguire, M., & Milbourne, L., (2003) Social exclusion: exclusion from school, *International Journal of Inclusive Education*, 7:2, 89-101.

<sup>78</sup> See Gazeley, L., (2010) The Role of School Exclusion Processes in the ReProduction of Social and Educational Disadvantage, *British Journal of Educational Studies*, 58:3, 293-30, at p. 302.

<sup>79</sup> See OFSTED (2018) *The Annual Report of Her Majesty’s Chief Inspector of Education, Children’s Services and Skills 2017/18*

<sup>80</sup> *Ibid* at p. 26.

<sup>81</sup> *Ibid* at p. 8.

<sup>82</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/734327/Teachers\\_Attitude\\_Survey\\_2018\\_awareness\\_and\\_perceptions\\_of\\_Ofsted\\_Final\\_Report\\_August\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/734327/Teachers_Attitude_Survey_2018_awareness_and_perceptions_of_Ofsted_Final_Report_August_2018.pdf) (last accessed 11th August 2019)

the effect of boosting the league table performance of the school which the pupil leaves”,<sup>83</sup> such evidence of illegality strikes to the heart of children’s education and exposes clear, regressive and unlawful behaviour which is arguably taking hold at the core of our education system. However, these issues, troublesome as they are, and a consequence of the traction which one specific type of educational measurement has had, namely along attainment lines, is also inseparable from the broader human rights emphasis on quantifiable measurement.

### **6.3.Current Mechanisms to Measure the Progressive Realization of Children’s Rights**

As stated earlier, measuring the progressive realization of children’s socio-economic rights is necessary to ensure that states are in fact moving as expeditiously as possible towards the full realization of their socio-economic rights realization. However, the task of measurement has also had a somewhat chequered existence. Fukada-Parr et.al. stated that: “The absence of widely vetted and broadly accepted measurement tools to assess the extent to which state parties ... meet their obligations to fulfil their economic, social and cultural rights obligations has not only frustrated monitoring but also impeded efforts to identify those policies, institutions, programs and measures that foster fulfilment”.<sup>84</sup> The absence of measurement coherence or consistency is evident in the abundance of disparate approaches which exist within socio-economic rights scholarship and practice. From the ‘violations approach’ championed by Chapman<sup>85</sup> which centred on her tripartite assessment of violations resulting from actions and policies on the part of governments,<sup>86</sup> violations related to patterns of discrimination,<sup>87</sup> and violations related to a state’s failure to fulfil the minimum core obligations<sup>88</sup> of enumerated rights<sup>89</sup>, to the SERF (Social and Economic Rights Fulfilment) Index for monitoring economic and social rights, devised by Fukada-Parr et.al.,<sup>90</sup> the history of

<sup>83</sup> See <https://ffteducationdatalab.org.uk/2017/01/whos-left-the-main-findings/> (last accessed 19<sup>th</sup> July 2019)

<sup>84</sup> See Fukada-Parr et.al (2015) Making the Principle of Progressive Realization Operational: The SERF Index, an index for Monitoring State Fulfilment of Economic and Social Rights Obligations, in Haglund, L. & Stryker, R. (eds.) *Closing the Rights Gap*, University of California Press, at p. 242.

<sup>85</sup> Chapman, Audrey R. (1996) A ‘Violations Approach’ for monitoring the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 18 No. 1

<sup>86</sup> Chapman conceptualises such violations as comparable to breaches of civil and political rights with such breaches emanating from State action or through the creation of policies or laws which are hostile to the realization of ESC rights. Ibid at page 43

<sup>87</sup> Chapman states that the duty to ensure the realisation of ESC rights on a non-discriminatory basis includes both positive and negative components and may subsume ‘a firmative action-type’ initiatives which will end both *de jure* and *de facto* forms of discrimination. Ibid at page 44

<sup>88</sup> The minimum core obligations pertaining to ESC rights represent the minimum accepted baseline for the enjoyment of a right which is incumbent on every states party to fulfil. See preceding chapter for discussion.

<sup>89</sup> Chapman argues that a ‘violations approach’ will entail a review process pertaining to the evaluation of compliance with the adoption of ESC rights. Ibid at page 36

<sup>90</sup> See n (25) above.

measuring human rights has been characterised by a plethora of approaches which seek to tackle the broad range of obligations, and indeed complexities, which flow from the duty to realize such rights.

Indeed, the recent OPERA Framework, devised by the Centre for Economic, Social and Cultural Rights has begun to embed itself as a functional and adaptable model to frame and guide a state's socio-economic obligations.<sup>91</sup> Built around a four-stage process which comprises Outcomes, Policy Efforts, Resources and Assessments, the OPERA framework seeks to reflect the multi-dimensional nature of the obligations which the realization of socio-economic rights imposes on states. The concept of outcomes embraces the use of indicators to assess the level of enjoyment of a particular socio-economic right in question. This could include for instance the measurement of school exclusion figures over a period of years to track the enjoyment of the right to education. By further disaggregating the data by gender, ethnicity, poverty or disability, we can see how certain groups of children are having their right to education progressively realized. Policy efforts represent a crucial function within the framework as this aspect centres on what deliberate, targeted and concrete steps the state has in fact taken achieve the full realization of the right in question. This involves both an examination of the quantitative and qualitative evidence to determine the success of such steps and also the processes and procedures through which policies are implemented and delivered. This ensures the values of transparency, particularising, fairness and accountability are upheld. The third step of resources focuses on the use of a state's budgetary resources, pursuant to the concept of 'maximum available resources' to meet the needs of the right in question. However, as this thesis has highlighted, it is important to not just confine the notion of resources to money alone. Resources embrace a wide array of issues and the full arsenal of all potential resources should be deployed to satisfy the realization of the right in question. The final stage of assessment draws together the preceding steps to determine whether the state is in fact achieving its obligations to progressively realize its socio-economic commitments. This stage also includes an appreciation of the constraints the state is under. So, for example, if a state is experiencing an economic downturn, then the steps it has taken will be positioned against that context to ensure that any retrogressive steps were subject to careful limitations, in terms of duration and necessity.

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<sup>91</sup> See Centre for Economic and Social Rights, *The OPERA Framework: Assessing compliance with the obligation to fulfil economic, social and cultural rights*, ([http://www.cesr.org/sites/default/files/the.opera\\_framework.pdf](http://www.cesr.org/sites/default/files/the.opera_framework.pdf)) (last accessed 11<sup>th</sup> August 2019).

From the foregoing assessment, it is clear that the OPERA framework could provide a useful overarching framework to guide a states behaviour in terms of its socio-economic rights commitments. Its inclusion of qualitative evidence in addition to an examination of whether the important procedural steps of participation and accountability were complied with give the framework persuasive appeal. While the issue of resources could be expanded to include non-fiscal measures and the procedural steps enlarged to include an appreciation of the child's best interest principle, the framework possesses much potential moving forward as an example and template for states to follow regarding the realization of their socio-economic rights commitments, including education rights. Indeed, within the specific context of education and school exclusions, one can see how the OPERA framework could bring together both qualitative and quantitative data and move beyond the dominant and enumerative model which currently characterises the measurement of education. With the previous chapter highlighting children's rights deficiencies across a number of areas within the exclusion system from the absence of information rights to the non-application of the child's best-interests principle, the OPERA framework would allow for such deficiencies to be accounted for by recognising these within its emphasis on 'Policy Efforts' and 'Resources' and consequently taking the relevant steps to remedy such deficiencies and deliver on the right to education. However, central to that is the recognition of such deficiencies in the first instance and as OPERA combines both quantitative evidence with more nuanced qualitative and contextual data, it thus provides a more holistic account of a given human rights situation. It also allows for more tailored approaches to be taken concerning the realization of the right in question.

However, aside from the emergence of the OPERA framework, a number of mechanisms have already been deployed by states to measure and monitor their socio-economic rights commitments. These include the use of and adherence to human rights indicators and the application of Children's Rights Impact Assessments (CRIAs) to determine the human rights impact and compatibility of decisions which affect children.

#### **6.4.Human Rights Indicators**

Human rights indicators undoubtedly represent the predominant model of measurement within current human rights scholarship and practice. Firmly part of, and embedded within, the international human rights monitoring system,<sup>92</sup> and described as also as a fixture of the

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<sup>92</sup> For example, see United Nations (2012) *Human Rights Indicators: A Guide to Measurement and Implementation*, Office of the High Commissioner for Human Rights & Monitoring Economic, Social and Cultural Rights, in *Manual on Human Rights Monitoring*, United Nations.

technologies of global governance,<sup>93</sup> human rights indicators command, and have commanded, the broad support the international human rights community.<sup>94</sup> Championed by the Committee on the Rights of the Child who have stated that the evaluation of whether states are complying with their duties under the CRC “requires the development of indicators related to all rights guaranteed by the Convention”<sup>95</sup>, the use of indicators has also been favoured by the Committee on Economic, Social and Cultural Rights.<sup>96</sup> Human rights indicators have further been delineated along three principle lines; namely, structural indicators, process indicators and outcome indicators. Firstly, structural indicators aim to assess the extent to which a state is implementing its obligations pursuant to the socio-economic right as contained within the human rights instrument. This will involve an assessment of the domestic legal, policy and institutional mechanisms used to implement the right within the state. So, looking at the child’s right to education, structural indicators would include whether the right to legally enforceable at the domestic level and does the state have a national educational strategy and policy to deliver the right to everyone. Process indicators differ in the sense that they seek to capture the measures and steps which the state is taking to convert rights into realities. These could include for example, how much resources have been invested into the education system; what laws and regulations have been enacted to deliver the right to everyone on the basis of equal opportunity and non-discrimination, or what redress mechanisms exist for those who are being denied access to their rights. Outcome indicators on the other hand seek to capture the net results of the state’s efforts to realize its socio-economic obligations. By focusing on individual and collective data aggregation, outcome indicators reflect an overall state of human rights enjoyment at a particular time.<sup>97</sup> They may include for example, net enrolment rates, school exclusion rates or academic attainment levels among specific groups of children. Unifying all

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<sup>93</sup> See generally, Davis et al., (2012) Indicators as a technology of Global Governance, 46 *Law & Society Review*, pp. 71 – 100.

<sup>94</sup> Additionally, David McGrogan argues that the use of indicators “has come to occupy a central role in the agenda of the United Nations (UN) treaty-based mechanisms”. McGrogan, D., (2016) Human Rights Indicators and the Sovereignty of Technique, *The European Journal of International Law*, Vol. 27, No.2, pp. 385 – 408, at p. 385.

<sup>95</sup> See n (21) above at para 48.

<sup>96</sup> See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/2000/4, 11 August 2000), paras. 57–8 which refer to the establishment of indicators to monitor the delivery of the right to health. See also, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/2002/11, 20 January 2003), which refer to the need to establish indicators monitoring the right to water. (para’s 53 – 54)

<sup>97</sup> For more on the type of indicators, see n (73) above at pages 33 – 38.

three forms of indicators, however, is their quantifiable focus; namely, their external objective to reduce and combine human rights realization into a statistical tapestry.

In their most reductionist form, indicators “are simply tools to aid understanding ... They are measurements or descriptions that, if recorded regularly, monitor changes over time”.<sup>98</sup> Thus, residing firmly within a methodological framework which falls predominantly within quantitative parameters, their ability to quantify, aggregate and compute information is arguably where their appeal both originated and matured.<sup>99</sup> Described as “numerical representations of complex phenomena”<sup>100</sup>, human rights indicators seek to establish the level of state compliance with agreed human right commitments. As Merry argues, they seek to restore clarity and specificity to the nature of state obligations arising from human rights commitments and consequently, increase accountability through the ability to assess the actions of states in a more precise manner.<sup>101</sup> This has arguably sustained their attraction, as their ability to convert and represent particular phenomena into an accessible and understandable format equips them with a broad allure. Unsurprisingly, therefore, characteristics such as “efficiency” “consistency” “transparency” “scientific authority” and “impartiality” have been ascribed to them.<sup>102</sup> Supporting these attributes, however, is the quantitative aggregations which indicators lend themselves to and the consequent appeal which this has for policy and decision makers. In the field of human rights compliance, that appeal seems to reside along the fact that indicators offer an objective and “seemingly neutral, scale-able and externally verifiable”<sup>103</sup> method to capture the extent to which state obligations are being upheld. Indeed, the UN have been unapologetic in their preferential endorsement of quantifiable indicators by stating that: “Fact based or objective indicators, in contrast with judgment-based or subjective indicators, are verifiable and can be easier to interpret when comparing the human rights situation in a country over time and across populations.”<sup>104</sup> Indeed, in their assessment of the tools used to measure compliance with socio-economic rights obligations, including indicators, Hunt et. al, state that such measures “can strengthen policy- making and other operational interventions, as well as monitoring and accountability of duty - bearers in relation to their legal

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<sup>98</sup> See n (23) above at p. 221.

<sup>99</sup> For instance, Langford and Fukada-Parr argues that such quantified data “is a powerful tool of communication” which offers “clear, comprehensive and simple snapshots of complex situations”. See n (2) above at p. 223.

<sup>100</sup> See n (42) above at p. 76.

<sup>101</sup> See Merry, Sally Engle, (2014) Global legal pluralism and the temporality of soft law, *The Journal of Legal Pluralism and Unofficial Law*, 46:1, pp. 108– 122, at p. 109.

<sup>102</sup> For further discussion on these characteristics, see n (42) above at p 84 – 87.

<sup>103</sup> See n (2) at p. 223.

<sup>104</sup> See n (42) above at 67 – 68.



obligations with respect to ESCR”.<sup>105</sup> However, the task of measuring the progressive realization of socio-economic rights should neither be circumvented nor avoided on the basis of professed methodological ease. Human rights and children’s rights demand rigorous approaches to measuring whether states are progressively realizing their socio-economic commitments.

#### **6.4.1. Limitations of Human Rights Indicators**

Despite the objective appeal of indicators, caution should be exercised regarding their apparent infallibility. While able to condense complex human rights situations into accessible statistical communiqués, the progressive realization of children’s socio-economic rights embraces other important rights-based values such as procedural rights, participation rights and adherence to the child’s best interests; values which are difficult to statistically surmise as they embody a subjective and individuated dimension. For instance, out of the two hundred plus indicators which the global right to education project have developed to assist in the monitoring of the right to education,<sup>106</sup> and which traverse a range of important issues from gender equality, language rights in education, education policy itself, the issues of discipline in schools and the use of resources, amongst others, limited attention was given to the procedural components of realizing children’s rights *in* education. Out of all the indicators, only one referred to assessing whether children could appeal against an exclusion from school before an independent appeal panel,<sup>107</sup> while none of them referred to the child’s best interests, which should guide and frame the delivery of children’s educational rights in their totality. Similarly, in the indicators developed alongside the educational targets associated with Sustainable Development Goal No. 4 on inclusive and equitable quality education,<sup>108</sup> no reference is made to children’s subjective and procedural rights *in* education. While not totally unsurprising given the international developmental focus of the SDGs, their absence nonetheless cannot be divorced from the negligible treatment which qualitative evidence enjoys within the indicators discourse.

In their assessment of the limitations of the current state of global indexes on rights, Langford and Loven highlight five major shortcomings or issues of concern pertaining to the deployment of human rights indicators.<sup>109</sup> The first of these is the issue of “relevance”<sup>110</sup> and specifically

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<sup>105</sup> Hunt et al., (2013), Implementation of Economic, Social and Cultural Rights’ in Scott, S., & Rodley, Sir N., (eds.) *The Routledge Handbook of International Human Rights Law*, (London: Routledge) p. 558.

<sup>106</sup> See Right to Education Project (2013) *The Right to Education: Indicators* (May 2013).

<sup>107</sup> Ibid at indicator A3.5.2.

<sup>108</sup> See <https://sustainabledevelopment.un.org/sdg4> (last accessed 12th August 2019)

<sup>109</sup> See Langford, M., & Kirkebo, T.L., (2019) Children’s Rights Indexes: Measuring Norway’s Performance, in Langford, M., Skivenes, M., & Sovig, K., (eds.) *Children’s Rights in Norway: An Implementation Paradox*, Universitetsforlaget.

<sup>110</sup> Ibid at p. 44.

the question of whether the indicator corresponds with the right being considered. So, in the context of education for example, this would mean whether the indicator fully or accurately captures the right in question. Both authors note, by examining the KidsRights index on education that their education indicators capture the issue of accessibility, and fails to capture issues of quality, affordability, acceptability or discrimination. Additionally, one can also see how the indicator also fails to capture the majority of the 4A framework as outlined in chapter three which is vital to the progressive realization of the right to education as accessibility is but one sub-component of the right. The second issue identified is that of “reliability”<sup>111</sup> and whether the data accurately or reliably reflects the situation under investigation. This also includes the challenges of addressing “human bias” and overcoming naturally occurring subjectivities. The third issue is that of “excessive aggravation”<sup>112</sup> and the limitations associated with broad-based computations which on the one hand may provide overarching information on progress and deficits but on the other hand “often do not provide adequate detail and differentiation”.<sup>113</sup> So for instance, while states may provide information on the number of children who have been excluded from school, they do not provide any detailed information on how their rights were upheld and complied with during the exclusion process. The fourth issue is what they call “action orientation and perverse incentives”.<sup>114</sup> This involves being alert to situations whereby indicators may be too abstractive in their composition in that they either fail to capture the relevant action or worse, the wrong information. Perverse incentives include situations whereby states may prioritize actions which may be quantitatively measured rather than those designed to satisfy the purpose of the indicator in question. The final challenge identified is that of “interpretation and publicity”.<sup>115</sup> This includes the dangers associated with how indicators are in fact interpreted, their methodological foundations and the subsequent hazards associated with relying on results which are arrived at through such processes rather than the actual situation on the ground. Accordingly, they argue that: “As in any other area, qualitative and cross-checking methods are needed for interpretation, and awareness is needed as to how data will be used in the public sphere”.<sup>116</sup>

The warnings pertaining to over-reliance on indicators as an almost unassailable method of measuring the realization of socio-economic rights have been cogently articulated elsewhere

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid at p.45.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid at p.46.

<sup>116</sup> Ibid.

with Corkery et.al., arguing that such methods “do not give a full, nuanced picture of a state’s human rights compliance”<sup>117</sup> and that “qualitative judgment is also essential to contextualize the data”.<sup>118</sup> Indeed, they go further and argue that qualitative methods are important for “uncovering systemic dysfunctions”<sup>119</sup> within the state and for “understanding the broader context”<sup>120</sup> in which it is operating. This, they argue, allows for the construction of a “well-evidenced and holistic argument about rights compliance”.<sup>121</sup>

#### **6.4.2. Indicators and School Exclusions**

Thus far the analysis on indicators has exposed the preference for the adoption of quantifiable summations of the existent state of affairs, to determine the level of enjoyment of a particular socio-economic right. In the context of school exclusions in England, that preference endures. Although annual statistical data is released every year which delineates the extent and prevalence of school exclusions in England and disaggregates that data further along the characteristics of the pupils and the reasons for the exclusions, no qualitative data or empirical evidence accompanies such releases. For instance, while the data enables conclusions to be drawn about the statistical likelihood of particular children getting excluded or may point to an increase or decrease in the exclusion rate for such children, they not tell us about what the experiences of these children were. They also do not elaborate on whether the children themselves were treated fairly by the exclusion process, nor do they tell us about whether important principles such as participation, accountability or the child’s best interests were upheld. Rather, existing as they do as part of the government’s meta-statistical information bank, they lack an equally important empirical analysis. This is important as the preceding chapter has exposed several issues which taken together, seriously impede not only the child’s right to education but are also directly inconsistent with the principle of progressive realization. Be it the lack of information, the negative internalization of a sense of one’s identity, a feeling of not being respected within the school, the absences of participatory opportunities and the failure to apply the child’s best interests principle within the exclusion system, the significance of such qualitative evidence becomes apparent. By adding a further layer of context to the data, such evidence affirms the broader need to move beyond mere reliance on numbers and engage

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<sup>117</sup> See Corkery, et.al., (2012) Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfil ESC Rights: The OPERA Framework, *Nordic Journal of Human Rights*, Vol. 30, Issue 3, pp. 324 – 349, at p. 338.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid at p. 339.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid,

with what McGrogan calls “human judgment and expertise”<sup>122</sup> which he says “cannot be replaced simply with the use of more and better indicators.”<sup>123</sup> Thus, the adoption of the OPERA framework as part of developing and improving domestic education law and policy as outlined earlier may offer a more holistic approach to ensuring children’s rights are progressively realized. This could involve the adoption of the OPERA framework at governmental level as a policy tool to guide and frame the implementation of the state’s socio-economic rights commitments. In the context of school exclusions, this would arguably mean that the multi-dimensional nature of the OPERA framework would allow for a well-evidenced assessment to be made as to whether the exclusions system, and the right to education more widely, was compliant with human rights standards.

### **6.5.Children’s Rights Impact Assessments**

In addition to the foregoing, the use of children’s rights impact assessments has emerged as a significant factor in determining whether states are realizing their socio-economic obligations towards children. A subsection of broader regulatory impact assessments which are “a method of policy analysis ... intended to assist policy-makers in the design, implementation and monitoring of improvements to regulatory systems, by providing a methodology for assessing the likely consequences of proposed regulation and the actual consequences of existing regulation”,<sup>124</sup> children’s rights impact assessments (hereafter ‘CRIAs’) invoke a purely children’s rights focus as their methodological purpose. Such impact assessments can be either *ex ante* or *ex post* in nature. For example, in the context of business activities, the Committee on the Rights of the Child have argued that CRIAs provide a means of “ensuring that the best interests of the child are a primary consideration in business-related legislation and policy development”.<sup>125</sup>

In simple reductionist terms, impact assessments, at least from a theoretical perspective, provide a durable and explanatory foundation upon which regulatory decisions can ultimately be made and defended. However, this will ultimately depend on several factors such as the time

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<sup>122</sup> See n (94) above at p. 391.

<sup>123</sup> Ibid.

<sup>124</sup> Jacobs S, ‘Current Trends in the process and methods of regulatory impact assessment: mainstreaming RIA into policy process’ in Kirkpatrick C and Parker C, *Regulatory Impact Assessments*, (Edward Elgar Publishing 2007) at p.1.

<sup>125</sup> For example, see Committee on the Rights of the Child (2013) General Comment No.16 on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, 17 April 2013, at para 78.

involved in preparing the impact assessment and the robustness and extent of stakeholder engagement. As De Deco argues, human rights impact assessments yield a number of benefits including increased compliance with human rights standards, greater integration of human rights within policy-making, increased accountability by facilitating participation and enabling empowerment by bringing rights-holders closer to policy development.<sup>126</sup> In their identification of the risks, benefits, costs, advantages and disadvantages which attach to a proposed measure, they seek to capture the broad spectrum of potentiality, which after careful examination, provides the evidence base upon which the decision to adopt or reject the measure will be taken. Indeed, that basis finds extensive prevalence in many contexts, both national<sup>127</sup> and international, including the OECD<sup>128</sup> and the EU.<sup>129</sup> As Jacobs argues, the net purpose of such assessments is that they are “aimed at fostering a richer and more informed public debate about important public policy issues”.<sup>130</sup> At the domestic level, the Department of Education have now introduced their own CRIA template as a means to guide and frame the enactment of future legal and policy decisions in the context of children’s education.<sup>131</sup> This is an important step forward in centralising children’s rights within prospective education law and policy and could potentially assume a significant role in the progressive realization of children’s education rights at the domestic level. Two fundamental questions underpin the Department’s new CRIA template. Will the proposed policy or legislation have an impact on children’s rights, and, if such an impact is negative, what changes might be made to mitigate its negative effects? Moreover, with specific references for policymakers to examine the CRC, Optional Protocol’s 1 and 2 which the UK have ratified, the CRC Committee’s Concluding Observations on the UK and the CRC Committee’s General Comments, much potential exists for the Department’s CRIA template to embed children’s rights within current and future education law and policy. Importantly from a children’s rights perspective, the Department’s

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<sup>126</sup> Beco, G. de. (2009). Human Rights Impact Assessments. *Netherlands Quarterly of Human Rights*, 27(2), 139–166.

<sup>127</sup> See for example, in the UK, *The Green Book: Central Government Guidance on Appraisal and Evaluation* (2018) which states that impact assessments “includes the rationale for government intervention, the policy objectives and intended effects, and the costs, benefits and risks of a range of options”. P.12.

<sup>128</sup> See for example, OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries*, [1997].

<sup>129</sup> See for example, *Communication from the Commission on Impact Assessment*, (Com)2002, *Communication from the Commission: Action Plan “simplifying and improving the regulatory environment”*, (Com)2002 & European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, Sec(2011).

<sup>130</sup> See Jacobs, S., *Current Trends in the process and methods of regulatory impact assessment: mainstreaming RIA into policy process*, in Colin Kirkpatrick and David Parker, *Regulatory Impact Assessment*, [2007] Edward Elgar Publishing, at p.18.

<sup>131</sup> Department of Education ([http://clientarea.skillset.co.uk/DfE/Childrens%20Rights\\_v0.3%20-%20Storyline%20output/story\\_content/external\\_files/CRIA%20template.pdf](http://clientarea.skillset.co.uk/DfE/Childrens%20Rights_v0.3%20-%20Storyline%20output/story_content/external_files/CRIA%20template.pdf))

template also makes provision for policymakers to review the compatibility of the proposed legislative or policy measure with the CRC's four interpretative principles, with further provision made also for ensuring that relevant stakeholders, including children and young people, to directly feed into the development of policy and legal development. Additionally, a further requirement is that the Department demonstrates how such views have been taken into account in the development of the law or policy in question.<sup>132</sup> This represents a significant step forward as it ensures, if properly adhered to, that Article 12 CRC is given effect to. However, in her examination of CRIAs, Payne highlights the fact that complying with, or adhering to, CRIAs is not an unproblematic endeavour, and the process can become, and often is, complicated by a variety of factors. These include “the quirks and ambitions of political personalities; the fragmentation of children’s policy across various government departments; the child-unfriendly time lags and delays between planning and implementing policy; and the perceived impediment of directly involving children in policy-making”.<sup>133</sup>

Moreover, while no singular or definitive approach exists in practice which underpins the delivery of impact assessments, they do exhibit some core unifying features. They represent an attempt to adopt a proportionate and informed approach to regulating a particular area of law or policy (or both) based on accurate evidence and data, with relevant stakeholders permitted to contribute to the debate with all costs and benefits of the proposed measure assessed in detail. Similarly, in his articulation of the guiding principles on human rights impact assessments of trade and investment agreements,<sup>134</sup> De Schutter sets out a number of important transferrable elements which comprise such assessments. Among these are the necessity for their methodological design to align with a human rights approach,<sup>135</sup> and the requirement to make explicit reference to the normative content of human rights obligations including the adoption of human rights indicators within the assessment model.<sup>136</sup> Thus, impact assessments undoubtedly fulfil a very important and indeed democratic function in terms of ascribing a sense of overarching legitimacy to either the disbursement of public resources or the enactment of regulatory or legal reform within a particular policy area.

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<sup>132</sup> Ibid.

<sup>133</sup> Payne, L., (2019) Child Rights Impact Assessment as a policy improvement tool, *The International Journal of Human Rights*, 23:3, 408-424, 410.

<sup>134</sup> See Report of the Special rapporteur on the Right to food, Olivier De Schutter, *Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, 19 December 2011.

<sup>135</sup> Ibid at Part IV.

<sup>136</sup> Ibid at para 5.

CRIAs are vital procedural safeguards in ensuring children's rights are foregrounded within policy formation.<sup>137</sup> In centralising such standards within the regulatory design (at all stages) CRIAs provide a mechanism whereby policy and regulatory reform adhere to children's rights, including the best interests principle. They also provide a direct opportunity for children and young people as stakeholders to directly contribute to the development of law and policy. As the CRC Committee have clearly stated:

*“Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3 (1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy”*<sup>138</sup>

Moreover, in view of the twofold nature of such assessments, whether they be forward facing (ex ante) or backward facing (ex post), little doubt exists that they incorporate much potential to advance policy and legal developments in a rights-based manner.<sup>139</sup> As Payne reminds us, CRIAs involve the examination of “laws, policies, and changes to public services to determine their impact on children, and whether they comply with and indeed further the implementation of the CRC”.<sup>140</sup> And while much of the literature on CRIAs or human rights impact statements more broadly focus on their ex ante nature, their possible ex post application has much potential to review the extent to which states are progressively realizing their socio-economic commitments. By capturing the success or otherwise of a given policy or decision, ex post CRIAs, or Children's Rights Impact Evaluations (CRIEs) as they are otherwise known, can play a crucial role in determining the success or otherwise of such measures. In providing an opportunity “to evaluate whether the legislation, policies or programmes have met their original aims and review the impacts (intended and unintended) they have had on children leading, if

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<sup>137</sup> For example, see Committee on the Rights of the Child (2013) *General Comment No.16 on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, 17 April 2013, at para's 21, 77, 78, 79, 80, 81 & 82.

<sup>138</sup> CRC Committee, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, para 45.

<sup>139</sup> For more on impact assessments and human rights, see Walker, S., Human Rights Impact Assessments: Emerging Practice and Challenges, in Eibe Riedel, Gilles Giacca & Christophe Golay, (eds.) *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, [2014] OUP.

<sup>140</sup> Payne, L., (2019) Child Rights Impact Assessment as a policy improvement tool, *The International Journal of Human Rights*, 23:3, 408-424, 410.

necessary, to future reform of the laws, policies or measures”.<sup>141</sup> By looking backwards on the actual and practical implementation and effect of the measures, laws or policies in question, CRIEs add an additional evidential layer in ensuring that children’s rights are embedded within legal and policy development and as such are an additional important device for ensuring the progressive realization of children’s rights.

### **6.5.1. CRIAs and School Exclusions**

While CRIA’s are primarily aimed at ensuring that regulatory and policy formulation is consistent with children’s rights, their use within the context of school exclusions and any future amendments to the legislative framework could provide the necessary justificatory basis to bring about much needed change. Indeed, it is in the context of education more widely that CRIAs have had much domestic visibility with Payne stating that between 2010 and May 2017 “only five government Bills were considered for their potential impact on children’s rights, and four of the five originated in the Department for Education (DfE)”.<sup>142</sup> However, with the introduction of the Department of Education’s new CRIA template, it is likely that CRIAs will become an important mainstay within future departmental legal and policy decision-making.

In examining the Acts of Parliament which have been subject to a CRIA, one principal common issue emerges. This relates to the lack of consistency in the collection of the views of children and young people who are ultimately subject to the legislative enactment in question and who will be directly impacted by it. For instance, the children’s rights impact assessment which accompanied the Education and Adoption Act 2016 revealed minimal engagement with children and young people. They were not been consulted regarding important legislative changes contained within the Bill (and subsequent Act) despite the clear impact which such changes would have on their lives.<sup>143</sup> In the context of children’s education, such changes included the proposal to convert schools deemed as failing or coasting, including those under the control of local authorities, into academies.<sup>144</sup> Despite the fact that academies operate under a vastly distinct framework,<sup>145</sup> and are more operationally and financially autonomous than

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<sup>141</sup> Payne, L., (2017) Child Rights Impact Assessment (CRIA): A review of comparative practice across the UK, UNICEF UK (June 2017), 6.

<sup>142</sup> See n (139) above at p. 412.

<sup>143</sup> Department of Education (2015) Considering the impact of the Education and Adoption Bill provisions (July 2015).

<sup>144</sup> Education and Adoption Act, section 7.

<sup>145</sup> See Academies Act 2010. See also Eyles, A & Machin, A., (2019), ‘The Introduction of Academy Schools to England’s Education’, *Journal of the European Economic Association*, Vol. 17(4) pp. 1107 – 1146.



maintained schools, the failure to consult children and young people about such a proposal undermines the evidential value of the impact assessment. Given further that academies are free to deviate from the national curriculum with clear implications for the quality and scope of children's education, the failure to engage children and young people is at odds with the requirements of Article 12 CRC. The failure to consult with, or ascertain, the views of children and young people was evident also in the human rights impact assessment accompanying the passage of the Children and Families Act 2014 which introduced a swathe of significant reforms across a multiplicity of areas of direct relevance to children and young people. These included reforms to adoption and contact,<sup>146</sup> family justice,<sup>147</sup> and the law governing the provision of services for children with SEND<sup>148</sup> amongst others. Despite such changes having a direct and tangible impact on the lives of children and young people, no evidence was presented within the impact assessment that children and young people were themselves consulted.<sup>149</sup> Rather, the assessment adopted a black-letter approach and examined the legislation in the context of the human rights obligations of the state arising under the ECHR and the CRC and ultimately concluded that such effects "would either be neutral or would strengthen the implementation of the rights set out in those Conventions".<sup>150</sup> While an overarching assessment of the proposed compatibility of the legislation with children's rights is an important and necessary aspect of CRIAs, they are not the only significant feature of CRIAs. The failure to engage children and young people as part of the assessment itself runs counter to the very operational essence and integrity of impact assessments which, by definition, are supposed to engage with the relevant stakeholders, including children, who are ultimately impacted by the proposed legislative or policy measure in question. In the absence of such engagement and consultation, not only does vital and relevant evidence evade policy and legal consideration, but commitments pursuant to Article 12 CRC are expediently abandoned.

In a similar vein, the children's rights impact assessment which accompanied the passing of the Children and Social Work Bill,<sup>151</sup> which ultimately become the Children and Social Work

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<sup>146</sup> Children and Families Act 2014, Part 1.

<sup>147</sup> Children and Families Act 2014, Part 2

<sup>148</sup> Children and Families Act 2014, Part 3.

<sup>149</sup> See Letter to the Chair, and Human Rights Assessment, from Rt Hon Edward Timpson MP, Parliamentary Under Secretary of State for Children and Families, Department for Education (2013), Joint Committee on Human Rights, Legislative Scrutiny: Children and Families Bill; Education Bill (Thirteenth Report Session 2013-14, HL 29, HC 452).

<sup>150</sup> Ibid, 43.

<sup>151</sup> See Department of Education (2016) *Children and Social Work Bill, Impact Assessments* (November 2016).

Act 2017, a significant piece of legislation which affected children and young people across a number of important areas, and one which placed important obligations on local authorities, was somewhat superficial in how the views of children and young people not only fed into the impact assessment but also how such views were acted on and given their due weight. According to the Act's explanatory notes the legislation was designed to serve four main aims. These included the intention to improve decision making and support for looked after and previously looked after children in England and Wales, to improve joint work at the local level to safeguard children and enabling better learning at the local and national levels to improve practice in child protection, to promote the safeguarding of children by providing for Relationships and Sex Education in school and to enable the establishment of a new regulatory regime specifically for the social work profession in England.<sup>152</sup> For instance, for the provisions pertaining to the manner in which local authorities now discharge their responsibilities towards looked-after children which includes the establishment of clear corporate parenting principles,<sup>153</sup> and the duty to provide young people leaving care with information regarding the services to which they are entitled to under the Children Act 1989 (and other services to which they may be entitled to in preparation for adulthood or independent living,)<sup>154</sup> the evidence for how children and young people's views were given effect was not overly clear. While the impact assessment stated that the Department "have gained a good sense about the extent to which they consider their LA acts corporately and behaves like a good 'corporate parent'"<sup>155</sup> from their engagement with looked-after children and care leavers through the All Party Parliamentary Group (APPG) for looked-after children and care leavers, little evidence was proffered as to firstly, what the primary findings of this engagement were and secondly, how they were given effect to within the legislative provisions as contained within the Bill (and subsequent Act) itself.

On the issue of the information and services available to care-leavers, despite the fact that the impact assessment referred to seven consultation events which took place to inform the development of a care-leaver cross government strategy, little evidence was again offered as to what were the principal concerns or issues which care-leavers spoke about and how these underpinned the development of subsequent law and policy. Moreover, on the issue of developing and improving the educational outcomes for children who have been adopted from

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<sup>152</sup> Children and Social Work Act 2017, Explanatory Notes.

<sup>153</sup> Children and Social Work Act, section 1

<sup>154</sup> Children and Social Work Act, section 2

<sup>155</sup> See n (151) above at p. 14.

care or for those who have left care, the impact assessment stated that no consultation had taken place with children and young people on this issue but that the views of the Children's Commissioner had been engaged.<sup>156</sup> While such views are of course welcome, they do not supplant the necessity or legal requirement to ascertain the views of children on all matters which affect them pursuant to Article 12 CRC. While this of course raises obvious practical issues, CRIAs should at the very least demonstrate that reliable efforts were made to engage with children in the first instance. While the impact assessment did make reference to the CRC and the manner in which certain legislative and policy provisions would impact children, the absence of a clear and consistent approach to gathering the views of children and young people on such matters which clearly affect them represents a missed opportunity for developing robust evidence-based law and policy. Such observations indicate that much work remains to be done to harness the operational, participatory, and evidential benefits which CRIAs can and should have in the context of policy and legal development.

In addition to the foregoing, a number of other important impact assessments have taken place in the context of domestic education law and policy. Take for example the 2013 Equalities Impact Assessment which accompanied the proposed reforms to the National Curriculum in England.<sup>157</sup> While assessing the impact of the proposed changes to the curriculum as against the protected characteristics as contained within the Equality Act 2010 the assessment received in excess of 1500 responses from all relevant stakeholders which enabled it to reach a conclusion that the proposed changes to the curriculum would not have any impact on equalities. However, as part of the consultation process, concern was expressed that the then wording of the statement of provision for children with SEN was not clear enough and consequently one of the outcomes of the equality impact assessment was the revision of the wording to provide more clarity for children with SEN. While such a framework of SEN provision has since been overhauled by the CFA 2014, the impact assessment process itself demonstrates how relevant stakeholder engagement can make positive and rights-enhancing changes.

More recently, the Equality Impact Assessment and Public Sector Equality Duty (PSED)<sup>158</sup> which accompanied the envisioned introduction of relationships education in primary schools and Relationships and Sex Education in secondary schools pursuant to the Children and Social

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<sup>156</sup> See n (151) above, 16.

<sup>157</sup> See Department of Education (2013) *Reform of the national curriculum in England*, (July 2013)

<sup>158</sup> See Department of Education (2019) *Introduction of statutory Relationships Education, Relationships and Sex Education and Health Education: Equality Impact Assessments and Public Sector Equality Duty*, (February 2019).

Work Act 2017 further highlighted the importance of engaging with the relevant evidence base in determining the consistency of proposed regulatory reform with broader human rights commitments. In determining that the proposed reforms and statutory guidance would have “a more positive than negative impact on pupils”, the assessment further stated that one possible tool of mitigating any negative consequences would be the “continued engagement process, the school support offer to implement the new subjects and the new statutory guidance to be published by the Department”.<sup>159</sup> Central to such an assessment was the detailed alignment of the proposed changes against the protected characteristics under the Equality Act as listed above which allows in turn a context specific assessment of the proposed reforms.

These examples, although occurring under the rubric of the Equality Act, demonstrate the advantages which attach to such endeavours. With appropriate and relevant stake-holder engagement, they highlight the potential which they can play in any future child rights proofing of the school exclusion system. Indeed, any future changes to the exclusion framework which may emanate from the Timpson Review may also arguably include an equality impact assessment given the effect of the Equality Act on the school exclusion system.<sup>160</sup>

More broadly, CRIAs arguably play a critical role in the progressive realization of children’s education rights. If properly adhered to, they can position prospective legislative and policy changes against the obligations expected of the state under the CRC. In view further of the important role which stakeholders assume within the assessment process, any future or prospective changes to the school exclusion system should engage children and young people. In spite of the fact that the Timpson Review did not include any proposed changes to enhance children’s educational procedural rights such as establishing a right to be heard, or to enshrine an independent right for children to have their exclusion reviewed, or to integrate a best interests assessment into the decision to exclude, any future impact assessment could highlight these anomalies.

## **6.6. Conclusion**

In conclusion, this chapter has highlighted the various methods which exist within children’s socio-economic rights scholarship which measure the progressive realization of their rights. It has also highlighted that within the specific context of education law and policy, the objective of measurement has had a long-standing and formidable appeal with such measurement

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<sup>159</sup> Ibid at p, 18.

<sup>160</sup> See Chapter Three for earlier discussion on the Timpson Report.

quintessentially revealing itself along the lines of academic attainment. Following on from this, children's educational rights have disproportionally developed along such narrow lines with the use of indicators the primary and arguably, instinctive method of measurement used by the human rights community.

However, as previous chapters demonstrated, children's educational rights embrace much more than access rights and include rights *in* education also. While disaggregated data will reveal a certain and specific statistical overview, the limitations of such an impression is that they do not capture the empirical and qualitative experiences of children and young people's educational experiences. In that regard datafication only brings us so far down the road. Therefore, while potential clearly exists in utilizing the various measurement tools to fully encapsulate the obligations which flow from the duty of progressive realization, new deployments and conceptualisations of those tools are necessary. As this chapter outlined, a number of measures could be undertaken which would enable such qualitative evidence to become part of the measurement landscape including the use of the OPERA framework, the enhanced role for student councils and the option for schools to become part of the UNICEF Rights Respecting Award scheme. While not exhaustive, they do nonetheless represent potential mechanisms in which to ensure the progressive realization of children's educational rights. Moreover, in addition to measuring progressive realization, states are also under a legal obligation to progressively realize children's (and socio-economic rights) educational rights and must be held accountable for such an obligation.

## **Chapter Seven**

### ***Legal Accountability for the Progressive Realization of Children's Socio-Economic Rights***

#### **7.0. Introduction**

This chapter will examine the notion of legal accountability as a means to secure the progressive realization of children's socio-economic rights, particularly in the context of school exclusions and the associated right to education. In building upon the preceding chapters which have analysed the multi-factorial elements which make up both the substantive and procedural components of the concept of progressive realization, this chapter adds to such analysis by interrogating how the principle is legally upheld and delivered. The legal enforcement of socio-economic rights generally is a legal endeavour which has not been unproblematic in practice, but rather the subject of much dispute and contestation.<sup>161</sup> With this in mind, this chapter explores the issue of legal accountability from two distinct analytical frames. The first of these relates to the role of the state, as primary human rights duty-bearer, to ensure the legal framework which governs both school exclusions and the child's right to education in England are themselves compatible with the duty to progressively realize children's socio-economic rights.

The second area of focus is the issue of judicial accountability for the realization of children's socio-economic rights and specifically their rights viz-à-viz school exclusion and the right to education. Further to this, this chapter will argue that the multi-dimensional and distinct components which comprise progressive realization can potentially become subject to judicial scrutiny and therefore inject the principle with a potentially powerful personality. This is necessary as the judicial adjudication of human rights, and particularly socio-economic rights, plays a significant role in holding states to account for their pre-determined and voluntarily agreed upon human rights obligations. Such adjudicative accountability assumes increased

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<sup>161</sup> For example, in his analysis of judicial practices and developments in four separate jurisdictions including South Africa, New Zealand, Canada and Israel, Ran Hirschl argues that the constitutionalization of human rights should be seen as integral to the political and ideological vacuum within which they are interpreted. Driven by what he calls "an interest-based hegemonic preservation approach", Hirschl argues that "In an age of social and economic neoliberalism, constitutional rights appear to have only a limited capacity to advance nonmarket notions of social justice into arenas that require wider state intervention and more public expenditure (for example, basic housing, healthcare, education, employment, and welfare). Redistribution of resources and opportunities...all lie beyond the reach constitutional rights as currently interpreted by national high courts". For more, see Hirschl, R., (2004), *Towards Juristocracy, The Origins and Consequences of the New Constitutionalism*, Harvard University Press, at p218.

import from a children's rights perspective given that access to and enjoyment of socio-economic rights are critical safeguards for children's overall development. This is especially evident regarding the right to education and the associated phenomena of school exclusions as outlined in chapter three.

This chapter will be divided into three sections. Section one will map out the importance of accountability as an overarching frame within which to situate the legal obligations of the state to progressively realize children's socio-economic rights. In particular, through the adoption of a broader accountability framework, it will be argued that 'progressive realization' can become an important and durable legal mechanism from which to hold states accountable for their human rights obligations. Section two will then proceed to examine the legal framework underpinning school exclusions in England and, drawing on the empirical evidence adduced within this thesis, will argue that much work remains to be done, in terms of updating and amending the current legislative structure to render it consistent with both the principle of progressive realization in particular, and the CRC more generally. Section three will then explore current judicial approaches to school exclusions and will further interrogate the potential which the principle of progressive realization could potentially assume from the perspective of judicial accountability. Central to this line of argument is the contention that if the principle is to have real legal bite, then it must not only survive, but also in vigorate, judicial scrutiny. Further to this, this section will analyse current judicial adjudicative trends pertaining to children's education rights, the structural and institutional parameters within which such adjudication occurs and an assessment of the constraints which have inhibited the progressive realization of these rights. This section will also advance a judicial defence of progressive realization which builds on the arguments as outlined in preceding chapters and which would arguably permit the judiciary to determine both education and socio-economic rights cases more broadly, in a manner which accurately and appropriately encompasses the obligation of states to progressively realize children's rights. This is necessary as given that the decision to exclude occurs within the school itself and amounts very much to a quasi-judicial function, the existence of a further and final legal arbiter in the shape of the courts could provide a further layer of legal accountability for many children.

### **7.1. Section One: Children's Socio-Economic Rights: The Need for Accountability**

Children's ability to enjoy, and assert where necessary, their economic, social and cultural rights occupy a perilous and insecure foothold within contemporary legal systems. Two principal reasons contribute to this reality. Firstly, as an assembly of rights which necessitate the deployment of resources to meet their fulfilment and as discussed in chapter five, the decisions and actions of democratically elected representatives assumes increased significance.<sup>162</sup> However, the numerical - indeed arbitrary - parameters within which children's lives are governed<sup>163</sup> often result in their automatic exclusion from established political and democratic processes.<sup>164</sup> Age based restrictions on the right to vote disproportionately if not exclusively impact children from participating in those matters which affect them, thereby eliminating their abilities to shape change and effectuate socio-economic and wider legal policy adjustments.<sup>165</sup> They are a non-constituency. They are shut out. Indeed, as Nolan argues, the denial of children's participation from such processes has the twin effect of undermining the very concept of children as 'citizens' in their own right but also the legitimacy of the decisions of elected representatives on children's rights issues. Nolan further states;

*"As non-voters, children have no opportunity to exert direct influence on the policymaking process. As a result, their interests are unlikely to occupy a consistently large space on the agenda of elected law and policy-makers".<sup>166</sup>*

Secondly, the legal configuration of socio-economic rights, by and of themselves, is inherently problematic. The historical division which accompanied the development of human rights law generally<sup>167</sup> was such that socio-economic rights in particular were subjected to sustained

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<sup>162</sup> For example, Kerry Rittich argues that the "social entitlements that an individual may claim against the state are typically connected to the breadth, depth and health of the social entitlements, programmes and institutions that exist in society at large" in Barak-Erez, D., and Gross, A., (eds.) (2011) *Exploring Social Rights: Between Theory and Practice*, Hart Publishing, at p. 107.

<sup>163</sup> Article 1 UNCRC states "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

<sup>164</sup> For example, in the UK, children do not possess the right to vote until they attain adulthood at 18 years of age.

<sup>165</sup> O'Connell also makes the argument that because socially excluded individuals tend not to participate in democratic and political processes, "they are likely to lack a significant political voice to influence the formulation of governmental policy". See O'Connell, P., (2012) *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, Routledge, Taylor and Francis, at p5.

<sup>166</sup> For more, see Nolan, A., (2010) *The Child as "democratic citizen: Challenging the Participation Gap*, *Public Law*, pp. 126-141, at p. 130.

<sup>167</sup> In her examination of the development of both sets of human rights; civil, political and economic, social and cultural rights, Ioana Cismas refers to a 'separation wall' which was politically constructed and contributed to the image of the 'non-justiciability of ESC rights' See Cismas, I., (2014) *The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights*, in Riedel, E., Giacca, G., & Golay, C., (2014) (eds.) *Economic, Social and Cultural Rights in International Law*, Oxford University Press, at p. 454.



attacks regarding their legitimacy and concomitant enforceability.<sup>168</sup> While such a division has subsided in favour of a theoretical acceptance of the interrelatedness and indivisibility of all human rights,<sup>169</sup> such an appreciation has not translated into an undisputed judicial acceptance of the enforcement of socio-economic rights at the domestic level.<sup>170</sup> Many institutional and procedural constraints persist. Indeed, this has led Fredman to describe such rights as “the Cinderella of the international human rights corpus”.<sup>171</sup> While many new and emergent constitutional arrangements explicitly provide for the protection of socio-economic rights,<sup>172</sup> many established legal settlements do not. Most notably are the constitutional arrangements of the United Kingdom and the United States of America.<sup>173</sup> Indeed, in her analysis of the Irish Supreme Court’s approach to socio-economic rights, Aoife Nolan paints an uninspiring picture in her assessment of the ‘restrictive approach’ adopted by the Irish judiciary towards such rights.<sup>174</sup>

Despite such realities, increased attention has now begun to refocus on the issue of legal accountability in safe-guarding socio-economic rights.<sup>175</sup> This has been coupled at the international level with the creation of both an Optional Protocol to the ICESCR enshrining an individual complaints mechanism for alleged violations of ESC rights under Article 2 ICESCR<sup>176</sup> and the Third Optional Protocol to the CRC on a Communications Procedure<sup>177</sup> which enables children to bring complaints about violations of their rights directly

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<sup>168</sup> See chapter four for discussion on the historical development of these rights.

<sup>169</sup> See generally, Langford, M., (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, CUP, 2008).

<sup>170</sup> See generally, O’Connell, P., (2011) The Death of Socio-Economic Rights *The Modern Law Review*, 74, pp 532 – 554.

<sup>171</sup> See Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at p 2.

<sup>172</sup> For example, see Chapter Two, The Bill of Rights of the Constitution of the Republic of South Africa. Socio-economic rights clauses are also included within the constitutional settlements of Colombia, Kenya, Benin and Guatemala to name but a few.

<sup>173</sup> While ESC rights are largely absent at the federal level, many State constitutions however do contain provisions which guarantee ESC rights. For example, in all 50 state constitutions the right to education finds expression.

<sup>174</sup> See Nolan, A., (2008) ‘Ireland: The Separation of Powers Doctrine vs. Socio-economic Rights?’ In Malcolm Langford (2011) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (Cambridge: CUP) pp 295 – 319.

<sup>175</sup> See for example, International Commission of Jurists (2014) *Judicial Enforcement of Economic, Social and Cultural Rights*, Geneva Forum Series No 2. See also, Amnesty International (2014) *Bringing ESC Rights Home: The Case of Legal Protection of Economic, Social and Cultural Rights in Ireland*.

<sup>176</sup> See Optional Protocol to the ICESCR, adopted by General Assembly Resolution A/RES/63/117, on 10 December 2008.

<sup>177</sup> See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011. See also the first decision taken by the Committee on the Rights of the Child under the Third Optional Protocol in Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No.3/2016, 25 January 2018, CRC/C/77/D/3/2016, available at

to the UN Committee on the Rights of the Child. However, the UK have not ratified the Third Optional Protocol and in their Fifth Periodic Report to the UN Committee on the Rights of the Child stated that: “The UK already has strong and effective laws under which individuals may seek enforceable remedies in the courts or tribunals if they feel that their rights have been breached”.<sup>178</sup> Despite the advances which have occurred, a number of recurrent issues persist, particularly at the domestic level which inhibit the enforcement of children’s socio-economic rights, including that of education. These include the perceived and/or actual capacity, competency and constitutional ability of the courts to make decisions which would ultimately impact upon domestic governmental spending<sup>179</sup> while concurrently remaining faithful to the institutional separation of powers underpinning the design of many constitutional and liberal democracies.

Therefore, the intersection of these realities crystallises in such a way that children’s socio-economic rights can be qualitatively distinguished from other rights. They inhabit a uniquely defenceless legal space. Their enforceability (and often lack thereof) exposes both the powerlessness of children as rights holders in their own right and their concomitant incapacity and inability to hold someone accountable for their enforcement. Indeed, Stalford and Hollingsworth argue that despite the extensive international endorsement of children’s rights: “both the idea and application of children’s rights remain highly contested and still struggle to gain traction in political discourse and legal practice”.<sup>180</sup> Therefore, the chasm between children’s certified socio-economic rights on the one hand and their progressive realization on the other demands a renewed focus and approach in terms of how those rights can be claimed and vindicated. Such vindication, as will be argued below, can occur within a transformed framework of accountability which can and would remain faithful to the separation of powers, avoid the institutional over-extension between the respective branches of government, and simultaneously uphold the obligation of states to progressively realize children’s rights. An accountability framework further possesses a jurisprudential and explanatory strength, in that

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<http://www.ohchr.org/Documents/HRBodies/CRC/CRC-C-77-DR-3-2016.pdf> (last accessed 22 February 2018).

<sup>178</sup> See HM Government (2014) *The Fifth Periodic Report to the UN Committee on the Rights of the Child: United Kingdom*, at para 5.

<sup>179</sup> In *R v Criminal Injuries Compensation Board, ex parte P* [1995] 1 WLR 845, the Court refused to grant judicial review of a decision of the Director of the Compensation Board in respect of injuries which were sustained and endured prior to October 1979 holding that such a decision was non-justiciable in nature. Crucially, the Court stated, “These decisions involve a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with” (para 38). See also cases of *R v Chief Constable of Sussex, ex p International Trader’s Ferry Ltd* [1999] 3 WLR 1260 & *R v Cambridge Health Authority, ex p B* [1995] 2 ALL ER 129.

<sup>180</sup> Stalford H., & Hollingsworth, K., (2017) *Rewriting Children’s Rights Judgment Project: From Academic Vision to New Practice*, Hart Publishing, at p. 19.

judicial actions and subsequent decisions anchored within such parameters possess a further layer of legitimacy. Therefore, situating and operationalizing the concept of progressive realization squarely within the context of socio-economic rights adjudication can provide the judiciary with a methodologically defensible tool in their deliberations regarding alleged violations of children's socio-economic rights, including the right to education. As the legal conduit connecting the right with its attainment, progressive realization should not be viewed as either peripheral to or marginal from the adjudicative remit of the courts.

### **7.1.1. The Value of Accountability**

Firstly, before assessing the importance of accountability from the perspective of the progressive realization of children's socio-economic rights, an understanding of its conceptual and normative features is necessary. As a political concept, accountability has a long history.<sup>181</sup> Classically intertwined with the notion of responsibility and the relationship which exists between the citizen and state, accountability has provided fertile ground from which to assess, examine and challenge the role and actions of elected representatives as they discharge the functions of their respective offices.<sup>182</sup> However, accountability as a concept has also migrated into the judicial sphere with increased attention being allotted to the role of the courts, their adjudicative functions and the reasons underpinning their decisions.<sup>183</sup> Such a voyage is perhaps unsurprising in view of the important role the courts' possess in protecting the rights of those who are less powerful and able than others.<sup>184</sup> Nowhere is such a reality more acute and visible than in the context of children's socio-economic rights and the importance such rights exert on children's capacity to develop to their maximum potential.<sup>185</sup> Indeed, Stalford and Hollingsworth argue that "there is a power in knowing that the protection of children's

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<sup>181</sup> For example, see generally, Harlow, C., (2002) *Accountability in the European Union*, Oxford University Press.

<sup>182</sup> Mulligan, R., (2000) Accountability: An Every Expanding Concept, *Public Administration*, Vol. 78, No.3 pp. 555 – 573. Schmitter, P.C., (2004) The Ambiguous Virtues of Accountability, *Journal of Democracy*, Vol.15, No.4 pp 47 – 60. Waldron, J., (2014) *Accountability: Fundamental to Democracy* NYU Colloquium, August 28 2014. Sinclair, A., (1995) The Chameleon of Accountability: Forms and Discourses, *Accounting Organization and Society*, Vol. 20, No. 2/3, pp 219 – 237.

<sup>183</sup> See generally, Bamforth, N, and Leyland, P., (eds.) *Accountability in the Contemporary Constitution* (2013) Oxford University Press.

<sup>184</sup> See judgment of Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 where she stated that "It is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not".

<sup>185</sup> In the context of education specifically, see Department of Education (2017) *Unlocking Talent, Fulfilling Potential: A Plan for Improving Social Mobility through Education*.

rights is beyond politics and that the independence of the judiciary offers a secure and influential brake on the unauthorised actions of the executive or legislature”.<sup>186</sup>

In the absence of legal force, human rights generally and children’s rights specifically would occupy an extremely insecure platform and potentially become the subjects of either executive or governmental beneficence. Deprived of the necessary enforceability mechanisms, they would amount to no more than vacuous assertions. Indeed, Freeman argues that a society without rights is one which would be “morally impoverished”.<sup>187</sup> Their legal enforceability prevents against this. Therefore, access to an independent and impartial judicial system ensures that those elemental standards which demarcate the contours between permissible and impermissible behaviour are upheld and vindicated when necessary. They also arguably demarcate the boundaries between democratic governance and unrestrained despotism. Such standards, falling as they typically do under the right to a fair trial<sup>188</sup> include the rights to legal representation, participation and appeal when necessary.<sup>189</sup>

The function and role of the courts themselves, as the last and final independent protectorate of human rights, have themselves been subject to much international standard-setting to ensure their own effectiveness, robustness and accountability.<sup>190</sup> As the Special Rapporteur on the independence of judges and lawyers has stated, “Judicial accountability exists to avoid the improper, inadequate or unethical behaviour of justice operators and as such, it is closely related to judicial independence”.<sup>191</sup> Aside from the normative advantages which accountability conceptually entails, there is a much deeper practical and structural dimension to its existence. Properly deployed, accountability can invigorate discussion, challenge existent (if not stagnant) practices and effectuate future-oriented change if necessary. This is especially true regarding children’s socio-economic rights where states have specific duties to progressively realize such rights. However, legal accountability for delivering on these issues must be positioned within the wider multi-layered legal systems which both intersect and

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<sup>186</sup> See n (20) above at p. 29.

<sup>187</sup> Freeman, M., *The Moral Status of Children, Essays on the Rights of the Child*, (1997) Martinus Nijhoff Publishers, at p. 21.

<sup>188</sup> For example, see article 6 ECHR, article 10 UDHR & article 14 ICCPR.

<sup>189</sup> For a discussion on such issues from a children’s rights perspective, see CRIN (Child Rights International Network) (2016) *Rights Remedies & Representation: Global Report on Access to Justice for Children*.

<sup>190</sup> For more, see UN Convention Against Corruption, Basic Principles on the Independence of the Judiciary, Bangalore Principles of Judicial Conduct, Council of Europe European Charter on the Statute for Judges, The Commonwealth (Latimer House) Principles on the Three Branches of Government.

<sup>191</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, 28<sup>th</sup> April 2014, A/HRC/26/32, page 19 at para 106.

complement each other.<sup>192</sup> Developments at international, regional and domestic level have created a rich habitat - at least theoretically and textually - for children's rights to flourish. Legal and jurisprudential developments within and across legal borders have fundamentally reoriented the legal landscape, with domestic adjudicative authorities, of all descriptions and classifications, now subject to increased accountability in the performance of their functions. For example, in the area of children's rights, the establishment of Children's Ombudspersons, with their statutory mandates across all four regions in the United Kingdom represent a tangible move towards increasing state accountability for delivering on children's rights.<sup>193</sup>

Moreover, the passing of the Human Rights Act 1998 in the UK which incorporated the European Convention of Human Rights (ECHR) into domestic law now compels public authorities to act in a manner consistent with ECHR rights<sup>194</sup> and further mandates the courts to interpret legislation 'so far as is possible' to give effect to these rights.<sup>195</sup> From a children's rights perspective, the ECHR and the Human Rights Act 1998 have been successful in a number of areas in holding the executive and legislature to account pertaining to their failure to uphold basic human rights for children. With the CRC still legally unincorporated under the constitutional design of the UK, the domestic incorporation of the ECHR has allowed children's rights to become part of the deliberative remit of the Strasbourg Court.<sup>196</sup> In the area of corporal punishment for example, numerous cases have exposed domestic legislative deficiencies with established human rights standards and compelled subsequent governmental action.<sup>197</sup> Accountability has not only been instrumental in exposing the legal incongruity

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<sup>192</sup> For an analysis of children's rights and their intersection with the multi-layered system in the UK, see generally, Williams, J., (2011) 'Multi-Level Governance and CRC implementation', in Invernizzi, A., & Williams, J., *The human rights of children: From vision to implementation*, (Farnham, Surrey, Ashgate)

<sup>193</sup> In England the Office of Children's Commissioner was set up pursuant to Part 1, Children Act 2004. In Scotland, the office was established under the Commissioner for Children and Young People (Scotland) Act 2003 while in Wales the office was established through Part V, Care Standards Act 2000 and the Children's Commissioner for Wales Act 2001. In Northern Ireland, the office was established under The Commissioner for Children and Young People (Northern Ireland) Order 2003. For discussion on the role of the four Children's Commissioner's within the United Kingdom and the role and remit which they enjoy, see generally Osian Rees and Jane Williams, *Framing Asymmetry: Devolution and the United Kingdom's Four Children's Commissioners*, *International Journal of Children's Rights*, 25 (2016) 408 – 433.

<sup>194</sup> Section 6 HRA 1998.

<sup>195</sup> Section 3 HRA 1998.

<sup>196</sup> For discussion on the interface between the CRC and the ECHR, see Kilkelly, U (2011) Protecting Children's Rights under the ECHR: The Role of Positive Obligations, *Northern Ireland Legal Quarterly*, Vol. 61, Issue 3, pp. 245 – 261.

<sup>197</sup> For example, see cases of *A v The United Kingdom* (Application No. 25599/94) 23<sup>rd</sup> September 1994 & *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15. For more on the intersection of children's rights and corporal punishment, see Stalford, H & Byrne, S (2018) *Human Rights, Children's Rights and the Family*, in Ruth Lamont, *Family Law* (2018) Oxford University Press.

between explicit human rights protections on the one hand and domestic realities on the other, but also highlighted its impact on judicial adjudication. As Colm O’Cinneide notes;

*“The expanded reach and substance of legal accountability controls reflects how public law has moved away from the positivism that dominated early twentieth century legal theory towards a greater embrace of principle – and value-based reasoning and the discourse of human rights. This has generated new expectations that laws regulating the relationship between the citizen and state should be based upon a more substantive concept of the rule of law and protect important human interest such as autonomy, equality and dignity which risk being marginalized by the utilitarian forces of most public authority decision-making and the majoritarian orientation of party political democracy. As a result, legal accountability mechanisms are now expected to play an active role in protecting individual rights and promoting adherence to values such as transparency, participation, fairness and the rule of law”*<sup>198</sup>

The practical translation of children’s socio-economic rights into accessible and enforceable entitlements shine a prominent spotlight not only on the notion of legal accountability *per se* but also on what Sandra Fredman calls “the need to formulate a democratically justifiable role for the courts”.<sup>199</sup> This raises the question as to the extent to which judicial organs can and should uphold and vindicate children’s socio-economic rights. How can they adjudicate on alleged violations of such rights without disturbing the age-old constitutional sanctity of the separation of powers? And perhaps more significantly, how can they ensure, give effect to, and account for the progressive realization of children’s socio-economic rights generally and the right to education specifically which includes the phenomenon of school exclusions. In his examination of the features which comprise legal accountability, Jeff King articulates six core fundamental ingredients which must be present for legal accountability to flourish. These include an individual right of petition, a functionally independent adjudicator, the application of publicly affirmed legal standards, a decision based on the interpretation of such standards, an appropriate remedy and finality whether the decision be appealed or reversed in accordance with the law.<sup>200</sup> Thus, King’s summation of those essential components which comprise legal

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<sup>198</sup> O.Cinneide, C., (2013) *Legal Accountability and Social Justice* in Bamforth, N., and Leyland, P., (eds.) *Accountability in the Contemporary Constitution* (2013) Oxford University Press at 0390.

<sup>199</sup> Fredman, S., (2013) *Adjudication as Accountability: A Deliberative Approach*, in Bamforth, N., and Leyland, P (eds.) *Accountability in the Contemporary Constitution* (2013) Oxford University Press at p105. For more critical assessment of the need for judicial restraint in human rights adjudication, see Kavanagh, A., (2010) *Judicial Restraint in the Pursuit of Justice*, 60 *U. Toronto L.J.* 23.

<sup>200</sup> See King, J. (2013) *The Instrumental Value of Legal Accountability*, in Bamforth, N., and Leyland, P (eds.) *Accountability in the Contemporary Constitution* (2013) Oxford University Press at p. 127.

accountability provide a fitting backdrop against which to position the current legal framework regarding school exclusions against the obligation to progressively realize children's rights.

## **7.2. Section Two: The School Exclusions Legal Framework and the Duty to Progressively Realize Children's Rights**

As outlined in the preceding chapters, children's socio-economic rights are dependent on the concept of progressive realization for their meaningful enjoyment. Therefore, the manner in which the contracting state has taken the relevant steps to the maximum of its available resources to progressively realise such rights becomes a critical factor.<sup>201</sup> As further outlined in the preceding chapters, progressive realization is simply not limited to material and/or fiscal resources but also incorporates wider procedural dimensions, not least the duty to ensure participation and from a children's rights perspective, the obligation to abide by the child's best interests principle. In practical terms, this translates into the obligation of decision-makers to ensure that the best interests of the child is a primary consideration in matters which affect them.

However, when one transposes the current legislative framework underpinning school exclusions in England against the obligation to progressively realize children's rights, multiple procedural, legislative, and human rights inadequacies become apparent.<sup>202</sup> Such practices which include the proliferation of 'unofficial' school exclusions and the removal of children from school for reasons which are in the school's best interests rather than the child's clearly contravene the permissible legislative basis which governs school exclusions.<sup>203</sup> Similarly, a recent study by the Children's Commissioner for England into the subjective and personal well-being of children excluded from school and who were currently in alternative provision (AP) revealed a number of significant findings<sup>204</sup> including experiences of being "victimised or treated unfairly by their teachers"<sup>205</sup> and that the curriculum post-exclusion "was different to their mainstream experience – both in a positive and negative way".<sup>206</sup> Moreover, the recent findings by the House of Commons Education Committee into both Alternative Provision and

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<sup>201</sup> See Chapter Five.

<sup>202</sup> For example, media coverage of school exclusions reveal that the official figures are not entirely accurate. See <https://www.theguardian.com/education/2017/oct/10/school-exclusion-figures-date-england-only-tip-iceberg> (last accessed 12th February 2018)

<sup>203</sup> For more, see Children's Commissioner for England, *Falling through the Gaps in Education*, November 2017.

<sup>204</sup> Children's Commissioner for England, *A Review of Evidence on the Subjective wellbeing of children excluded from school and in alternative provision*, November 2017.

<sup>205</sup> Ibid at p.28.

<sup>206</sup> Ibid.

what they call the “scandal” of ever rising school exclusions further sheds light on the many human rights shortcomings within current law and practice.<sup>207</sup> This report emphasised instances where schools were unable to provide pastoral support owing to a lack of funds,<sup>208</sup> where pupils with SEND were being excluded on the basis that their needs would be better accommodated for in alternative provision,<sup>209</sup> and situations where children’s emotional, social and mental health needs were not being met by the school.<sup>210</sup> In further highlighting evidence of a “zero-tolerance”<sup>211</sup> approach to behaviour management which can escalate rates of exclusion, the Committee acknowledged that: “The exclusions process is weighted in favour of schools and often leaves parents and pupils navigating an adversarial system that should be supporting them”.<sup>212</sup> These realities converge to paint a bleak picture regarding the state of children’s rights within the exclusion system. When taken together with the evidence adduced in earlier chapters, which include the absence of a best interests assessment within the exclusion framework, the ineffective application of the child’s right to express their views on matters which affect them and the subjective feeling among some of the Agenda Day attendee’s that their identity and background was a contributory factor in their exclusion from school, the need to rectify such deficiencies becomes apparent. Within such a context, the question arises as to not only the permissibility of such practices but also, as to how to ensure adequate legal accountability for such behaviour. As King noted, one of the central aspects of legal accountability is both an individual right of petition and the right to a remedy. Following on from this, evidence from the young people involved in the Agenda Days reveals that the current framework is no longer fit for purpose to ensure that accountability as it deprives children of their ability to seek redress for any transgressions of the school exclusion code. This is evidenced by the fact that not only were the appeal mechanisms which previously existed downgraded for parents to a review system by the introduction of the IRPs, but also and perhaps more fundamentally, children and young people continue to find themselves deprived from participating in this reduced review mechanism. However, before one can activate such review mechanisms, it is firstly important to consider the reasons why they would do so and why they would want to challenge the exclusion in the first instance. Evidence from the Agenda Days

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<sup>207</sup> See House of Commons (2018) Education Committee, *Forgotten children: alternative provision and the scandal of ever increasing exclusions: Fifth Report of Session 2017–19*, (18<sup>th</sup> July 2018).

<sup>208</sup> Ibid at p. 10.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid at p. 12.

<sup>211</sup> Ibid at p. 11.

<sup>212</sup> Ibid at p. 17.



carried out as part of this thesis revealed noticeable disparities in the reasons given by the children and young people as to why schools excluded children.

### 7.2.1. Varying Reasons for Exclusion

The account given by the children and young people in this study revealed a number of findings which highlight many legal irregularities within the school exclusion process itself. One of the more concerning findings was evidence of schools excluding children for reasons which clearly fell outside the permissible criteria. As chapter three outlined, school exclusions are subject to a clearly demarcated statutory process and one which is broadly conceived along the lines of natural and constitutional justice.<sup>213</sup> Thus, a decision to exclude can only be taken on disciplinary grounds and must be fair, lawful, rational, reasonable and proportionate.<sup>214</sup> However, evidence from the Agenda Days exemplified serious procedural irregularities and noticeable deviations from the prescribed statutory code which governs the school exclusion system. In this regard, a clear division could be extrapolated from the findings between legitimate and illegitimate reasons underpinning the decisions for exclusion. On the question of why schools excluded children, evidence from the Agenda Days included the following:

*“They get excluded because of their background life and expressing themselves”.*

(Chloe & Caitlin, Bishop Auckland Report)

*“... some reasons for exclusion are pretty fair, but in most cases students are excluded for reasons such as uniform or hair colour”*

*“Not wearing a jumper in assembly”*

*“Excluded for standing up for your rights and views”*

*“piercings, hair colour, nail varnish, false nails”*

*“Get kicked out for hair colour, nails, trousers, trainers, uniform”*

*“Sometimes they will tell you the reason you are been excluded but on other occasions they won’t tell you why you have been excluded”*

(Leah & Ali, Room 14 Pelton Report)

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<sup>213</sup> See cases of *R v Bryn Elan High School Board of Governors Exp. W* [1999] E.L.R. 380 & *R (on the application of D) v Independent Education Appeal Panel of Bromley LBC* [2007] EWCA CIV 1010 for more on judicial treatment of natural justice in the context of school exclusions.

<sup>214</sup> See Chapter Three.

Such findings clearly reveal the use of exclusion as a sanction for purposes which demonstrably fall outside the confines of what is permissible. Indeed, in one of the responses the failure to even impart the very reason for the exclusion itself runs counter to the statutory guidance which, as chapter three outlined, encourages the head teacher “where practical ...to give the pupil an opportunity to present their case before taking the decision to exclude”.<sup>215</sup> This, in addition to the reasons given by the young people regarding the reasons to exclude, raises a number of accountability issues as it points to clear evidence of schools misapplying and even abusing their statutory powers. As chapter three highlighted, the legislation and guidance governing exclusion stipulates that it should only be used as a last resort and for persistent breaches of the school’s disciplinary code. Additionally, the decision to exclude must be fair, proportionate and reasonable. With the Agenda Days adduced evidence which points to exclusion being used for objectively trivial matters such as a student’s hair colour or not wearing the correct clothing, it becomes clear that exclusion is being used in a way which clearly departs from its legislative basis.

Furthermore, an examination of the statistics regarding the reasons why schools excluded children and young people in the first instance confirms such accountability deficits. Governmental figures from the preceding academic year show that out of the 7,900 permanent exclusions which took place, 1,442 of them were for reasons listed “other”. Amounting to around 18.25% of all permanent exclusions, the reasons listed as “other” was the second highest category after persistent disruptive behaviour that was given by English schools for the reason to exclude. Similarly, for fixed term exclusions, reasons listed as “other” also accounted for the second highest category of exclusions and signified just over 20% of all fixed term exclusions, or 82,668 children.<sup>216</sup> Such figures corroborate the data from the previous academic year of 2016/7 which also listed reasons as “other” amounting to the second highest reason for school exclusions. Such figures provoke a deeper sense of inquiry. What exactly does “other” constitute? And how is it acceptable that the second highest recorded category of reasons for exclusions fall into such an opaque classification that fails to provide any justificatory information regarding such a decision. When taken together with the empirical evidence as outlined above, serious accountability issues emerge which weaken the legal integrity of the

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<sup>215</sup> See Department for Education (2017) *Exclusion from Maintained Schools, Academies and Pupil Referral Units in England*.

<sup>216</sup> For more see, Department of Education (2019) *Permanent and fixed period exclusions in England: 2017 to 2018*, (25 July 2019).

exclusion framework itself. The reasons relating to their exclusions are themselves either impermissible, or demonstrably obscure. Either way, both realities remove children from being able to obtain or enforce legal accountability in their own right and this is inconsistent with any notion of progressively realizing children's rights.

That said, legitimate reasons for exclusion were also advanced within the Agenda Days and these would certainly give rise to arguable and permissible grounds for exclusion. These included:

*"Most cases of being excluded was due to fighting, being bullied that resulted in self-defence, and being tricked into stealing a scooter"*

*"His friend told him to steal a scooter"*

*"Fights, being bullied"*

*"Self defence against someone who hit him"*

*"Throwing a chair at a teacher, fighting, breaking a fence"*

(Caitlin & Jasmin, Spennymoor Report)

*"Fighting ... smoking .... throwing paper around"*

(Leah & Ali, Room 14 Pelton Report)

For reasons which are legitimate a number of additional issues arise. For the cases involving self-defence or allegations of bullying, the school should properly investigate such instances and root out such behaviour as opposed to using exclusion. This is clearly envisaged within the statutory guidance which states head teachers should "take account of any contributing factors that are identified after an incident of poor behaviour has occurred"<sup>217</sup> and specifically mentions bullying. It would also appear that in some instances the exclusion system is being used in a manner which is totally at variance with its legally stated purpose. This becomes all the more problematic in light of the fact that children and young people in England do not possess an independent right to review or to challenge their exclusion. There are currently denied this opportunity.

### **7.2.2. The Right to Review a School Exclusion**

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<sup>217</sup> See n (52) above at p.10.

Under the current school exclusions system, children do not possess an autonomous right of appeal against an exclusion. Neither the primary legislation, the 2012 Regulations nor the accompanying statutory guidance contains such a provision. This creates an additional legal quandary for children as the denial of appeal rights arguably amounts to a ‘double breach’ of their right to education. If excluded for questionable or objectively illegal reasons, they do not possess an individual right to a remedy. While of course their parents or guardians can appeal, the denial of the right in the first instance runs counter to one of the basic elements of legal accountability which King outlined earlier; namely, the right of individual petition. Indeed, one could posit the question whether an adult would be satisfied if someone else, however closely related, possessed *their* appellate rights for a breach of their rights.

The failure to allow children a right of appeal against exclusion also runs counter to a well-established jurisprudential line of authority which has consistently re-affirmed the fundamental importance of a right to a remedy. From William Blackstone’s historical espousal that “it is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress”<sup>218</sup> to its inclusion in numerous human rights covenants,<sup>219</sup> the right to an effective remedy has a treasured and sacred place in the legal vernacular.<sup>220</sup> From a children’s rights perspective, the Committee on the Rights of the Child have also been clear in their articulation that such a right also attaches to children. In General Comment No. 5 on the general measures of implementation, they stated that:

*“For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights.”*<sup>221</sup>

That children retain the right to have an effective remedy for a breach of their human rights also unquestionably extends to the realm of their socio-economic rights. Where allegations

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<sup>218</sup> Blackstone, W., *Commentaries on the Laws of England*, Book 3, Chapter 7 at para 4.

<sup>219</sup> For example, the right to an effective remedy is enshrined in Article 8 UDHR, Article 2 ECCPR, Article 13 ECHR and Article 47 EU Charter of Fundamental Rights.

<sup>220</sup> For example, see the Latin legal maxim “*ubi ius ibi remedium*” (Where there is a right, there is a remedy). See also from a regional European perspective the guidance adopted by the Council of Ministers on the 18<sup>th</sup> September 2013 in respect of good practice with regard to domestic remedies under Article 13 ECHR which guarantees the right to an effective remedy. Available at [http://www.echr.coe.int/Documents/Pub\\_coe\\_domestic\\_remedies\\_ENG.pdf](http://www.echr.coe.int/Documents/Pub_coe_domestic_remedies_ENG.pdf) (last accessed 9th November 2017)

<sup>221</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 at para 24.

pertain to a breach of their education rights, particularly their rights under the school exclusion procedure, children absolutely possess the right to an effective remedy. The progressive realization of their rights demands nothing less. As Raoch has previously argued:

*“Remedies attempt to bridge the gap between what exists and what ought to exist. They require judges to have one foot in the normative world and the other foot in the practical world. Too much weight on either foot can have disastrous consequences. Unrealistic remedies can erode the place of the judiciary and undermine respect for its judgments. Remedies that are too weak or not forthcoming can undermine the very notion of rights and the rule of law and harm the reputation of the courts as a place where litigants can seek remedies”.*<sup>222</sup>

The failure to permit children and young people a right of review is objectively inconsistent with Article 12(2) of the CRC. This provides for children and young people to be given the right to heard before judicial or administrative tribunals. In view of the quasi-judicial nature of a school exclusion hearing, be in at first instance where the head teacher exercises the power to exclude or at a later review hearing before an independent review panel, the denial of the right of review for children is a flagrant denial of their educational procedural rights.

### **7.2.3. Current Rates of Review/Appeal**

Current rates of review (or appeals under the previous legislative system) for school exclusions (by parents on behalf of children) are quite low. Indeed, Harris has previously noted that such a process “remains under-utilized by parents”.<sup>223</sup> Taking for example the North West of England as a geographical focus, we can see just how low the review rate actually is. Freedom of information requests show that over that over a ten-year period from 2008 – 2018 the number of appeals lodged against permanent exclusion from secondary schools was negligible. For example, Blackpool Council recorded 3 challenges against a total of 212 permanent exclusions during this period, of which none were successful. In statistical terms, this equates to a review rate of around 0.14% over the ten-year period.<sup>224</sup> Similarly, evidence from Warrington Borough Council show that over the same period, 6 challenges were lodged in respect of 126 permanent exclusions, of which four were successful, equating to a statistical rate of 0.47% over the ten-

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<sup>222</sup> Roach, K., (2016) ‘Polycentricity and queue jumping in public law remedies: A Two track response’ *University of Toronto Law Journal*, Vol. 66, Issue 1, pp 3 – 52, at p5. See also Roach, K., (2008) ‘The Challenges of Crafting Remedies for Violations of Socio-Economic Rights’, in Langford, M., (ed.) (2013) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (Cambridge University Press, CUP).

<sup>223</sup> See Harris, N., (2000) *Education Law: excluding the child*, *Education and the Law*, Vol. 12, No.1,

<sup>224</sup> Freedom of Information Request, Response, received 25/2/19.

year period. During the same period Trafford Council recorded 451 permanent exclusions of which 39 were challenged which correlates to a statistical review/appeal rate of 0.86% during this period.<sup>225</sup> Over the same period, the statistical rate was 1.58% for Cheshire West and Chester Council,<sup>226</sup> and 0.007% for Cheshire East Council.<sup>227</sup> While the figures do not illuminate the many reasons why parents do not challenge their child's permanent exclusion, the infrequency of such challenges in the first instance raises many questions regarding the process itself.

Indeed, in their investigations into the prevalence of what were then appeals against school exclusions, prior to the introduction of IRPs, Harris et.al, uncovered a number of findings which directly affected parents in their choice of whether or not to appeal.<sup>228</sup> These included incidents of parents expressing a lack of confidence in the outcome of an appeal,<sup>229</sup> feelings that their child would be better off in another school,<sup>230</sup> disagreement with the exclusion itself,<sup>231</sup> the desire to advance mitigating factors regarding their child's behaviour,<sup>232</sup> feelings of injustice and concern for the long-term development of their child.<sup>233</sup> Harris et.al., also worryingly highlighted that parents from partly-skilled, unskilled or economically inactive backgrounds were less likely than others to appeal their child's exclusion.<sup>234</sup> More recent research carried out by Hodge and Wolstenholme,<sup>235</sup> who interviewed twenty-one parents who navigated the current process reveals a number of noteworthy findings which further corroborate existent evidence which privilege the role of the school over parents and pupils in such challenges.<sup>236</sup> Parents reported that their primary motivation for challenging the exclusion was to "redress a wrong by having an unjust decision overturned".<sup>237</sup> This was due to a number of factors including the belief that the school overreacted or failed to account for the individual circumstances of the child leading up to the exclusion or that they failed to take into account that the child had a SEN or was being bullied. Indeed, some parents were of the view that

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<sup>225</sup> Freedom of Information, Request, Received from Trafford Council.

<sup>226</sup> Figures based on 39 appeals lodged against 246 recorded exclusions 2008 – 2018 inclusive.

<sup>227</sup> Figures based on 21 appeals lodged against 278 recorded exclusions 2010 – 2019.

<sup>228</sup> See Harris et. al., (2000) *Challenges to School Exclusion*, RoutledgeFalmer (London and New York), chapter 8.

<sup>229</sup> Ibid at p. 133.

<sup>230</sup> Ibid at p. 134.

<sup>231</sup> Ibid at p. 136.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid at p. 138.

<sup>235</sup> See Hodge, N & Wolstenholme, C., (2016) "I didn't stand a chance": how parents experience the exclusions appeal tribunal". *International Journal of Inclusive Education*, 20(12), pp. 1297 – 1309.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

school exclusions were used as a “back-door” to get rid of unwanted pupils. In relation to the process itself, the majority of parents felt “disadvantaged and disempowered in relation to the schools in terms of access to resources, familiarity with the process and credibility with the panel”.<sup>238</sup> Overall, the evidence suggested that the review process was such that the “voice of the school appears to them to speak louder and with more perceived authority than those of parent”<sup>239</sup> thus leading to feelings of dissatisfaction, marginalisation and disadvantage.

The cumulative consequence of these legal realities (the repudiation of children’s right to review or challenge an exclusion in their own right, coupled with low rates of review by parents on their behalf) is that they denude children and young people of any access to, or enforcement of, legal accountability. On a wider legal level, the denial of review rights for children is inconsistent with the progressive realization of their right to education as it renders the right legally ineffective should a breach eventuate. Positioning the current lack of review rights for excluded children within education law more widely also exposes the disjunctive nature of the delivery of education law domestically. With the Children and Families Act 2014 enshrining a right of appeal for young people themselves within the context of SEN provision,<sup>240</sup> which Harris and Davidge have said was motivated by the willingness “to recognise and support the developing autonomy of children and young people with SEN”,<sup>241</sup> little reason exists why the same logic is not applied to school exclusions. As chapter five concluded, the progressive realization of children’s educational rights should avoid such legislative imbalances. More widely also, the importance of legal recourse, and hence legal accountability was aptly summarised by Donald H. Zeigler, who writing over thirty years ago stated;

*The principle that legal rights must have remedies is fundamental to democratic government. In a democracy, legal rights define social relations and promote human well-being in the broadest sense. Justice requires their enforcement. The principle is so obviously correct that assent to it is instinctive.*<sup>242</sup>

### **7.3. Section Three: Judicial Approaches to School Exclusions**

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<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Section 51 of Children and Families Act 2014.

<sup>241</sup> See Harris, N & Davidge, G., (2019) The practical realisation of children and young people’s participation rights: special educational needs in England, *Child and Family Law Quarterly*. 31, 1, pp. 25-45, at p. 25.

<sup>242</sup> Zeigler, D.H., (1987) *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 *Hastings L.J.* 665, 728 at p. 665.

While the foregoing analysis has exposed the failure of the legal structures surrounding school exclusions to ensure children and young people can obtain legal accountability for any wrongs committed to them thereunder, this section will explore the current judicial treatment of school exclusions and interrogate how the principle of progressive realization could, in future, enhance such deliberative approaches.

Although the issue of school exclusions has come before the English Courts<sup>243</sup> the majority of school exclusion decisions are not subject to any formal judicial examination. They occur within the school itself. They happen at the localised level. And with such minimal reviews (previously appeals) taking place, the majority of school exclusions occur within a legally inscrutable domain. The cases which do reach the courtroom illuminate the many issues which have not only given rise to judicial deliberation, but also more significantly the approach taken by the Courts in examining the legality or otherwise of a school's decision to exclude. Such cases also affirm in the most austere way the noticeable children's rights anomalies which persist within the school exclusion process.

As chapter one outlined, school exclusions have been categorised as the "most severe sanction available to a head teacher".<sup>244</sup> Further to this, the courts have laid down some important (and occasionally inconsistent) principles in relation to the exclusion process. These principles assume considerable significance as once a decision to exclude is taken, the corresponding statutory obligation for the local authority to provide suitable education for the excluded child becomes operational.<sup>245</sup> One persistent theme that emerges from the case-law relates to the standard of proof to be applied by the school, the governing body and/or the review panel in relation to the decision to exclude a child. In cases of factual or evidential disputes the courts have stated that the correct evidential standard to be deployed in such circumstances is the civil standard of proof.<sup>246</sup> In the case of *R (LG) v The Independent Appeal Panel for Tom Hood School*<sup>247</sup> the Court, per Wilson LJ., affirmed the primacy of such a standard by holding that

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<sup>243</sup> For example, see cases of *R (Begum) v Head Teacher and Governor of Denbigh High School*, *R(X) v Head Teacher of Y School*, *R (Playfoot) v Governing Body of Aberdare Girls High School*, *Rhondda Cynon Taff Unitary Authority*, *R (on the application of S (A Child)) v Brent LBC* [2002] A.C.D. 90, *P v Governors of A Primary School* [2013] UKUT 154 & *SA v Camden LBC Independent Appeal Panel* [2013] EWHC 2464 (Admin) exclusion.

<sup>244</sup> See *In re L (a minor by his father and litigation friend) (Appellant)* [2003] UKHL 9 at para 11.

<sup>245</sup> Section 19(1) of the Education Act 1996 states that "Each local education authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them".

<sup>246</sup> See cases of *R (on the application of A) v Independent Appeals Panel for Sutton LBC* [2009] EWHC 122 & *Culkin v Wirral Independent Appeal Panel* [2009] EWHC 868.

<sup>247</sup> [2009] EWHC 369 (Admin).



“the panel proceeded lawfully in acting upon proof on a balance of probabilities”.<sup>248</sup> Prior to exclusion moreover, the school must ensure that the child has received a fair hearing. In the case of *R v Headteacher and Independent Appeal Committee of Dunraven School, ex p B*<sup>249</sup>, the Court, per Sedley LJ., outlined the role of the governing body in this regard by stating that “its role must be precisely to ensure that exclusion (including the facts on which it is founded) is properly reconsidered in a manner which ensures that the pupil is being treated fairly”.<sup>250</sup> The Court further outlined that in relation to a permanent exclusion: “the pupil through his or her parent, has a right to be heard”.<sup>251</sup> While the right to be heard is in and of itself inseparable from any conception of a fair hearing,<sup>252</sup> such a right is an individual right which autonomously and independently attaches to children themselves and one which assumes growing strength and significance as the child matures. However, in the area of education law and policy as previous chapters have outlined, children’s rights including the right to be heard are materially subordinated to and subsumed within parental rights. This subordination is distinctly evident within the field of school exclusions.

### **7.3.1. School Exclusions and the Right to a Fair Trial**

Another key feature of the exclusion process has been the domestic judicial determination that a decision to exclude, in and of itself, does not engage the right to a fair trial under Article 6 ECHR.<sup>253</sup> Enshrined in Article 6(1) of the ECHR, the right to a fair trial, it states:

*“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”*<sup>254</sup>

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<sup>248</sup> Ibid at para 6.

<sup>249</sup> [2000] ELR 156

<sup>250</sup> Ibid at para 7.

<sup>251</sup> Ibid at para 18.

<sup>252</sup> See Committee on the Rights of the Child, General Comment No 10 (2007) *Children’s Rights in Juvenile Justice*, at paragraphs 43 – 46.

<sup>253</sup> See also the case of *R v Richmond-Upon-Thames London Borough Council, ex parte JC (A Child)* [2001] LGR 146.

<sup>254</sup> Article 6(1), ECHR.

Thus, from the perspective of a school exclusion, the key aspect of Article 6(1) ECHR has been whether the child's right to education as guaranteed in Article 2 Protocol 1 of the ECHR amounts to a 'civil right' within the context of Article 6 ECHR. The practical consequences of such a finding is that the legal and procedural guarantee's contained within Article 6 ECHR would subsequently apply in the context of an exclusion review. This would necessitate the compliance with the procedural requirements such as ensuring a fair and public hearing before an impartial tribunal. However, the very notion of what constitutes a 'civil right' pursuant to Article 6 ECHR has been described as "a contested concept".<sup>255</sup> In the context of education rights generally and school exclusion matters specifically, this has been borne out by case-law.

The issue of the intersection of school exclusions and Article 6(1) rights came to the fore in the case of *R (on the application of LG) (Appellant) v Independent Appeal Panel for Tom Hood School (Respondent) & Secretary of State for the Department for Children, Schools and Families (Interested Party)*.<sup>256</sup> This case revolved around the permanent exclusion of the applicant on the basis that he carried a knife and had been fighting in school. His permanent exclusion was affirmed by the Appeal Panel under the then Education (Pupil Exclusion and Appeals) (Maintained Schools) (England) Regulations 2002. He subsequently appealed against the decision to refuse his application for judicial review to challenge his permanent exclusion. Central to the claim was the argument that his Article 6(1) rights had been engaged on the basis that the Appeals Panel were making a determination on his right to education which he argued fell within a 'civil right' under Article 6(1) or on the basis that the Appeals Panel had determined a criminal charge against him and by adopting the civil standard of proof in upholding his exclusion, as opposed to the criminal standard, had thus breached his Article 6(1) rights. In rejecting the applicant's claim, the Court of Appeal held that the applicant's Article 6(1) ECHR rights were not applicable in the context of a school exclusion hearing as the right to education did not fall within the meaning of a 'civil right'. In arriving at this decision, the Court stated that it was "necessary to ascertain first if the Panel was concerned with any right enjoyed under the domestic law"<sup>257</sup> and after reviewing the jurisprudence on the right to education stated that "any right to education in English law does not mean in the words of the Court of Appeal *"a right to be educated in any particular school"*.<sup>258</sup> As such, the limited legal

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<sup>255</sup> See Settem O.J. (2016) 'The Various Components of ECHR Article 6(1)' in Settem, O.J. (ed.) *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings* (Springer, Cham) 58.

<sup>256</sup> [2010] EWCA Civ 142

<sup>257</sup> Ibid, para 20.

<sup>258</sup> Ibid, para 26.

nature of the right to education was highlighted by the Court. Moreover, the Court held that in the instant case, the exclusion panel had not been engaged in the determination of a criminal charge against the applicant as to engage Article 6(1) ECHR and as such, the evidential standard of proof to be applied within an exclusion hearing was the civil standard.

However, coming shortly after the *Tom Hood* case was the decision in *Orsus and others. V Croatia*<sup>259</sup> by the European Court of Human Rights, in a case which related to the educational separation of Croatian nationals of Roma origin. In this case, the Court held that the right to primary education does indeed engage Article 6(1)ECHR.<sup>260</sup> In affirming the decision in the earlier case of *Emine Araç v. Turkey*,<sup>261</sup> which held that the right of access to higher education was a civil right pursuant to Article 6(1) ECHR, the Court unequivocally abandoned its previous position as outlined in *Simpson v United Kingdom*<sup>262</sup> wherein it held that: “ *the Commission does not consider that this right under English domestic law or under Article 2 of Protocol No. 1 (P1-2) is of a civil nature for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention* ”.<sup>263</sup> Indeed, central to the Court’s determination in the *Orsus* case that the right to education did indeed fall within the realm of a ‘civil right’ pursuant to Article 6(1) was its assertion that: “where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights”.<sup>264</sup>

Thus, from the foregoing case-law, one can see two distinct approaches. On the one hand the European Court of Human Rights clearly states that the right to education falls within the remit of a ‘civil right’ pursuant to Article 6(1) ECHR, while on the other hand the domestic Courts adopt the opposite approach. This was highlighted by the Joint Committee on Human Rights (JCHRs) during the passage of the Education Bill 2011, which when passed, altered the law in relation to school exclusions by replacing Independent Appeal panels with Independent Review Panels. In recounting the *Orsus* decision, the JCHRs noted that “if Article 6 ECHR applies to such an educational dispute, exclusion from school is an even stronger case”.<sup>265</sup> In accepting the factual distinction between the *Tom Hood* and the *Orsus* case, they nonetheless held that “as a matter of Convention law Article 6 ECHR applies to decisions permanently to exclude a

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<sup>259</sup> [2010] (Application No. 15766/03), 16 March 2010.

<sup>260</sup> Ibid at para’s 104– 107.

<sup>261</sup> (Application no. 9907/02), 23 September 2008

<sup>262</sup> (Application no. 14688/89), 4 December 1989.

<sup>263</sup> Ibid, p 5.

<sup>264</sup> See n (96) at para 105.

<sup>265</sup> Joint Committee on Human Rights, Legislative Scrutiny: Education Bill and other Bills (Thirteenth Report Session 2010- 11, HL 154, HC 1140), 29.

child from school”.<sup>266</sup> Further prompted by concerns by the Administrative Justice and Tribunal Council (AJTC) that the downgrading of the remedies open to the IRP which included the removal of the power to reinstate permanently excluded pupils, the JCHRs further stated that: “the provisions in the Bill for review panels without full appellate jurisdiction on factual matters and without the power to order reinstatement, are incompatible with the requirements of that Article”.<sup>267</sup> Indeed, the recent report by JUSTICE not only highlighted the incongruity of the current legislative system with Article 6(1) ECHR but further underscored a number of procedural issues which blight the IRP process.<sup>268</sup> In highlighting the fact that IRP’s have no case management powers, that no two IRP’s are conducted in the same manner and the fact that the statutory guidance gives no clear guidance as to how the hearings should take place, JUSTICE highlight a number of procedural irregularities which have a direct bearing on children’s education rights.<sup>269</sup> Similarly, in recounting the fact that members of the IRP are expected to apply the principles of judicial review in their determinations, JUSTICE again highlight the paradoxical anomaly whereby a review panel with no substantive remedial powers are expected to apply the well-established legal principles of judicial review when reaching their decisions. It comes as no surprise therefore that they recommend that all permanent exclusions should be heard by the First-tier Tribunal (SEND) which they state should be re-named the First-tier Tribunal (Education).<sup>270</sup>

Thus, in holding that the right to education does not amount to a ‘civil’ right within the meaning of Article 6, the English courts have expelled the exclusion procedure beyond the margins and deliberations of the extensive jurisprudential pronouncements and protections under the rubric of the right to a fair trial.<sup>271</sup> This is further compounded by the failure to ensure that the legislative framework complies with ECHR requirements. Despite the concerns noted by both the JCHRs and the AJTC, the remedies afforded to permanently excluded children and young people were significantly downgraded by the Education Act 2011. This has enormous consequences in the context of their education rights for it removes a layer of accountability which could otherwise ensure their rights are upheld in a transparent and effective manner.

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<sup>266</sup> Ibid.

<sup>267</sup> Ibid, 30.

<sup>268</sup> See JUSTICE (2019) *Challenging School Exclusions*, (London: 2019)

<sup>269</sup> Ibid, p.46.

<sup>270</sup> Ibid, 51.

<sup>271</sup> For more see European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights*, (Updated to 31 December 2017) (Last accessed 25<sup>th</sup> March 2017).

This is necessary in view of the judicial pronouncements which have occurred regarding school exclusions and the right to education more widely.

### **7.3.2. School Exclusions and the Right to Education**

Furthermore, as a decision to exclude a child automatically activates the correlative duty for the State, via the local authority, to provide sufficient education to the excluded child, a noticeable trend can also be deduced from the courts' interpretation of this important legal function. Put simply, the courts have long adopted a narrow interpretation of the right to education and as litigation has tended to occur under the ECHR, through the Human Rights Act 1998, the right as contained within Article 2 Protocol 1 (A2P1) has come under the judicial scope. However, the United Kingdom has not embraced A2P1 in its entirety and has made a reservation owing to governmental concerns regarding resource allocation and potentially onerous obligations in the field of public expenditure. To this end, the United Kingdom only accepts the second sentence of A2P1 'only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure'.<sup>272</sup>

Moreover, the interpretation of A2P1, both regionally and domestically is noteworthy. In contrast to the CRC which expounds a broad purposive approach to education, the narrow nature of the wording of A2P1, namely that no -one shall be denied a right to education has been correspondingly replicated in judicial construction. From its earliest construal in the *Belgian Linguistics Case*<sup>273</sup> it became apparent that the requirements of A2P1 were to be negative and constricted in nature. In this instance, the Court held that the contours of A2P1 included a right of access to existing educational establishments, a right to an effective (but not the most effective possible) education, a right to the official recognition of academic qualifications and a right not to be discriminated against by reason of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status without objective and reasonable justification. Subsequent judicial interpretations of A2P1 at the national level, continued such an approach. In the case of *A v Head Teacher and Governor of Lord Grey School*<sup>274</sup> the then House of Lords reinforced the decision and reasoning of the *Belgian Linguistics Case*, holding that the right to education under A2P1 did not entail a particular, specific or minimum level of education as

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<sup>272</sup> This reservation is grounded in section 15(1)(a) of the Human Rights Act 1998

<sup>273</sup> [1968] 1 EHRR 252

<sup>274</sup> [2006] UKHL 14

adjudged by an objective standard. Rather, the provision of education pursuant to A2P1 is a negative obligation and restricts the provision of education to that which exists within the structural make-up of the contracting State. As was observed by Lord Bingham, the right to education is;

*"a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the State".*<sup>275</sup>

While such an approach might arguably represent the allocative autonomy which states retain in terms of progressively realizing socio-economic rights like the right to education; an overly deferential approach possesses the possibility of nullifying the legal content of the right itself. This was reflected in the case of *A v Essex County Council and National Autistic Society (Intervener)*<sup>276</sup> where the courts endorsed a stagnant version of the right to education, the undercurrents of which are anathema to the progressive realization of such a right. In this case, the Supreme Court held that no breach of A2P1 pertaining to the right to education occurred as a result of the delay of the State, for a period of eighteen months, to find a suitable educational establishment for a severely autistic boy with both incontinence and epileptic difficulties. In upholding the negative application of education as contained in the ECHR, the Court emphasised that the circumscription of such a right is governed by the prevailing educational system within a particular contracting State. Moreover, in light of the unique and severe difficulties experienced by the applicant in the instant case, Lord Phillips in referring to the 'enormous' costs associated with providing education for a disabled child asserted that;

*"It is plainly highly desirable that a State should make provision for the educational needs of those who are disabled, but the signatories to A2P1 did not commit themselves to establishing educational facilities that did not exist in their countries".*<sup>277</sup>

Similar restrictive approaches have also permeated the Courts examination of school exclusion cases. For example, in the case of *In the matter of an application by 'JR17' Judicial Review (Northern Ireland)*<sup>278</sup> the Supreme Court, despite holding that the applicant had been unlawfully excluded from school following non-compliance with the exclusion code, held that

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<sup>275</sup> Ibid at paragraph 24

<sup>276</sup> [2010] UKSC 33

<sup>277</sup> Ibid at paragraph 80

<sup>278</sup> [2010] UKSC 27

his right to education pursuant to A2P1 of the ECHR was nonetheless unaffected. There was no breach. As Sir John Dyson SCJ stated;

*“The state, therefore, provides educational facilities for pupils who are suspended from school and the appellant was not denied access to those facilities in this case. The fact that the standard or quality of the education provided may have been low is not material”.*<sup>279</sup>

Furthermore, in their extensive reliance on the earlier House of Lords decision in *A v Head Teacher and Governors of Lord Grey School*<sup>280</sup> and in particular the judgment of Lord Bingham of Cornhill which expounded the limits of the right to education in the explicit context of a school exclusion case, the Supreme Court held that no breach of the applicants right to education occurred. As stated in the *JR17* case;

*“As Lord Bingham said in the Lord Grey Case at para 24, there is no Convention right to education of a particular kind or quality, other than that prevailing in the state. Thus, there is a breach of article 2 only if the person is denied effective access to such educational facilities as the state provides for such pupils.”*<sup>281</sup>

Thus, in becoming the subsequent basis of a Strasbourg challenge in the form of *Ali v. The United Kingdom*<sup>282</sup>, the *Lord Grey School* case is significant as it established not only the current legal framework guiding a head-teacher’s decision to exclude a child or not, but further outlined the legal approach of the European Court of Human Rights in their adjudication of the interface between school exclusions and the right to education. Arising out of circumstances regarding an allegation of arson within the school which the applicant attended, he was excluded pending the outcome of the police investigation. However, contrary to the statutory guidelines (then contained in sections 64 - 68 of the Schools Standards and Framework Act 1998) the exclusion was improperly communicated, and no time period underpinned the period of exclusion. Although successive exclusions were communicated in a similarly unlawful manner, the applicant was offered tuition and an opportunity to sit his examinations. When the police concluded their investigations into the arson attack and the criminal proceedings were discontinued, the applicant’s parents failed to attend a meeting with the school and consequently he was deleted from the school registrar. An action alleging a violation of Article

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<sup>279</sup> Ibid at para 65.

<sup>280</sup> [2006] UKHL 14

<sup>281</sup> See n (100) above at para 63.

<sup>282</sup> (Application No. 40385/06). 11<sup>th</sup> January 2011

2 Protocol 1 ECHR followed, ultimately reaching the European Court of Human Rights (ECtHR).

In recognising that “the right to education does not in principle exclude recourse to disciplinary measures such as suspension or expulsion from an educational institution in order to ensure compliance with its internal rules”<sup>283</sup> the Court proceeded to set out the factors to consider in determining whether a school exclusion is contrary to the right to education. In so doing, the Court stated;

*“In determining whether or not an exclusion resulted in a denial of the right to education, the Court will have to consider whether a fair balance was struck between the exclusion and the justification given for that measure. It will therefore have regard to factors such as the procedural safeguards in place to challenge the exclusion and to avoid arbitrariness; the duration of the exclusion; the extent of the co-operation shown by the pupil or his parents with respect to attempts to re-integrate him; the efforts of the school authorities to minimise the effects of exclusion and, in particular, the adequacy of alternative education provided by the school during the period of exclusion; and the extent to which the rights of any third parties were engaged”*<sup>284</sup>

While the exclusion was ultimately found to be lawful, a number of issues arise within the judgment from a children’s rights perspective. These issues are also central to gaining a deeper and more thorough understanding as to how children’s rights regarding school exclusions can be ‘progressively realized’. While the need to strike a *fair balance* between an exclusion and its justification is indicative of the wider principle of proportionality which underpins the Courts jurisprudential deliberations,<sup>285</sup> a striking number of anomalies are evident within the *Ali* judgment, particularly from a children’s rights perspective. Firstly, no reference is made to the child’s ‘best interests’ given the effect of school exclusions *per se* and the acceptance within the judgment and by the parties thereto that the school’s behaviour and approach was itself procedurally deficient at times. This absence is all the more recognisable given that at the time of the judgment in 2011, the European Court of Human Rights had firmly embedded the CRC, including the best interests principle, within its adjudicative artillery.<sup>286</sup> Secondly, the Court’s

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<sup>283</sup> Ibid at para 54.

<sup>284</sup> Ibid at para 58

<sup>285</sup> For more on the concept of ‘fair balance’ see generally, Alastair Mowbray (2010) A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights, 10 *Human Rights Law Review*, 289-318.

<sup>286</sup> See Kilkelly, U., (2001) The Best of Both Worlds for Children’s Rights: Interpreting the European Convention on Human Rights in light of the UN Convention on the Rights of the Child, *Human Rights Quarterly*, Vol23 No.2.



reference to the ‘*procedural safeguards to challenge the exclusion*’ is further bereft of any subsequent detailed examination. Specifically, what procedural mechanisms is the Court referring to? Who should have the benefit or indeed the privilege of such safeguards? And what remedies should be available in the absence of such safeguards? As children in England did not possess an autonomous right to appeal their exclusion at the time of the judgment, (nor do they currently possess a right of review under the current framework), with such a right falling exclusively into the parental domain, the question arises as to the Courts’ own appreciation for children’s procedural rights. This question assumes increased significance in view of the Court’s subsequent statement that in its determination of that fair balance, it would also have regard to “the extent of the co-operation shown *by the pupil* or his parents with respect to attempts to re-integrate him”<sup>287</sup> [emphasis added]. Such a position, in view of the complete marginalisation of the *pupil* from the exclusion process itself it difficult to comprehend. Children do not receive notification of the exclusion process; they do not receive the written reasons underlying the exclusion nor do they receive the relevant time frame and accompanying guidance pertaining to the review mechanisms which accompany a permanent exclusion. They receive no information and remain outside the exclusion system. They are procedurally estranged from it. Indeed, the evidence from the Agenda Days was that children do not know what the exclusion process or code even is. Therefore, the Court’s articulation of the child’s own individual attempts to re-integrate themselves into the school is somewhat of a *non-sequitur*, failing as it does to account for, or even recognise the almost invisible status of the child with the English exclusion system. The judgment is further silent as to what level of cooperation is expected of the pupil and specifically as to how they satisfy this cooperative requirement. Indeed, the test as laid out by the ECtHR with regard to school exclusions is disjunctive in its methodology and incompatible with basic and elemental children’s rights principles. In recognising children at only the end stage of the exclusion process - at the re-integration stage - the Court has completely side-stepped children’s rights at all other stages of the process.

Thus, in view of the above, in terms of the incompatibility of the exclusion system with Article 6(1) ECHR, the negative and narrow judicial articulation of the contours of the right to education and the position of children’s rights within the exclusion system in England, the question arises as to how the courts can better enforce the progressive realization of children’s

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<sup>287</sup> See n (106) above.

rights not only within the exclusion process but also their right to education more broadly. It is argued that the formal adoption of the concept of ‘progressive realization’ within judicial deliberations can provide the Courts with a judicially defensible and methodologically rigorous tool with which to adjudicate socio-economic rights generally and children’s rights more specifically, including the right to education. It will be further argued that the formalised judicial adoption of such a concept by could also potentially guide the very many decisions to exclude which happen at the school level and become part a key consideration at that quasi-judicial level. In this regard, consideration must be given as to how the courts can engage with the concept of progressive realization and its distinct elements.

### **7.3.3. Centralising Progressive Realization within Judicial Decisions**

The interface between the judiciary and children’s rights manifests itself along several clear fracture lines in England. From the numerous children’s rights issues which pertain to family law disputes to the adjudication of criminal matters which involve children, the Courts regularly and often (unnoticeably) resolve sensitive and complex legal issues involving children. In such circumstances, they are guided by well-crafted concepts which have become firmly embedded within the English legal infrastructure. From adherence to the welfare principle<sup>288</sup>, the best interests principle<sup>289</sup> and the acceptance of child participation as fundamental to the legal process<sup>290</sup>, the Courts play a pivotal role in ensuring conformity to established children’s rights principles. They also ensure that legal effect is meaningfully accorded to children as individual rights-holders. Although such a task regularly occurs in matters which directly relate to children, the Courts have often incorporated children’s rights principles into their adjudicative outputs in cases which, on their facts, indirectly or obliquely pertain to children’s rights. For example, the case of *R (SG and Others) v Secretary of State for Work and Pensions*<sup>291</sup>, which involved a human rights challenge to the ‘benefits cap’ introduced under the Government’s austerity measures<sup>292</sup> on the grounds that it amounted to unlawful indirect sex discrimination on the basis that the vast majority of lone parents were women, involved a serious and detailed discussion on the child’s best interest’s principle.<sup>293</sup> Indeed,

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<sup>288</sup> Children Act 1989

<sup>289</sup> Article 3 CRC.

<sup>290</sup> Article 12 CRC.

<sup>291</sup> [2015] UKSC 16.

<sup>292</sup> See Welfare Reform Act 2012

<sup>293</sup> For more the approach taken by the Supreme Court in this case, see Hollingsworth, K., (2015) Judging

Hollingsworth argues that while the case “concerned the discriminatory impact on women of the benefit cap, at its heart were children's rights”.<sup>294</sup> Such adherence to children’s rights owe its origins, arguably, in part, to the cultivation of such standards at the international,<sup>295</sup> regional<sup>296</sup> and domestic levels.<sup>297</sup>

However, on the issue of socio-economic rights, the courts have displayed a long-standing reluctance to trespass into areas which are regarded as polycentric or non-justiciable in nature. Indeed, the question of justiciability is one which has long haunted the legal realization of socio-economic rights.<sup>298</sup> In its most elemental form, justiciability determines whether a court can resolve a matter before it with constitutional integrity or whether such an intercession is beyond the powers ascribed to it.<sup>299</sup> In its distinction between claims which should be either advanced before Parliament or the appropriate legal forum, the doctrine of justiciability plays a significant role in the furtherance of socio-economic rights generally and children’s rights specifically.<sup>300</sup> Described by Cohn as ‘the most open-ended and sensitive judge-made public law doctrine’,<sup>301</sup> the notion of justiciability operates, in essence, as a *de facto* judicial filter which determines whether a case is ultimately adjudicated upon or not.<sup>302</sup> As McGoldrick notes

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Children’s Rights and the ‘Benefits Cap’: R (SG and Others) v Secretary of State for Work and Pensions, 27 *Child & Fam. L. Q.* 445.

<sup>294</sup> Ibid at p. 465.

<sup>295</sup> See for example, UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),

<sup>296</sup> See for example, European Commission (2011), Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Agenda for the Rights of the Child*, COM (2011) 60,14, the European Commission (2010) Communication from the Commission, *Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 and the revised *EU Guidelines for the Promotion and Protection of the Rights of the Child (2017)* also referred to as the Leave No Child Behind Policy, were adopted by the European Council at its 3525<sup>th</sup> meeting held on the 6<sup>th</sup> March 2017.

<sup>297</sup> See for example, section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to have regard for the welfare of the child when discharging her obligations under the Act and section 11 of the Children and Families Act 2014 contains a new presumption in favour of parental involvement in the life of the child unless the contrary is shown

<sup>298</sup> Masteman argues that the concerns regarding justiciability attach to the ‘unsuitability of the courtroom to determine how best to deploy public monies in pursuance of a particular policy or legislative objective’. Masteman, R., (2010) *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* Cambridge University Press at page 93

<sup>299</sup> Harris observes that the question of justiciability involves decisions pertaining to where ‘decision-making responsibility should best reside’, and that a decision ‘that a matter is not justiciable will remove that matter from the jurisdiction of the court’. Harris, B.V (2003) ‘Judicial Review, Justiciability and Prerogative of Mercy’ 62 *Cambridge Law Journal* 631 at page 634.

<sup>300</sup> See generally, International Commission of Jurists (2008) *Courts and the Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*.

<sup>301</sup> Cohn, M., (2011) Formula and Constitutional Ethos; The Political Question/Justiciability Doctrine in Three Common Law Systems, *The American Journal of Comparative Law*, Vol. 59, No. 3 at page 676

<sup>302</sup> Harris argues that the innately nebulous configuration of the doctrine of justiciability, with no clear demarcation of its contours, or no clear distinction as to what is justiciable or non-justiciable, has created the potential for vast judicial discretion and the creation of a ‘forum for tension between judicial restraint and judicial activism’ further stating that the opaque nature of justiciability is such that it has been described as a ‘judge-made self-limiting

“[D]octrines of justiciability commonly appear as attempts to determine the limits of judicial or quasi-judicial functions and to distinguish them from ‘political’ functions and processes”.<sup>303</sup> Central to such a filter process lies the vast expanse of judicial discretion which Lacey defines as the requirement of a judge “to choose between several different, but equally valid, courses of action”<sup>304</sup> in that it represents “the space between laws... where the inflexibility of fixed legal rules gives way to powers for exercising personal judgement that enable both flexibility and individualisation within discrete cases”.<sup>305</sup> In short, however, a finding of non-justiciability has the effect of automatically excluding a legal claim from any form of deliberation or judicial consideration.

It is contended however, that one way to assuage concerns regarding justiciability is to integrate the principle of progressive realization into the adjudicative process. This would of course necessitate the articulation of the principle through oral and written legal argument in addition to the elaboration of, and engagement, with its multi-dimensional elements as outlined earlier. However, such a move is not beyond the realms of prospective possibilities. The oft-cited case of *Government of South Africa and Others V Grootboom and Others*<sup>306</sup> exemplifies the potential. The case involved a challenge by over eight hundred people, adults and children who argued that their constitutionally guaranteed right to adequate housing was violated. In finding a violation on the basis that the government failed to adopt reasonable legislative and other measures to achieve the progressive realization of the right to adequate housing, the Court engaged in a detailed assessment of what constituted the progressive realization of the right to adequate housing pursuant to section 26 of the Constitution of South Africa. In particular, the Court stated that:

*“the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses”*.<sup>307</sup>

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tool’. See n (136) above.

<sup>303</sup> McGoldrick, D., (2010) The boundaries of justiciability, *International and Comparative Law Quarterly*, Vol 59 at p 985.

<sup>304</sup> Lacey, W., (2004) Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere, *Melbourne Journal of International Law* Vol. 5

<sup>305</sup> Ibid

<sup>306</sup> (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

<sup>307</sup> Ibid at para 45.

In laying down what has since been entitled the ‘reasonableness’ standard of review, the Court stated that a number of factors must be considered when examining whether the socio-economic right in question has been fulfilled. First, the measures taken by the contracting state “must be capable of facilitating the realisation of the right”<sup>308</sup> and in determining this the Court will consider the reasonableness of such measures. In essence;

*“considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met”.*<sup>309</sup>

In furthering the determination of reasonableness, the Court stated that “[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavor to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.”<sup>310</sup> In aligning ‘reasonableness’ with a broader individuated assessment which considers both the effect and position of those most in need as against the measures taken by the State, the South African Constitutional Court has carved out a method which situates socio-economic rights adjudication alongside executive and legislative discretion. The approach further signifies that courts can indeed assimilate progressive realization within their adjudicative reasoning.

However, in view of the narrow judicial elaboration of the scope and content of the right to education which persists in the UK and as outlined earlier, the question arises as to how the judicial parameters can be opened up to allow for a more expansive interpretation of the right. More recently however, in the case of *R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent)*,<sup>311</sup> the Supreme Court held that the blanket requirement that applicants for a student loan ‘have indefinite leave to remain’ was contrary to A2P1 of the ECHR. Of particular interest was the economic balancing exercise engaged in by the Court whereby it stated, per Lady Hale, that:

*“Any short-term savings to the public purse by denying these students finance, by way of loans, not grants, are just that, as most of them will eventually qualify for*

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<sup>308</sup> Ibid at para 41.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid at para 32.

<sup>311</sup> [2015] UKSC 57.

*loans, and in the meantime the benefit their enhanced qualifications will bring to the exchequer and the economy have been lost.*"<sup>312</sup>

This approach, which recognises the long-term economic and societal benefits of education, is a positive development as it opens the door to more unreserved arguments regarding socio-economic rights and potentially also their means of delivery; namely, progressive realization. Although the principle of progressive realization was not addressed within the judgment, the Court's reference to the long-term societal benefits which will accrue by virtue of providing the educational finance highlight the importance of accentuating the long-term advantages which education (and other socio-economic rights) bring. Indeed, third level education is itself subject to progressive realization and the provision of finance is certainly a 'step' which can be taken to progressively realise the right to third level education. Contemplatively, if there was a General Comment on Progressive Realization in existence at the time of the hearing and which unpacked the core aspects of the principle, then arguably this could have contributed to legal argument or provided an additional legal avenue to explore within the case. Indeed, using the concept of 'progressive realization' would allow for an individuated judicial assessment as to whether a prospective claimant's rights were in fact fulfilled. This would grant the Court a permissible basis upon which to inquire as to the various measures which were taken to progress the right in question? No longer limited to fiscal or material measures, such inquiries could hypothetically subsume issues as to whether the child's voice was heard? Were they accorded an opportunity to have a say in those matters which affected them? And more significantly, were their views given 'due weight' in view of their age and maturity? Such judicial explorations would feed into the wider examination as to whether the child's rights within and under the exclusion system were progressively realized? Just as the South African Constitutional Court's assess whether an impugned measure was 'reasonable' the English Courts could adopt a comparable position and anchor their decisions within the language of accountability and progressive realization.

Moreover, in view of the arguments advanced by Merris Amos that social rights claims on the domestic adjudicative front receive "less-favourable treatment"<sup>313</sup> than other claims under the Human Rights Act 1998, namely those classical civil and political rights, the judicial adoption

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<sup>312</sup> Ibid at para 41.

<sup>313</sup> See Amos, M., The Second Division in Human Rights Adjudication: Social Rights Claims under the Human Rights Act 1998, (2015) *Human Rights Law Review*, 15, pp 549–568, at p. 550.

of ‘progressive realization’ as a legal tool to deploy in socio-economic claims could arguably assist somewhat in remediating such a legal disparity. Amos advances three reasons which she argues have caused this uneven judicial adjudicative treatment. The first she argues is that the English courts have adopted a ‘conservative approach’ to the implementation of such rights and claims. The second is the failure of the English courts to follow the jurisprudence laid out by Strasbourg and the third is the standard of review to determine the justification for the interference with the social right if often not the proportionality standard. In arguing that such disparate judicial treatment has caused “a second division”<sup>314</sup> of human rights adjudication, Amos proceeds to persuasively argue that such differential standards risk “breaching the fundamental principle of equality before the law”.<sup>315</sup> In the context of school exclusions therefore, it is clear that Amos’ arguments hold considerable weight. The case law as alluded to earlier reveals that the English Courts do indeed adopt a conservative approach to school exclusion challenges and are considerably deferential to the overall margin of appreciation enjoyed by the State in terms of upholding the right to education. However, from a children’s rights perspective, such practices can ultimately denude children’s rights of their intrinsic legal value. In the absence of adequate enforcement, the right itself becomes inconsequential. Therefore, as the legal mechanism which connects socio-economic rights with their eventual fulfilment and as the mechanism of rights attainment which contracting states have voluntarily subscribed to, progressive realization can offer the courts a rigorous and defensible mechanism to deploy in social rights cases, including those related to education. In the context of school exclusions, this could have a significant impact. For example, courts could enquire whether the decision to exclude the child from school was fair, reasonable, proportionate and lawful? Was the decision to exclude taken on disciplinary grounds? Was the decision consistent with the best interest’s principle and other children’s rights more generally? Did the decision align with the exclusion code? And what alternative options were considered in view of the proportionality requirement? Specifically, the court could deploy this framework to determine whether the school and indeed the contracting state *progressively realized* the right in question. Indeed, the use of ‘progressive realization’ could lay the foundations for the strengthening of those necessary procedural rights which are applicable within the educational institution itself. While the right to education undeniably necessitates access to a school or alternative suitable

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<sup>314</sup> Ibid at p. 562.

<sup>315</sup> Ibid.

educational institution in the first instance, it also envisages that children continue to possess their human rights within that setting.

Therefore, in securing all educational rights, both in terms of access to and those which persist within the school, the judicial focus should revert to the core legal and factual analysis, as to whether the right in question was progressively realized. Therefore, in concretizing the principle of ‘progressive realization’ within the adjudicative artillery of the Courts, the judiciary could grant relief, where appropriate and within permissible legal and constitutional boundaries. Indeed, the use of children’s rights and their judicial deployment is an exercise which has been proven to be both judicially defensible and methodologically rigorous.<sup>316</sup> For example, declaratory relief could be granted should the Courts hold that the existent school exclusion system is inconsistent with the progressive realization of children’s rights. Furthermore, should the concept of progressive realization establish itself as a central adjudicative component, its impact would arguably reach the quasi-judicial level where the decision to exclude habitually occurs; namely within the school itself. For instance, in the case of permanently excluded students, the above considerations could form part of the deliberations of the IRP given their obligation to apply the principles of judicial review in their decisions. Moreover, updated statutory guidance could flesh out such considerations and provide additional direction to both head-teachers and Boards of Governors in their application of their powers in relation to school exclusion.

#### **7.4.Conclusion**

In conclusion this chapter has examined the role of legal accountability in securing the progressive realization of children’s rights and specifically their right to education and the school exclusion system therein. In outlining how the current legal framework underpinning school exclusions has not only marginalised children but utterly failed them, this chapter has highlighted the vast discrepancies which persist within the legal framework. In combining such legal inconsistencies with the evidence from the Agenda Days, this chapter has underlined the difficulty for children in obtaining legal accountability for any transgressions of their rights within the school exclusion system. Their denial of review rights in the case of permanently excluded pupils when taken together with the evidence of highly suspect reasons for exclusion

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<sup>316</sup> See for example, *Stalford, H. E., & Hollingsworth, K. (2017). Towards Children’s Rights Judgments. In H. Stalford, K. Hollingsworth, & S. Gilmore (Eds.), Rewriting Children’s Rights Judgments: From Academic Vision to New Practice (pp. 53-85). Oxford: Hart.*



demonstrated how the current legal system estranges children and young people both from their rights and their ability to enforce them.

However, this chapter has also advanced a possible way in which the courts could invoke the concept of progressive realization within their deliberations regarding education issues and more specifically school exclusions, to truly uphold children's educational rights. It has argued, by drawing on the South African experience as an example, for the legal centralisation of progressive realization within judicial adjudication as a possible mechanism to give legal effect to not only education cases, but socio-economic rights more generally. Such a move could also arguably influence the actions of schools wherein the vast majority of decisions pertaining to school exclusions take place as integrating progressive realization within judicial decision-making could potentially contribute to the improvement of current practices at the quasi-judicial and administrative school level.

## **CHAPTER EIGHT**

### **CONCLUSION: TOWARDS A STRONGER IMPLEMENTATION OF PROGRESSIVE REALIZATION**

#### **8.0. Introduction**

The starting point for this thesis was a simple one. What role, if any, can the principle of progressive realization play in the advancement of children's socio-economic rights and specifically within the context of school exclusions in England. However, such an enquiry opened additional legal issues which this thesis has sought to address. And although the principle of progressive realization has long darkened the hallowed corridors of international human rights scholarship, little scholarly attention beyond transitory remarks and the repeated assertions concerning the principles complicated connection with resources have been made. Rarer still was the engagement between children's rights scholarship and progressive realization. With this in mind, this thesis sought to unpack what exactly the principle actually entailed and how it was defined, achieved, measured and enforced. Against the backdrop of a profoundly transformed legal environment than that which prevailed at the time of the entry into force of the CRC, this thesis argued that the principle of progressive realization can offer much potential to children's rights scholarship and that it is now time for the principle to become a more visible and rooted mainstay within children's rights more broadly.

By using school exclusions, a practice inseparable from the child's right to education, as an illustrative frame to guide the analysis, this thesis has demonstrated that progressive realization can amount to much more than an abstracted or aloof legal concept. Indeed, as Lundy has previously posited within the context of the right to health and the right to education, the issue is not so much whether international human rights possesses the ability or scope to better children's rights across these two fronts, and indeed others, but whether "the international frameworks actually make a difference at a local level".<sup>1</sup> It is precisely by unpacking the legal obligations which reside within the principle that its true promise and untapped potential can be reached. As this thesis has highlighted, by positioning school exclusions squarely within the context of progressive realization, its impact on the local level becomes apparent. By framing the legal realities and practices which attach to school exclusions within the language of

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<sup>1</sup> See Lundy, L., (2005) *Schoolchildren and Health: The Role of International Human Rights Law*, in Harris, N., & Meredith, P., (2005) *Children, Education and Health: International Perspectives on Law and Policy*, Ashgate Publishing, at p.14.

progressive realization, it becomes apparent that much can be done to the exclusion system to better comply with and uphold children's educational rights. Indeed, it also exposes the necessity to continuously engage with, and apply, international legal principles at the most local and immediate level. That necessity further provokes questions concerning issues of legal relevance; namely, what purpose do these principles, including progressive realization, serve if they exclusively reside in theoretical legal uplands. This thesis has highlighted that children's rights scholarship must reengage with the principle of progressive realization, in all of its parts, to ensure contracting states to the CRC are upholding their socio-economic rights commitments thereunder. It has also argued that a comprehensive understanding of the principle enables it to become a durable device within children rights and indeed human rights more broadly. Within the context of school exclusions, we can see how that durability can and should take hold by using the language of progressive realization to not only capture or examine existent state practice but also to frame and guide future legal developments.

In addition to this chapter, this thesis was comprised of seven substantive chapters. Chapter One set about establishing the backdrop to this thesis by firstly highlighting the need for children's socio-economic rights scholarship to respond to the changed legal realities in which it now finds itself. By examining school exclusions as an example, this chapter emphasised that as a direct component of the child's rights to education, the principle of progressive realization should not be seen as either separate to, or immune from, the phenomena of school exclusions in England. Chapter two established the methodological approach which underpinned this thesis, which included a child-participatory empirical investigation of school exclusions in addition to a doctrinal legal analysis of the principle of progressive realization. Central to this chapter was the contention that while child-participatory approaches provide a critical space for children to express matters which affect them, their methodological strength not only resides in their compatibility with Article 12 CRC but also with the principle of progressive realization. As this chapter recognized, the principle necessitates an awareness of the on-the-ground realities in respect of children's enjoyment of their rights as this provides an empirical floor upon which to assess whether contracting states are in fact progressively realizing the right in question. This chapter also outlined the use of the Agenda Model of engagement to determine children and young people's experiences and understandings of the school exclusions system in England. Chapter three set out the legal and regulatory framework which surrounds children's educational rights, highlighting the legal connection between the right itself and the principle of progressive realization. This chapter also set out the legal framework

underpinning school exclusions in England and the primary obligations which flow from the decision to exclude the child. The next three chapters set about engaging with the legal nuances which attach to progressive realization. Chapter four unpacked the definitional contours of the principle by stripping it back to its core features. Rather than reinforcing the principle as some sort of aggregate legal tenet which exists to exclusively pacify competing legal, political and economic priorities, this chapter demonstrated that the principle possesses clear identifiable features which enable it to be properly assessed, examined and applied. Building on from this, chapter five examined how the principle is achieved in practice by exemplifying the realities associated with its application in the direct context of school exclusions in England. This chapter demonstrated that by applying the principle's discrete constituent elements which comprise the obligation to take steps, to the maximum availability of a state's resources, within the framework of international assistance and cooperation where necessary, to ensure the non-retrogressive and non-discriminatory enjoyment of children's education rights, progressive realization can become not only an important principle to hold states accountable for their actions, but also an important legal tool to guide and frame the behaviour and actions of the state in question regarding their socio-economic commitments. By drawing on the empirical evidence gathered as part of this thesis, this chapter exposed some key inadequacies, from a children's rights perspective, concerning the school exclusion system in England. Chapter six examined the methods by which progressive realization is in fact measured and recognised not only the limitations of existent measures, particularly those which relate to the over dependency on the use of human rights indicators, in terms of actually capturing the true extent to which children's rights are being progressively realized but also the possibilities of reframing such measures to not only address school exclusions but also to align them with more robust qualitative evidence. This ensures a more thorough and accurate account, beyond the wholesale reliance on statistics alone, of the true extent to which children's socio-economic rights are being realized. Lastly, chapter seven examined the issue of legal accountability for progressively realizing children's rights. By again drawing on the empirical evidence collected as part of this thesis, this chapter exposed some key legal deficiencies within the exclusion framework; namely the absence of an independent review mechanism for children in their own right and indeed the complete absence of an appeals process for children and young people to directly challenge their exclusion. When coupled with evidence of the very dubious grounds for excluding children in the first instance, which itself runs counter to the very essence of legal accountability, the need for the introduction and restoration of such mechanisms was highlighted. This chapter also explored the possibility of progressive realization becoming part

of the judicial adjudicative artillery and the potential which it could play in future educational judicial deliberations. The exploration of the above legal and empirical issues provides a foundation for rethinking and reframing children's rights across two distinct fronts. The first issue relates to how children's rights scholarship as a whole can re-embrace the full potential which progressive realization could exert while the second of these relates to how children's rights within the school exclusion system in England can be progressively realized and better protected on the domestic front.

### **8.1. Recommendations for the Committee on the Rights of the Child**

It has been contended throughout this thesis that the CRC Committee have insufficiently and inadequately engaged with the principle of progressive realization. The net effect of this failing is that the CRC Committee has contributed to the principle's under-development within children's rights law, which if left unremedied, could potentially curtail the effective implementation of children's socio-economic rights moving forward. In recommending the promulgation of a new General Comment on Progressive Realization to give effect more visibly to the principle, it is contended that this will assist children's rights law to meaningfully reconnect with the principle in a more consequential way.

#### *1) The Case for a General Comment: Elaborating the Duty to Progressively Realize Children's Rights*

The principal recommendation that this thesis makes owing from the limited interaction as outlined in the preceding chapters between the CRC Committee and the principle of progressive realization is for the promulgation of a new General Comment (GC) on Progressive Realization. A new GC on the requirements of progressive realization could bridge the chasm between children's socio-economic rights on the one hand and their means of realization on the other. A new GC could also go further and champion a bolder meaning for the principle to advance a transformative vision for children's rights. In this regard progressive realization can and should become *a way of doing* and *a way of thinking* regarding the development of children's socio-economic rights and become a more central component in children's rights law, practice and advocacy. A new GC could also galvanize cross-national efforts – at both state and civic society level - to implant the concept as part of the everyday wordbook of human rights and to hold states accountable for ensuring that children's socio-economic rights are fulfilled. By defining the legal contours of states obligations, children's rights law can set down

identifiable legal markers from which to assess, and challenge, if necessary, future state practice. Progressive realization can thus become a more central mainstay within the CRC, as opposed to an abstracted, marginal concept. This requires a leap beyond abstractive theorisations and a more pragmatic engagement with what guidance on progressive realization would look like in practice.

A new GC on progressive realization would need to, first, set out its rationale, background and objectives. This demands not only an appreciation of the legal, social and political idiosyncrasies which (frequently) exist within and between different groups of children<sup>2</sup> but also of the necessity to ensure such differences do not deprive children of their socio-economic rights. By confronting what Dixon and Nussbaum call the “differences of social starting point”<sup>3</sup> a new GC would recognise that responding to children’s rights requires detailed and continuous engagement with the manifold issues and realities which impact children’s socio-economic rights. By building on the work of the Committee in the areas of finance and resources,<sup>4</sup> the implementation of the rights of the child in early childhood,<sup>5</sup> the interface between children’s rights and the business sector<sup>6</sup> and the CRC’s General Measures of Implementation,<sup>7</sup> a new GC would add to this rich guidance by raising the awareness of the duty of progressive realization among both contracting states and civic society, by developing clear guidance on the obligations, expectations and indeed challenges which the duty entails. Moreover, a new GC would also stipulate that, in progressively realizing children’s rights, contracting states must implement adequate and acceptable disaggregated data collection systems – both qualitative and quantitative – to prevent de jure and de facto backsliding in terms of the enjoyment of such rights. It would provide clear guidance on state reporting to evidence what steps and measures states have taken within each reporting cycle to demonstrate how such steps have progressively realized the rights of children within their territory. In this way, by incorporating progressive realization into the reporting cycle, states would be placed on a

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<sup>2</sup> See generally, Ferguson, L., (2013) 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' 21 *The International Journal of Children's Rights* 177

<sup>3</sup> See Dixon, R., & Nussbaum, M., (2012) Children's Rights and a Capabilities Approach: The Question of Special Priority, *Cornell Law Review*, Vol. 97, , U of Chicago, Public Law Working Paper No. 384 at p. 251.

<sup>4</sup> See Committee on the Rights of the Child, (2016) General Comment No. 19 on public budgeting for the realization of children’s rights (art.4).

<sup>5</sup> See Committee on the Rights of the Child, General Comment No.7 (2005) on implementing child rights in early childhood.

<sup>6</sup> See Committee on the Rights of the Child, General Comment No.19 (2016) on public budgeting for the realization of children’s rights (art.4).

<sup>7</sup> See Committee on the Rights of the Child, General Comment No. 5, General measures of Implementation of the Convention on the Rights of the Child, 2003.

justificatory evidential back foot. As earlier chapters have highlighted,<sup>8</sup> rather than illuminating and centralising the principle's guiding features within its guidance, the Committee's treatment of progressive realisation in almost separate and inchoate terms possesses the potential to critically undermine the development and realization of children's socio-economic rights. And for those who possess an awareness of broader socio-economic rights law or who can disentangle the legal, conceptual, and vocational overlap between the CRC Committee and the work of the Committee on Economic, Social and Cultural Rights, this might not prove overly problematic. But for stakeholders who perhaps principally rely on the CRC's guidance, the marginal treatment of progressive realization could prove problematic in terms of enabling them to hold states accountable for their obligations. Similarly, a new GC on progressive realization could also provide an opportunity for the CRC Committee to engage with the OPERA framework as discussed in chapter six as a means to underpin the effective delivery of contracting states obligations in furtherance of their socio-economic rights commitments. Such engagement would not only also expose the benefits of the OPERA framework to a wider children's rights audience but also highlight how states can engage with the delivery and monitoring of their socio-economic rights obligations.

It is further contended that a new GC on progressive realization could also assist with the wider implementation of the CRC within contracting states. Contracting states possess several options with regards to the implementation of the CRC into their domestic legal systems.<sup>9</sup> They can opt for direct incorporation either at the constitutional or statutory level or indirect incorporation, usually through legislative enactments which involves giving "the CRC some effect in national law but they stop short of making substantive rights part of the domestic legal order".<sup>10</sup> Equally important in implementing the CRC into domestic systems is the adoption of non-legal measures. This has been explicitly recognised within CRC General Comment No. 5<sup>11</sup> with the CRC Committee stating that measures such as training and capacity building in relation to children's rights,<sup>12</sup> the establishment of independent human rights institutions,<sup>13</sup> co-

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<sup>8</sup> See Chapter Four for earlier discussion on the failure of the CRC Committee to engage with progressive realization within its General Comments.

<sup>9</sup> For a recent example of the effect of the domestic implementation of the CRC, see Kilkelly, U., & Liefwaard, T. (2019). Legal implementation of the UNCRC: Lessons to be learned from the constitutional experience of South Africa. *De Jure*, 52(Special Issue), 521-539.

<sup>10</sup> Lundy et al., (2013), 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review', *International Journal of Children's Rights*, 21, 442 – 463, at p. 451.

<sup>11</sup> See n (7) above.

<sup>12</sup> *Ibid*, para 53.

<sup>13</sup> *Ibid*, para 56.

operation with civil society,<sup>14</sup> effective data collection systems,<sup>15</sup> making children visible in budgets,<sup>16</sup> and the establishment of national children actions plans or strategies<sup>17</sup> are important elements which further the domestic implementation of the rights enshrined in the CRC. Against this backdrop, a new GC on progressive realization could assist in the development of the legal principles which guide and frame the application of the principle in practice at the state level. Beyond this, it could develop the work and thinking of civil society, NGO groups and national human rights institutions around the obligations which flow from the principle.

Moreover, any discussion on whether the CRC Committee should introduce a new GC on progressive realization raises further the connected issue as to whether one in fact is necessary and whether the duties which progressive realization entails are adequately delineated within the Committee's existent guidance, namely though GC No. 5 on the General Measures of Implementation and GC No. 19 on Public Budgeting. However, a closer examination of both GC's reveals that a new GC is in fact warranted.

### *1.2.The Limitations of GC's No. 5 and No. 19*

Closely connected with the CRC Committee's failure to incorporate progressive realization within its GC's as outlined earlier in this thesis is the failure of GC No.5 on the General Measures of Implementation and GC No.19 on Public Budgeting to sufficiently give effect to progressive realization within their guidance. Undoubtedly GC's No.5 and No.19 represent critical consultative and procedural directives for ensuring the effective implementation of the CRC into domestic legal systems. However, on closer inspection they do not fully address the core obligations which fall under the principle of progressive realization and which this thesis has examined. As a carefully calibrated legal principle designed to placate the tensions between a state's economic capacities, their allocative autonomy and the obligations arising under socio-economic rights law, progressive realization warrants considerably more engagement than that which it currently receives under GC's No. 5 and No. 9.

Looking firstly at GC No. 5, the need for additional guidance becomes apparent. Introduced in 2003, it firstly commences with a heavily caveated foreword which professes the "complex"<sup>18</sup> nature of the CRC's general measures of implementation and secondly with an admission of

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<sup>14</sup> Ibid, para 65.

<sup>15</sup> Ibid, para 48.

<sup>16</sup> Ibid, para 51.

<sup>17</sup> Ibid, para's 28 – 37.

<sup>18</sup> Committee on the Rights of the Child, General Comment No.5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, (27 November 2003), Foreword.



the Committee's intention to issue more "detailed guidance of individual elements in due course".<sup>19</sup> While Collins has described the CRC's general measures of implementation as a "useful, practical framework to facilitate the realisation of child rights",<sup>20</sup> it is nonetheless important to appreciate that GC No.5, even by the Committee's own stated intentions, is by far a fault-proof or finalised implementation manual. Despite the singular textual reference to progressive realization,<sup>21</sup> it fails to expound what is meant by progressively realizing children's socio-economic rights or what Ssenyonjo calls the "obligation to ensure that the steps taken are geared towards the obligation of result which is 'achieving progressively the full realisation' of ESC rights".<sup>22</sup> In other words, it fails to expressly state that the actions and steps which states are expected to take must progressively realize the socio-economic rights contained within the CRC. Such steps must also reflect, and remediate where necessary, the specific plight of children and the unique social, legal and political position they occupy. Nolan argues that factors such as children's heightened vulnerability to violations, their inability to secure special rights for themselves, the impact which violative actions exert on them in the short and long term, their difficulty in vindicating their socio-economic rights, the additional vulnerabilities which some children face through membership of pre-existing minority groups, the need to give effect to their evolving capacities and their reduced ability to advance rights claims in comparison to adults, all converge to set children apart, by virtue of being children, regarding the enjoyment (or non-enjoyment) of their socio-economic rights.<sup>23</sup> Such realities not only underscore the need for detailed elaboration about how progressive realization intersects with children's rights specifically but also the need for the CRC Committee to move beyond their reliance on the work of the Committee on Economic, Social and Cultural Rights whose legal focus is of a much more general nature.

Moreover, on the issue of resources, which are integral to the principle's operation, the Committee's treatment of what is encapsulated within the phrase itself is conceptually limited

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<sup>19</sup> Ibid.

<sup>20</sup> Collins, T.M., (2019). "The general measures of implementation: opportunities for progress with children's rights, external link", *International Journal of Human Rights*, 23(3), 338-356, 339.

<sup>21</sup> Committee on the Rights of the Child, General Comment No.5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, (27 November 2003) para 7.

<sup>22</sup> Ssenyonjo, M., (2010) Reflections on state obligations with respect to economic, social and cultural rights in international human rights law, *The International Journal of Human Rights Law*, Vol. 15, No. 6, pp. 969 – 1012, 977.

<sup>23</sup> Nolan, A., (2013), Economic and Social Rights, Budgets and the Convention on the Rights of the Child. *The International Journal of Children's Rights*, 21(2), 248-277.

and legally underdeveloped. Their allusion to “financial resources and other resources”<sup>24</sup> within the context of the general measures of implementation lacks any explanation of what is meant by “other resources” and how these are to be mobilized and distributed. And although a more expansive interpretation of resources was adopted in their 2007 Day of General Discussion, which included a reference to “qualitative” resources,<sup>25</sup> the primacy of CG No. 5 within the Committee’s reporting system and its corresponding reporting guidelines do not reflect the Committee’s more enlarged conception of resources. Similarly, and perhaps more problematically, the Committee’s reference to qualitative resources warrants further clarification. In the absence of such explaining, the potential which this prospective body of resources could bring to bear on the obligations of states to fulfil children’s rights is severely constrained. While financial resources are of course the primary determinant in the realization of socio-economic rights, they are not the sole aspect of such an endeavour. In this regard children’s rights scholarship and the labour of the CRC Committee should caution against any dismissive treatment of so called ‘other resources’.

Relatedly, the Committee’s failure to interrogate what is meant by the concept of “maximum available resources” beyond the inconsequential restatement of its alignment with progressive realization further possesses the capacity to dilute the obligations of states towards realizing children’s socio-economic rights.<sup>26</sup> The Committee’s passing references to it divest it of its critical significance for they fail to acknowledge the manifold “pools from which resources can be drawn”.<sup>27</sup> For example, in his discussion of the importance of “social resources”<sup>28</sup>; namely those which are “mobilised by the widest possible participation in development, as necessary for the realisation by every human being of ESC rights”,<sup>29</sup> Ssenynjo reminds us of the importance which non-fiscal resources play in the progressive realization of socio-economic rights. It also underlines the need for more updated and comprehensive guidance on this issue from a children’s rights perspective. Thus, the narrow and largely monetary approach to resources which GC No. 5 currently adopts and prioritises, reflects a legal myopia, the manifestation of which is distinctly inimitable to the pronounced procedural

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<sup>24</sup> Committee on the Rights of the Child, General Comment No.5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, (27 November 2003) para 7.

<sup>25</sup> Committee on the Rights of the Child, (2007) Day of General Discussion on “Resources for the Rights of the Child – Responsibility of States”, (21 September 2007), para 24.

<sup>26</sup> CRC Committee n (20), para’s 6, 7, & 51.

<sup>27</sup> Kendrick, A., (2017) Measuring compliance: social rights and the maximum available resources dilemma, *Human Rights Quarterly* 39, No. 3, pp 657 – 679, 662.

<sup>28</sup> See n (23) above at p.980.

<sup>29</sup> Ibid.

safeguards which children's rights have meticulously cultivated over the years. As O Connell et. al have argued: "...the content of the duty to realize progressively is not just about the positive actions that have to be taken but also about the process through which decisions regarding those actions are taken."<sup>30</sup>

Similarly, the complete absence of any reference to the principle of non-retrogression, the legal and practical corollary of progressive realization represents a striking anomaly within GC No.5. Described by Warwick as a doctrine requiring "urgent"<sup>31</sup> discussion, its absence from GC No.5 is noteworthy for it removes an important layer of legal protection for children's socio-economic rights from the lexicon, and indeed operable reach, of children's rights law. As discussed earlier, its function as a legal backstop plays a critical role in preventing against the de jure and de facto reversion in the enjoyment of socio-economic rights. However, the doctrine of non-retrogression has itself not evaded critique. In her examination of the intersection of human rights, economics and austerity, Dowell-Jones argues that current global fiscal realities have exposed serious limitations within the international socio-economic rights-based framework. Specifically, her argument that well-established principles such as non-retrogression and progressive realization "are simply not sufficient to address the very critical challenges of solvency and fiscal sustainability that welfare systems in the advanced economies now face",<sup>32</sup> demands broader scrutiny of both the contours and context within which such principles operate. Whilst such principles have demonstrably failed to push back against austerity, that failure is arguably not attributable to the principles themselves, but rather with their conceptual and legal underdevelopment, and practical application, by the broader human rights community. As Wills and Warwick argue, such principles "can serve as important counterframes to the dominant neoliberal fixation on competitiveness, efficiency and economic rationality".<sup>33</sup> Thus, the centrality of non-retrogression as an inseparable legal corollary of progressive realization is beyond doubt. It therefore requires additional detailed elaboration by the CRC Committee to imbue it with its full legal potential.

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<sup>30</sup> O, Connell et al. (2014) *Applying an International Human Rights Framework to State Budget Allocations*, Taylor and Francis, 69

<sup>31</sup> Warwick, Ben T.C., Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights, *Human Rights Law Review*, Volume 19, Issue 3, November 2019, Pages 467–490, 468.

<sup>32</sup> Dowell-Jones, M., (2015) The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments, *Human Rights Law Review*, 15, pp. 193–223, 212.

<sup>33</sup> Wills, Joe J., and Warwick, Ben T.C., 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse' *Indiana Journal of Global Legal Studies* (2016) 23(2), 629–664, 631.

Regarding GC No. 19, its primary limitation is perhaps the unintended consequence of its explicit thematic focus. Coming thirteen years after GC No.5, it exclusively situates state obligations within the realm of public budgeting and aims to embed children's rights within such processes. With its emphasis therefore on the broader fiscal approaches towards realizing children's rights, it does not engage with non-fiscal resources and/or approaches which also apply to the progressive realization of children's rights. Although the comment does indeed refer to the principle of progressive realization, the concept of 'maximum available resources' and the principle of non-retrogression, such references again, predictably occur within the framework of broader economic and budgetary considerations and specifically in light of how such concepts are applicable in times of economic crises.<sup>34</sup> While these represent significant implementation reminders given the important role which public budgeting plays in the progressive realization of children's rights, it is necessary to recollect that budgeting alone is not tantamount to progressive realization. Rather, it forms a crucial component along the continuum of improvement which progressive realization compels. The danger with elevating public budgeting as the sole and exclusive metric against which to determine the allocation of resources or the extent to which states are fulfilling their socio-economic commitments is that non-fiscal and indeed qualitative resources are not only marginalised, but arguably dismissed altogether. Thus, when considered together, the limitations of both GCs No.5 and No.19 regarding the application of the principle of progressive realization become evident. This further demonstrates the need for the CRC to more fully engage with the principle and to delineate its application within the specific context of children's rights law.

## 2) *Progressive Realization and the CRC's General Principles*

The second area where a new GC on progressive realization would be beneficial is in examining how the principle interacts with the CRC's existing general principles. As Doek states, they "have a well-established and widely accepted position in the reporting on and monitoring of the CRC".<sup>35</sup> As individual entitlements, in addition to their status as general principles, these four provisions have created an enduring legal connection such that all other

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<sup>34</sup> Committee on the Rights of the Child, *General comment No. 19 (2016) on public budgeting for the realization of children's rights* (art. 4), CRC/C/GC/19, para's 29 – 31.

<sup>35</sup> See Doek, J.E., (2005) *The CRC General Principles*, in *18 Candles The Convention on the Rights of the Child Reaches Majority*, Institut international des droits de l'enfant (IDE) Sion, Switzerland, at p.38.

provisions within the CRC must be upheld and delivered against them.<sup>36</sup> Simply put, all other rights must not be viewed as either separate to or distinct from these principles. Thus, a new GC on progressive realization could expand on how these principles would apply in the context of progressively realizing children's socio-economic rights and how they could become important legal hooks upon which to advance the progressive realization of children's rights. As free-standing entitlements in their own right, the general principles are not subject to the principle of progressive realization, falling as they do under the classification of rights commonly referred to as civil and political rights. But given that they also underpin the delivery of all other rights within the CRC, including the right to education and other socio-economic rights, a new GC on progressive realization would have to engage with how these principles apply to, and inform the application of the principle of progressive realization.

#### I. Non-Discrimination (Art. 2)

In light of the protections afforded to children under Article 2 to prevent discriminatory treatment on grounds of “*race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*”, a new GC could pin down the extent of the non-discrimination duty within the specific field of children's socio-economic rights law. This could further allow the Committee to highlight the plight of particular groups of children whose socio-economic rights are regularly infringed and thereby not progressively realized. For instance, in the context of education, children with disabilities and Roma children represent two categories of children who suffer disproportionate contraventions of their right to education. As highlighted in this thesis, children in England with SEN are disproportionately represented in the exclusion figures from all state-funded primary, secondary and special schools.<sup>37</sup> And in addition to the educational cutbacks they have experienced, the net effect of such practices is that this already vulnerable group of children are almost automatically marked out to endure further breaches of their rights. Progressively realizing their rights in conjunction with Article 2 should demand interventionist approaches by the state with more targeted and detailed supports made available for such children.

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<sup>36</sup> See Lundy, L. and Byrne B. (2017) ‘The Four General Principles of the United Nations Convention on the Rights of the Child: The Potential Value of the Approach in Other Areas of Human Rights Law’, in Brems, E., Desmet, E., and Vandenhoe, W., (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration*. Routledge.

<sup>37</sup> See Department of Education (2019) *Permanent and fixed period exclusions in England: 2017–2018*, (25 July 2019).

Similarly, the plight of Roma children within domestic education systems remains problematic with issues of segregation and outright racial discrimination persisting.<sup>38</sup> As is clear from their continuously low educational attainment, Roma children in England experience breaches of their rights on many fronts. Research carried out in the UK in 2009 by the Equality and Human Rights Commission found that the Roma population experience pervasive and continuous discrimination throughout their entire lives with lower educational qualification rates, higher infant mortality rates and lower child immunisation rates, among other inequities, than the non-Roma population.<sup>39</sup> When taken together with the continuous educational under-achievement which the Roma population endure a new GC on progressive realization could align non-discrimination, in all its forms, with socio-economic rights provision by elaborating on the measures states must take to address the deep-seated and often structural inequalities which endure within educational and other systems. As chapter four outlined, the principle of non-discrimination is not subject to progressive realization. Rather progressive realization is subject to full and immediate compliance with the principle of non-discrimination. Therefore, a new GC would highlight this legal reality and stipulate that all measures taken to progressively realize children's rights should not be either directly or indirectly discriminatory in nature.

## II. The Best-Interests principle (Art. 3)

A GC on progressive realization could further outline the need for states to continually engage with, and amend where necessary, domestic law and practice to ensure the child's best interests are upheld in all socio-economic matters which affect them. In practical terms, this would also mean the Committee clearly states that it is in children's best interests to have their socio-economic rights progressively realized. The Committee should also state that the child's best interests principle also represents an important procedural tool in itself which can ensure that children's socio-economic rights are progressively realised. As O'Connell et al have previously posited, the principle of progressive realisation also encapsulates the processes through which decisions are taken regarding the positive actions required by the principle's adherence.<sup>40</sup> In this regard, the child's best interests principle represents a critical aspect of ensuring that such processes are children's rights compliant. Moreover, the Committee's threefold articulation of

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<sup>38</sup> See for detailed discussion on the plight of Roma children within an educational context, Peleg, N., (2018) *Marginalization by the Court: The case of Roma children and the European Court of Human Rights*, *Human Rights Law Review*, vol.18, pp. 111 – 131 & Harris, N, Ryffe, D, Scullion, L & Stendahl, S 2017, 'Ensuring the Right to Education for Roma Children: An Anglo-Swedish Perspective', *International Journal of Law, Policy and The Family*, vol. 31, no. 2, pp. 230-267. <https://doi.org/10.1093/lawfam/ebx001>.

<sup>39</sup> See Cemlyn et.al., (2009) *Inequalities experienced by Gypsy and Traveller communities: A review*, Equality and Human Rights Commission.

<sup>40</sup> See n(30) above.

the principle as encapsulating an individual substantive right, an interpretative legal principle and a rule of procedure<sup>41</sup> could become a more prominent legal feature within socio-economic law and policy, including education. This could lead, for example, to the incorporation of a best interests determination within the English legislative framework governing school exclusions as recommended earlier. Since this particular issue has continuously dominated the correspondence between the UK and the CRC monitoring committee, it appears entirely logical that such a determination should form part of this important and determinative aspect of a child's education. Despite the fact that the decision to exclude will undoubtedly impact the child's right to education, such decisions are taken within an administrative province where exclusive power and decision-making is devolved to the head-teacher.<sup>42</sup> Their power to determine the fate and educational prospects of a child, while authorised by statute and guided by enduring judicial standards such as fairness, reasonableness, proportionality and natural justice are, however, simultaneously immune from any direct obligation to consider the best interests of the child.

A GC on progressive realization could further highlight key deficiencies and anomalies within state practice regarding adherence to the child's best interests and urge contracting states to adopt and maintain a consistent application of the principle across all socio-economic areas. In England (and Wales), this would involve the statutory activation of the public sector socio-economic duty pursuant to section 1 of the Equality Act 2010 which has never been implemented, and which was designed to ensure public authorities address inequality and socio-economic disadvantage when making decisions. This would also involve the need for states to avoid disjunctive approaches when incorporating the principle within socio-economic law and policy. While the principle is absent from the legislation, regulations and accompanying guidelines concerning school exclusions, it does however influence the revised Code of practice (DfE, 2015) underpinning special educational needs and disability provision enacted pursuant to Part 3 of the Children and Families Act 2014. While this is of course welcome, (and necessary), all facets of education law and policy should include specific requirements which centralise the best interests principle within decision-making structures.

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<sup>41</sup> See Committee on the Rights of the Child, General Comment No. 15 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), (2013).

<sup>42</sup> See Monk, D., (2005) '(Re)constructing the Head Teacher: legal narratives and the politics of school exclusions' *Journal of Law and Society* (2005) Vol 32(3): 399-423.

Therefore, a new GC could engage with the principle's absence in many aspects of education law. Remedying this lacuna may require the need for revised teacher-training practices and/or continuous professional development such that teachers and specifically head teachers, who exercise the statutory power to exclude a child from school, familiarise themselves with the threefold conceptualisation of the best interests of the child which has been expounded by the Committee on the Rights of the Child in GC No.14.

### III. The Right to Life, Survival and Development (Art. 6)

Progressively realizing children's socio-economic rights is intimately connected with the child's right to life, survival and development, which falls under the classification of rights known as civil and political rights. Broadly construed, Article 6 contains much potential for development through the articulation of a new GC aligning progressive realization with the child's life chances. A new comment would expand on the obligations expected of states to ensure compliance with Article 6 CRC by highlighting the need for them to identify and remediate the risks which disrupt or prevent the child's enjoyment of their socio-economic rights. Practically speaking, a new GC on progressive realization could provide an opportunity for the Committee to highlight the significant link between the progressive realization of children's socio-economic rights with the child's right to life, survival and development. While Article 6 is itself not subject to progressive realization, one can see how the realization of children's health, education, housing and social security rights, amongst others, can simultaneously contribute to, and enhance, the child's right to life, survival and development. This again highlights the indivisibility of all human rights.

Indeed, the right to education is instructive in highlighting the negative lifelong effects of children falling out of education through exclusion. A study in 2012 by the UK Ministry of Justice into the childhood circumstances and backgrounds of 1,435 prisoners found that 63% had either been suspended or temporarily excluded from school while 42% has been permanently excluded.<sup>43</sup> Similarly, the UK's 2018 *Serious Violence Strategy* highlights the evidential link between children within the care system and children who have been excluded from school, recognising both as "markers" for the increased risk of both victimisation and perpetration.<sup>44</sup> Moreover, evidence from the Government's *Race Disparity Audit* provides further evidence which highlights the disproportionately diminished life chances to which

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<sup>43</sup> See UK Ministry of Justice (2012), *Prisoners' childhood and family backgrounds: Results from the Surveying Prisoner Crime Reduction (SPCR) longitudinal cohort study of prisoners*.

<sup>44</sup> See HM Government, (2018) *Serious Violence Strategy*, Cabinet Office.



particular children are almost automatically exposed to.<sup>45</sup> In recounting the fact that children from gypsy, Roma or Irish Traveller heritage backgrounds have the lowest attainment and progress rates in education and who are the least likely to remain in education after 16 years of age, the report also highlights that such low rates are connected with poverty and economic disadvantage.

Within this context, a new GC could amplify the requirements of contracting states in investigating why certain population groups are more susceptible to breaches of their rights than others. This may subsequently necessitate specific interventionist approaches and targeted supports for such children.

#### IV. The Right to Participate (Art. 12)

The right to participate and for such views to be given due weight in accordance with children's age and maturity is a critical channel for not only ensuring that children's rights are upheld but also for fostering a rights-respecting culture. A new GC on progressive realization would highlight the importance of children's participatory involvement across all branches of socio-economic provision and detail the requirement for states to assess all existent legislative, regulatory, administrative and other measures, to determine any inadequacies and enact the appropriate rights-respecting corrective measures to ensure such participatory rights are vindicated. As stated earlier in this thesis, the recent implementation by the Irish government of the Lundy model of child participation across all public policy and legal spheres attests to the broader legal and political traction which the persistent engagement with children's principle has had. Moreover, as this thesis has also highlighted, participation is itself an important component to the principle of progressive realization.

Indeed, with recent scholarship advocating a move towards children's autonomy on the grounds that the right to be heard as contained in Article 12 is often ineffective and futile in practice,<sup>46</sup> a new GC could also engage with such debates and potentially advance a bolder, more meaningful directive regarding children's participatory rights. In this regard, the arguments advanced by Daly that children should be ascribed with the right to decide for themselves, in legal proceedings in which their best interests are a primary consideration, both how they are involved (which she terms process autonomy) and on the outcome (so-called outcome autonomy), unless it is likely that significant harm will follow from their decisions

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<sup>45</sup> See Cabinet Office (2018) *Race Disparity Audit*.

<sup>46</sup> See Daly, A., (2018) *Children, Autonomy and the Courts: Beyond the Right to be Heard*, (Leiden: Brill/Nijhoff)

could be further engaged with. Daly's promotion of an autonomy principle and a move away from the right to be heard invites further engagement around whether children's autonomy is in fact acknowledged or respected within socio-economic rights law and practice. It also provokes a sense of broader questioning concerning the ability of children and young people to exercise their autonomy across the full spectrum of rights which the CRC enshrines.

In education for instance, this would necessitate not only that children be allowed to participate in matters which affect them, but also that their ability to participate be developed and supported through the provision of information and other capacity-building measures. In the context of school exclusions in England, this would involve the enactment of legislative measures, as recommended above, to permit children and young people the right to review (at the very least) against their school exclusion in view of the immediate impact such a decision has on themselves and their family. Indeed, the failure to permit review rights for excluded children stands in striking contrast to the enhanced participatory rights of children with SEN under the CFA 2014 and further typifies an unequal approach to child participation within English education. Progressively realizing children's rights should avoid any asymmetrical statutory protection and entitlements for children. Although detailed guidance is given to inform the role of the school in how it engages with the child's parents, the complete absence of engagement with the child herself, and the recognition of her right to appeal is objectively incompatible with Article 12 CRC.

While much progress has been made in advancing children's participatory rights in private law,<sup>47</sup> socio-economic areas like education continue to play catch up. Fundamentally however, a new GC would emphasise that children's participatory rights extend across the full gamut of convention rights, including socio-economic areas, and that states must ensure that the child's voice is heard within all domains.

## **8.2. School Exclusion Recommendations**

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<sup>47</sup> See Kay, E. et al., (2012) Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences, in Freeman, M (ed.) *Law and Childhood Studies: Current Legal Issues Volume 14* (Oxford University Press).

From an examination of the empirical evidence in conjunction with the current legislative framework underpinning school exclusions in England, this thesis makes a number of findings which subsequently warrant reform. These will now be dealt with in turn.

### *1) Children's Informational Rights*

One of the stark findings emanating from this research was the unanimous confirmation by the children and young people who attended the Agenda Days that they knew very little about the school exclusion code itself and the rules underpinning it. This is significant for two reasons. Firstly, as chapter two outlined, children's informational rights are critical to not only ensuring their participatory rights are enabled but also for the cultivation of their wider sense of social citizenship. The second reason is that given that school exclusions, both official and unofficial, are an escalating reality within the English education system and which both seriously affect the wider educational prospects of the excluded child, it is imperative that all relevant information be imparted to children concerning exclusion within the educational establishment itself. This should include a child-friendly version of the rules which enable the school to exclude the child and the relevant sections from the statutory guidance so that children and young people have access to such information in the event of an exclusion. Indeed, the practice of conveying child-friendly information to children and young people is a well-established practice across multiple areas where children's rights are engaged including criminal justice<sup>48</sup> and migration<sup>49</sup> to name but two. However, beyond the specificities of the child's right to information itself, the provision of such information is an important aspect of progressively realizing children's education rights. This is not to say, as chapter four outlined, that the right to information is itself conditioned by, or dependant on, the principle of progressive realization. Rather, by immediately satisfying the right to information, itself a civil and political right, the state, as duty-bearer, also contributes to the progressive realization of the right to education. This also highlights the indivisibility of all human rights and corroborates what Ida Kock stated which is that: "The impact of education is not only on economic, social and cultural rights but reaches into the sphere of civil and political rights".<sup>50</sup> By providing direct information on school exclusions, it alerts children and young people to the rules and regulations which

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<sup>48</sup> See Council of Europe (2010) Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Council of Europe Publishing.

<sup>49</sup> For example, see Council of Europe (2018) How to convey child-friendly information to children in migration: A handbook for frontline professionals, (available at <https://rm.coe.int/how-to-convey-child-friendly-information-to-children-in-migration-a-ha/1680902f91>, last accessed 19<sup>th</sup> September 2019).

<sup>50</sup> Koch, I., (2009) *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*, (BRILL: Nijhoff), 150.

underpin it and may ultimately provide an additional layer of consideration in relation to their behaviour. From the evidence gathered within this thesis, schools in England should provide this information to all children and young people. What would be contained within this information would be child-friendly and accessible outline of the law as it relates to school exclusions. This would include the rules and regulations which underpin it and a clear statement that schools should only use exclusion as a last resort. By imparting the laws, rules and regulations which apply in the context of school exclusions, children and young people are equipped with the knowledge of this important area of law which they are subject to during their education. This could be done either as a part of a starter/information pack at the start of the school year or as part of an assembly address. In any event, the provision of such information should become part of the education process.

## *2) Post Exclusion Return Meetings*

The second finding generated within this study was the complete absence of a post exclusion return meeting between the school and the excluded child. Indeed, one of the discernible dimensions to the empirical evidence was the negative perceptions which children and young people felt upon their return to school either in terms of a perceived stigma or diminished opportunities thereafter. To foster a greater sense of integration between the children and young people who have been excluded and the school, in addition to recognising that school exclusions should not act as an automatic black mark on the child's character, abilities or prospective opportunities, post return meetings should form a distinct and enforceable part of the exclusion process itself. They should occur after the child has returned to school in the case of a fixed-term exclusion, or in the case of a permanent exclusion within the new school, as an opportunity for both parties to start afresh. And although the statutory guidance regarding school exclusions states that: "Schools should have a strategy for reintegrating a pupil who returns to school following a fixed-period exclusion and for managing their future behaviour",<sup>51</sup> the guidance fails to substantively outline what is expected of the school and/or head teacher within these meetings. Significantly, Appendix B to the statutory guidance which contains the non-statutory advice states that schools should have a process in place for such reintegration meetings but again fails to elaborate on what is expected of the educational provider in question.<sup>52</sup> This is significant because although reference is made to these reintegration meetings, such reference is minimal in nature, skeletal in substance and ultimately

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<sup>51</sup> Department of Education (2017) *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion*) 6.

<sup>52</sup> Ibid, 50 & 54.

devoid of legal enforceability. Indeed, neither the Education Act 2002 nor the 2012 Regulations make any reference to the need for such meetings. Therefore, to progressively realise children's education rights, reintegration meetings should be placed on a statutory footing, thereby underpinning them with a legal enforceability. Placing these meetings on such a foothold would also mean that the statutory guidance would have to be updated to give schools and head teachers clear directions on what is expected of them. Perhaps, however, more significantly, would be the symbolic consequence of such an action. By legislating for such meetings, a clear signal is sent to children and young people that their right to education is valued and respected within domestic law and that despite their exclusion, their right to education persists. Given the recent statement by Edward Timpson within the Timpson Review that an exclusion from school should not amount to exclusion from education itself,<sup>53</sup> reintegration meetings should form a more visible and enforceable component to the school exclusion system in England.

### *3) The Child's right to be heard*

While the child's right to be heard is one of the most established and arguably recognised children's rights principles, the evidence adduced as part of this thesis point to two separate areas where children and young people do not have a voice within the school exclusion system. The first issue as discussed in chapter five was that the children and young people felt they had no say in their punishments with evidence from one Agenda Days stating that, depending on the circumstance's, children should indeed have a say in their punishments. Similarly, chapter five outlined that the adoption of restorative practices within schools did indeed reduce offending behaviour in the London Borough of Barnet and that generally such practices do yield positive results. In light of such evidence, the Department of Education should engage in a broader public consultative process to ascertain whether every school should start implementing these practices within their schools and also about how best to ensure that restorative practices are properly delivered and resourced within English schools.

The second issue which arose in chapter seven of this thesis and which requires urgent remediation is the absolute absence of, and the procedural disregard for, the voice of the child within the formalised school exclusions process itself. With the legislation, regulations and accompanying statutory guidance containing no independent or autonomous right for children to have their school exclusion reviewed, the legal framework stands in direct contravention with established children's rights, not least their right to be heard and their right to a remedy.

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<sup>53</sup> See Department of Education, (2019) Timpson Review on School Exclusion.

Indeed, as chapter seven further highlighted, the net consequence of not bestowing children and young people with their own separate right to review or indeed, to appeal a school exclusion not only undermines any notion of the child's Article 12 (2) CRC rights but also more fundamentally, strikes right at the heart of any conception of legal accountability which is itself an integral component to the rule of law. Given further that criminal culpability commences at ten years of age for children in England,<sup>54</sup> the illogicity of denying children a right to review their school exclusion, which itself constitutes a direct interference with their right to education, becomes all the more apparent. Therefore, in its most elemental form, the very essence of progressively realizing children's rights demands at the very least the statutory establishment of an independent right of review for children and young people. This is necessary to ensure children's participatory rights pursuant to Article 12 CRC, including their rights under Article 12(2) which guarantees the right of children and young people to be heard in judicial or administrative hearings of which an IRP clearly falls under, are upheld. This should also be extended, so that when head-teachers use their statutory powers to exclude, children should also have an established right to make representations at this point. Given that O'Connell et al<sup>55</sup> have identified that participation is one of the aspects underpinning progressive realization, it is imperative that the right to be heard is given full and immediate effect within the exclusions system. This also highlights a deeper point. The immediate compliance with Article 12 CRC, and indeed other procedural rights such as upholding Article 3 CRC, provides a gateway through which the progressive realization of children's education rights in the context of school exclusions are upheld. This is not to say that such rights are subject to progressive realization. Rather, their fulfilment further enables the progressive realisation of children's educational rights thereby underscoring the indivisibility of all human rights.

Indeed, given further the changes that have occurred within the school exclusion system as outlined in chapter three and which include the downgrading of the remedies which are ultimately available to the independent review panel, the progressive realisation of children's rights further demands the consideration of whether the right of review, in the absence of any

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<sup>54</sup> For further discussion on the age of criminal responsibility, see Hollingsworth. K, (2014) 'Theorising children's rights in youth justice: the significance of autonomy and foundational rights', *Modern Law Review* 76(6) pp.1046-69, McDiarmid. C, (2013) 'An Age of Complexity: child and criminal responsibility in law', *Youth Justice* 13(2), pp.145-6 & Goldson. B, (2009) 'Difficult to Understand or Defend': A Reasoned Case for Raising the Age of Criminal Responsibility', *The Howard Journal* 48(5) pp.514-521.

<sup>55</sup> O, Connell et al. (2014) *Applying an International Human Rights Framework to State Budget Allocations*, Taylor and Francis, 69.

substantive or corrective consequences, is itself consistent with the principle of progressive realization. This is because a school exclusion amounts to a clear interruption in, and at times a cessation of, the child's right to education, and therefore should be subject to robust scrutiny. In the absence of a right to be reinstated should an exclusion be deemed to be improper, unlawful, or inconsistent with the principles of natural justice, then the right of review and the participation rights which is envelops are themselves ineffectual and superficial. Therefore, progressively realizing children's rights necessitates not just the establishment of review rights for children and young people but the full restoration of reinstatement powers for independent review panels. While of course there may be circumstances owing to issues of capacity or age where children may not be able themselves to exercise review rights on account of a lack of understanding regarding the issues at stake, then such rights can and should be exercised in those circumstances by their parents or legal guardians. However, for children who understand such issues, they should be bestowed with their own independent rights.

#### *4) The Best Interests Principle*

Another finding emanating from this thesis as a result of the examination of the legal framework governing school exclusions is the complete nonexistence of any reference to the child's best interests principle. When taken together in conjunction with the broad-based rights-deficient culture which was empirically adduced and highlighted in chapter five, the failure to recognise or give effect to what is in the child's best interests represents a regressive measure in relation to the enjoyment of children's rights. Indeed, as this thesis has determined, the progressive realization of children's rights extends beyond the material or fiscal investment in their rights. Rather, it also includes the protection and advancement of their procedural rights of which the best interests principle is one. Given further the principle's existence in other socio-economic areas such as health care, the progressive realization of children's educational rights necessitates the inclusion of the principle within the legal and statutory framework governing exclusion. Indeed, an examination of other discrete domestic statutory frameworks reveal that the best interests principle, or that of the welfare of the child, both of which are often used interchangeably, has a central role in decision making processes concerning children. For example, section 11 of the Children Act 2004 places an obligation on public bodies to have regard to promote and safeguard the welfare of the child while section 55 of the Borders, Citizenship and Immigration Act 2009 mandates that in the discharge of the functions arising under the Act that the welfare of children in the United Kingdom will be safeguarded and promoted.

Consequently, given the extensive prevalence of the principle's operation of other areas of children's rights law and policy, no reason exists to seal education law from the operable reach of the principle. Rather, given the fact that the decision to exclude a child will automatically impact upon their education in one way or another and further that the long-term educational prospects of excluded children are generally quite low, a determination of the child's best interests should unquestionably become a central statutory aspect of the head teacher's decision to exclude or not. The principle should also become part of the statutory obligations of both the Board of Governors and the Independent Review Panel in their determination of an exclusion. While the 2012 Regulations do refer to the child's 'interests and welfare', such considerations are not tantamount to the legal obligations which the best interests principle imposes. As chapter three earlier outlined, it imposes a high legal threshold whereby decision-makers must treat the child's best interests as a primary consideration and as a thought of first importance. Therefore, the distinction between a child's interests and a child's best interests represents an important and consequential legal distinction.

Moreover, the absence of the best interests principle from the school exclusion legal framework is all the more perceptible given that the principle has featured in subsequent legislative enactments regarding children's education. For instance, the 2015 statutory guidance which accompanied the enactment of Part 3 of the Children and Families Act 2014, which overhauled the provision of education for children with special educational needs and disabilities, makes a number of references to the child's best interests principle. These include an obligation to make decisions for children which are in their best interests whenever they lack capacity,<sup>56</sup> to ensure that the outcomes which are established within their Education, Health and Care Plans have their best interests at heart<sup>57</sup> and that those in receipt of direct payments for social care services will use such payments in the best interests of the child or young person concerned.<sup>58</sup> While such references are of course welcome, they nonetheless expose the fragmented nature of how the child's best interests principle is given effect to within domestic education law and policy, with one area of children's education law not subject to the principle, while another area is. This legislative dissonance regarding the application of the best interests principle could have been addressed within the Timpson review on school exclusions, but the failure to engage with, or allude to the principle, in any shape or form, highlights the lack of traction which the

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<sup>56</sup> Department of Education (2015) *Special educational needs and disability code of practice: 0–25 years*, (January 2015), 128

<sup>57</sup> *Ibid*, 163.

<sup>58</sup> *Ibid*, 184.



principle is having on this important area of children's educational rights. Despite the fact that the Committee on the Rights of the Child has previously stated that the best interests principle applies to decisions taken by administrative authorities, which they have broadly defined to include decisions concerning children's education,<sup>59</sup> the failure by the Tinspon review to recommend that the decisions taken by head teachers, governing bodies or independent review panels be guided by the child's best interests represented a missed opportunity to child rights-proof the school exclusion system. Therefore, placing the principle on a statutory foothold, either through an addition to section 52A Education Act 2002 or by amending the 2012 Regulations to ensure that the child's best interests form part of legal framework would represent a clear commitment to the progressive realization of children's educational rights.

#### 5) *Greater Accountability*

Another finding from this thesis was the need to ensure greater accountability within the school exclusion system itself. This includes the need to provide greater clarity regarding the reasons which are given for an exclusion in the first instance, coupled with the need to ensure children and young people are bestowed with their own independent right of review in the event of an exclusion. As chapter seven outlined, given that children possess appellate rights in other areas of education law and policy, no reason exists why children should not be able to challenge and review a school exclusion given the very draconian and long-lasting impact which a school exclusion can have on their life. Moreover, in relation to the need for more accountability underpinning the reasons which are given for an exclusion, the departmental category listed as "other" should be abolished and replaced with the requirement that head teachers clearly stipulate the reason for the exclusion in the first instance. Two reasons necessitate this. Firstly, the opaque nature of this category runs counter to the need for contracting states to the CRC to collect appropriate and well-organised disaggregated data, which itself is an important dimension to the progressive realization of children's rights. The second reason is that the objectively vague nature of this classification, coupled with the lack of independent review rights for children and young people, effectively renders a school exclusion which falls under this heading inscrutable. Therefore, by clearly outlining the reasons underpinning the exclusion in question, consistent patterns in relation to the prevalence of certain behaviour by groups of children, or the correlation between such behaviour and particular groups of children can be identified. This could subsequently lead to the implementation of policies and practices within

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<sup>59</sup> See Committee on the Rights of the Child, General Comment No. 15 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), (2013), para 30.

the school in order to remedy such behaviour and ensure that exclusion is properly used as a last resort. Moreover, the identification of these reasons listed as “other” is important to ensure that exclusion is in fact being invoked as a last resort and that the reasons for excluding a child fall within permissible boundaries. In addition to the foregoing, greater accountability is also required in relation to issues of ‘off-rolling’ and home education. In this regard, the Department of Education must ensure robust disaggregated data collection systems which enable the numbers of children who have been off-rolled or home-schooled to be collected. This can further allow for a deeper assessment to be carried out pertaining to the characteristics of these children so that appropriate interventions can be made. This will require good quality data at local authority level and also necessitate the exchange of this data at central government level so that a well-evidenced picture can be drawn up as to whether certain children are having their right to education realised or not.

### **8.3. Moving Forward and Some Broader Reflections**

While this thesis has sought to advance the potential which progressive realization can and should play within the context of both enhancing children’s rights within the school exclusion system at the domestic level and within children’s rights scholarship more generally, it is necessary to realise that the recommendations suggested above will not amount to a panacea for the many deep-seated issues which persist within our education system. Indeed, if anything, the deployment of progressive realization into the debates surrounding children’s educational rights, both in terms of the legal duties which arise from it but also in terms of the linguistic connotations it arouses can bring new thinking to the many issues which persist in our education system. While progressive realization should not be seen as a mechanism to either replace or supersede the use of, or potency, of existent children’s rights principles to guide state action regarding the delivery of education, it can however become a significant guiding factor regarding the use of resources and how those resources are distributed. Indeed, as this thesis has demonstrated, it can also act as a necessary stimulus to better improve and consolidate children’s procedural rights such as ensuring children have a say in matters which affect them and that their best interests are taken as a primary consideration.

At present, much debate abounds domestically regarding the delivery of education in England. With a governmental consultation process activated to consider the issue of home education in addition to the investigation into SEN provision, much scope exists for progressive realization to become part of the broader national conversation, both legally and practically. In relation to

home schooling and as this thesis alluded to, concerning evidence has emerged pertaining to coercive patterns within the education system whereby parents are left with no other choice but to home educate their child or face the prospect of a school exclusion.<sup>60</sup> In relation to alternative provision, much scope also exists there to frame any future developments in the language of progressive realization and better protect the quality and standard of education within such settings. Indeed, what permeates much of the discourse and issues surrounding children's educational rights are the border intersecting factors such as race, disability, gender, poverty and ethnicity which directly engages the issue of intersectionality from a children's rights perspective. Such issues very much crystallise in the context of school exclusions and while this thesis has sought to examine how the concept of progressive realization can better protect, and inform, the law surrounding the legal framework underpinning school exclusion, much scope exists moving forward in examining the potential which progressive realization can play in remediating the vast intersectional realities which abound within our education system.

On a broader children's wide systems-level, this thesis has highlighted the real lack of engagement which children's rights scholarship has devoted to the notion of progressive realization. And while suggestions have been advanced as to how children's rights can re-engage with the principle, it is important to remember that children's rights itself, as the introductory sentence of this thesis stated, is very much in an early stage. Therefore, many possibilities exist to assimilate progressive realization into the ongoing debates and conceptualisations occurring within children's rights. Take for example, the issue of children's rights budgeting, which Nolan describes as a "hot topic".<sup>61</sup> A sub-division of broader human rights budgeting,<sup>62</sup> it essentially involves a child-rights based approach to the allocative autonomy which states retain regarding the disbursement of their finances and resources and therefore should not be seen as something extraneous too, or distinct from, the principle of progressive realization. Rather, progressive realization should underpin the very practice and delivery of budgeting. Similarly, while this thesis briefly alluded to the concept of mainstreaming in chapter six to contextualise the discussion on human rights measurement,

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<sup>60</sup> Children's Commissioner for England (2019) *Skipping School: Invisible Children, How children disappear from England's schools*, (February 2019)

<sup>61</sup> Nolan, A., (2014) Budget Analysis and Economic and Social Rights, in Riedel, E., Giacca, G., & Golay, C., (eds.) *Economic, Social and Cultural Rights in International Law*, Oxford University Press, at p. 369.

<sup>62</sup> For more on human rights budgeting, see generally, O'Connell, R., Nolan, A., Harvey, C., Dutschke, M., & Rooney, E., (2014) *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources*, Taylor and Francis & Fundar, Centro de Análisis e Investigación & International Budget Project International Human Rights Internship Program, (2004) *Dignity Counts: A guide to using budget analysis to advance human rights*.

again much potential remains to amplify its conceptual parameters. In this regard progressive realization can become a central aspect of mainstreaming in all its forms. For example, the principle can and should become part of any related impact assessments which happen when decisions regarding children's rights policy and legislation are taken. Such assessments should ask whether the envisaged policy will progressively realize children's rights and more importantly how? By engaging with the relevant evidence base from all appropriate stakeholders, progressive realization could very quickly become part of the human rights wordbook regarding children's rights.

In one of the earliest examinations of the CRC in 1993, and writing shortly after its enactment, the late Eugene Verhellen in his examination of what was then a convention in its embryonic stages, alluded to the CRC as possessing both defensive and offensive characteristics in its overall pursuit of the fulfilment of children's rights.<sup>63</sup> Perhaps it is now time to fully grasp one of those characteristics, namely; progressive realization and drive forward a new wave of thinking about how best children's socio-economic rights can be better realized, better protected and better enforced. If children's rights are to rise-up and confront the challenges and demands of an ever-changing world, then new approaches are evidently required. While much work would undoubtedly remain to refine its operationalisation as a legal principle, the potential which progressive realization could ultimately wield would arguably far outweigh such efforts

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<sup>63</sup> See Verhellen, E., Children's Rights in Europe, *International Journal of Children's Rights* (1993) (1) 357 – 376

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## **APPENDIX**

1. Appendix One – Participant Information Sheet at pages 273 - 276
2. Appendix Two – Consent Form at pages 277 - 278
3. Appendix Three – Capture Form at page 279



## **Participant Information Sheet**

### **Children's Research Reference Group**

#### **Title of Study**

Other Children, Other Voices: Education and Exclusion and the Duty to Progressively Realise Children's Rights

You are invited to be part in a research study. Before you decide whether you want to be involved, it is important for you to understand why the research is being carried out and what it will involve. Please take time to read the following information and feel free to ask for further information or clarification on any aspect of the research. Contact details are included at the end of this information sheet.

#### **Purpose of the study**

The aim of the study is to examine the views of children and young people who have been excluded from secondary school. The researcher is interested in gathering the views and opinions of these young people with a view to better understanding their experiences of exclusion. When such information is gathered by the researcher, he will be able to look at these experiences in light of the human rights duty of the State to progressively realise the right to education for children and young people. Children have a right to education and that right is made real by the State continuously working to make sure that the right is being upheld.

## **Why have you been asked to take part in this research study?**

You have been asked to take part in this study because the researcher wants to work directly with children and young people. The researcher thinks it is important that children and young people are directly involved in the research and help the researcher with the project. The researcher wants to recruit and put together a 'Children's Rights Reference Group' (CRRG). The aim of the group is to work alongside the researcher and carry out some of the research. The CRRG will carry out the Agenda Days on behalf of the research and will present the findings to the researcher. Afterwards, both the CRRG and the researcher will draw up a list of questions and topics which will be asked in the interviews with children who have been excluded.

## **Do I have to take part?**

No. Participation is entirely voluntary and you are free to stop or withdraw at any time without giving a reason

## **What is involved?**

You will be part of a reference group who will help the researcher with his research. You will carry out Agenda Days on behalf of the researcher and will report back to the researcher with the findings of the Agenda Days.

## **What if I am unhappy or if there is a problem?**

If you are unhappy, or if a problem arises, please feel free to let either myself or my supervisor know and we will do our best to resolve the issue / concern. Our contact details are included at the end of this information sheet. If you remain unhappy or have a complaint which you feel you cannot come to us with, you can contact the Research Governance Officer on 0151 - 7948290 (ethics@liv.ac.uk). When contacting the Research Governance Officer, please provide details of the name or description of the study (so that it can be identified), the researcher involved, and the details of the complaint you wish to make.

## **Will my participation be kept confidential?**

Yes. All data collected will be stored in a secure filing cabinet in the researcher's office and the researcher's university's computer is password protected to ensure privacy at all times. The information which comes from the Agenda Days will be made anonymous and no identifying details or names will be made public. Access to the data collected during the Agenda Days will be restricted to yourselves, myself and my supervisors. The data will be stored for one year or however long as required by the University following the completion of my PhD thesis.

## **What will happen to the results of the study?**

The results of the study will form part of the researcher's PhD thesis, a copy of which will be stored in the University library. The results will also be used in future publications, but no identifying details will be disclosed.

## **What will happen if I want to stop taking part?**

You can withdraw at any time without giving a reason

If you have further questions or need clarity on any issue, please feel free to contact either myself or my supervisor.

Contact details



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## CHILDREN'S RESEARCH REFERENCE GROUP - CONSENT FORM

### Title of Research:

Other Children, Other Voices: Education and  
Exclusion and the Duty to Progressively Realise  
the Right to Education

**Researcher:** Seamus Byrne

**Please  
tick**

1. I confirm that I have attended a one day workshop for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily. I confirm that I wish to be part of the Children's Research Reference Group. ☐
2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, without my rights being affected. ☐
3. I understand that, under the Data Protection Act 1998, I can at any time ask for access to the information I provide and I can also request the destruction of that information if I wish. ☐
4. I understand that any personal information collected during the study will be anonymised and remain confidential. ☐

_____ Participant	_____ Date	_____ Signature
_____ Researcher	_____ Date	_____ Signature

**The contact details of the Researcher are:**

Address:     The School of Law and Social Justice,  
                  Mulberry Court  
                  Liverpool

Telephone:   07425-743703

Email:       [Seamus.Byrne@liverpool.ac.uk](mailto:Seamus.Byrne@liverpool.ac.uk)



Date .....

Venue .....

Worker .....

Name	Contact Details Home Address / Email address / Contact Number	Ethnicity	Postcode	Do you have a Disability  Yes / No	Do you receive free school meals?  Yes / No	Are your parents divorced  Yes/No