

Child Care as a Human Right: A New Perspective on an Old Debate

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Abstract:

A range of international human rights documents recognize the importance of child care for both parents and children, including the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Covenant on Economic, Social and Cultural Rights. While domestic advocates within the United States have long argued for an expansion of government-supported child care, the significance of child care’s status as an international human right has not been explored. In other nations, international law has played an important role in spurring governments to expand childcare services. Reframing the child care issue in the United States as a question of international human rights could be an effective way to enlist new allies, posit new paradigms, re-energize the child care debate and shift the domestic focus toward more progressive models.

Introduction

The United States' failure to match the level of social supports provided by other industrialized nations is well-documented. Unlike other major industrialized nations where child care is highly – and in some instances, fully -- subsidized, in the United States, families pay a significant portion of the annual cost of child care and early education (Clawson & Gerstel, 2002). Indeed, annual child care costs may be as much as \$10,000 a year, tantamount to college tuition (Mitchell, et al, 2001). Similarly, in contrast to comparable nations, the U.S. does not offer any formal, paid maternity leave. The federal Family and Medical Leave Act mandates only twelve weeks of leave that, because it is unpaid and is required only for employers of fifty or more, is inaccessible to many individuals with family care needs (29 U.S.C. § 2601-2654). In contrast, in European nations subsidized (and in several instances, fully paid) maternity leave is the norm, and paid paternity leave is typically mandated as well (Dialogue with Citizens, 2003; O'Holloran, 2000). These and other industrialized nations typically follow such leave policies with expanded access to early childhood education (Clearinghouse on International Developments in Child, Youth, and Family Policies, 2001).

While these family policy disparities between the United States and other industrialized nations are well-known, the role of international law in supporting and encouraging expansion of family supports such as child care has been little explored. In fact, child care is recognized as a component of international human rights in three major international convention. The Convention on the Rights of the Child (CRC) mandates that States Parties “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities,” and specifies that States Parties should take appropriate steps to ensure that working parents have access to child care services (CRC, Art. 18(2), (3)). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) encourages provision of necessary supportive services to parents, and urges the “establishment and development of a network of child care facilities” in participating states (CEDAW, art. 11(2)©). The International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that everyone has a right to work and to have an equal opportunity to be promoted in employment, has been interpreted broadly to encompass child care (Canada, E/C.12/1/Add. 31).¹

In addition to these treaties, the importance of child care has been specifically recognized in international documents such as the final Programme of Action developed by the International Conference on Population and Development in Cairo in 1994 (ICPD). As stated in that document, “[g]overnments, in cooperation with employers, should provide and promote means to facilitate compatibility between labour force participation and parental responsibilities . . . Such means could include . . . day-care centers . . .” (Programme of Action, A/CONF.171/13, para. 5.3). The United States has

¹ Individual reports filed by countries under human rights treaties, as well as Committee responses, can be found at: United Nations Documentation Research Guide, www.un.org/Depts/dh/resguide. This site also provides the complete text of the relevant treaties.

not ratified the CRC, CEDAW or the ICESR, but it did actively participate in the negotiations of these conventions as well as the negotiations surrounding the Cairo agreement.

In those nations that have ratified international human rights conventions – the vast majority of industrialized nations -- the United Nations review process plays an important role in monitoring government family support policies and encouraging expansion of services. Ratifying nations are required to submit periodic reports to the United Nations human rights committee monitoring compliance with the particular treaty. The committee then provides substantive input on how state policies might be improved or altered to meet international standards.

Reports submitted by states parties to these human rights treaties routinely address child care. Indeed, the official Guidelines for Reports to be Submitted by States Parties under the Children’s Rights Convention specify that States Parties should “provide information . . . on the institutions, facilities and services developed for the care of children” and “indicate the measures adopted . . . to ensure that working parents have the right to benefit from child-care services and facilities for which they are eligible” (Guidelines for Periodic Reports, 2003).

Responding to these country reports, the Committees monitoring treaty compliance have often urged States Parties to expand child care and family support services, expressing particular concern about working parents. For example, the Children’s Rights Committee has encouraged Honduras to “further support measures which promote the provision of child-care services and centers for working mothers” (Honduras IRCO, Add. 24, para. 27). In reviewing Hong Kong’s family leave policies, the Committee noted that the extent to which these policies were in compliance with the Convention “remains a matter of concern” (UK dependent territory: Hong Kong IRCO, Add. 63, para. 16). On the other hand, the Committee praised Denmark for its child care initiative, implicitly holding it out as a model for other nations (Denmark, CRC/C/15/Add.151, para. 5).

The CEDAW Committee also reviews States Parties family support policies, including child care. During hearings on their reports, country representatives are frequently questioned about their child care policies. (Barbados IRCO, A/49/38, para. 439; Japan IRCO, A/49/38, para. 566). Likewise, the Committee on Economic, Social and Cultural Rights is cognizant of the significance of child care in family’s well-being. In the Committee’s concluding observations on Canada’s 1998 report, for instance, the Committee recommended that “federal and provincial agreements should be adjusted so as to ensure, in whatever ways are appropriate, that service such as . . . child care . . . are available at levels that ensure the right to an adequate standard of living.” (Canada IRCO, E/C.12/1/Add. 31, para. 42).

These comments and criticisms do not go unheeded by States Parties. For example, responding to the Committee’s criticism of Sweden’s failure to extend unrestricted child care to unemployed parents, Sweden extended child care access to all

parents as of 2001 (Almefeldt, 1999). Similarly, Nepal's efforts to implement the CRC appear to have directly contributed to national efforts "to get information about existing child care centers, and encourage and help to NGOs to establish child care centers especially for disadvantaged groups." (Nepal, Additional Report on Initial Country Report, 1996, para. 29).

Because the United States has not ratified the CRC, CEDAW or the ICESCR, it has not formally participated in this international child care dialogue. Adopting an approach known as "exceptionalism," the United States has instead taken the position that it has little to learn from human rights practices of other nations, and need not participate in international human rights treaties. (Ignatieff, 2002; Thomas, 1996). Tacitly accepting this approach, United States child care and family advocates have limited the framework of their advocacy to domestic standards and paradigms – in this country, child care has not been framed as a human rights issue.

At the same time, however, this domestic advocacy to expand child care benefits has had only limited success, particularly at the federal level. Despite decades of attention to the issue, efforts to identify a legal source for a broad right to child care have been unsuccessful. Litigation – often used by domestic advocates to establish rights and affect social policy in other contexts -- has been particularly unfruitful. No reported case asserts that the government's failure to provide child care benefits constitutes a denial of state or federal constitutional rights. No reported case argues that an employer's failure to provide child care discriminates against women.² Other child care litigation has had limited significance beyond very low income families, since claims arise based on statutory grounds in the context of welfare or other government benefits.

Under the circumstances, framing child care as a human rights issue may provide new avenues for advocacy. Simply acknowledging the human rights significance of child care situates the policy debate within a broader agenda that may bring new energy to the issue. The power of human rights as an organizing tool within the United States has been noted in other contexts. For example, Sandra Robertson of the Georgia Citizens Coalition on Hunger found that when her organization was introduced to the concept of human rights

it just caught us on fire. Sometimes it's hard to talk about economic justice because it has so many facets to it. The human rights framework really allows you to tie it all together. (Nicole Davis, 2000).

The ability of a human rights framework to "tie it all together" may also give rise to new allies from the economic justice movement, both here and abroad.

² Interestingly, the U.S. Supreme Court's recent decision in Nevada v. Hibbs, 123 S.Ct. 1972 (2003), upholding the application of the FMLA to states, credits Congress's findings that the gender-neutral FMLA was intended to address the unequal caregiving burden imposed on women. Certainly, the FMLA has contributed to ending the stigma associated with caretaking leave, and has benefited both men and women. However, upholding this legislative mandate of a short unpaid family leave without regard to gender is a far cry from requiring that government affirmatively address the discriminatory impact of the lack of safe, affordable and accessible child care.

Further, adopting a human rights framework for domestic child care advocacy may also lead to tangible policy changes. Should the U.S. ratify the CRC, CEDAW and/or the ICSECR, international scrutiny and pressure would augment domestic voices supporting reform. Even absent ratification, support for child care is arguably a matter of customary international law among industrialized nations, supporting additional claims for expanded benefits in the U.S. In particular, the human rights framework supports the claim that adequate child care and appropriate family policy is an affirmative obligation of government rather than simply another policy option. This distinction is significant, since it puts the onus on the U.S. government to acknowledge the near-global consensus on the significance of child care and family policy by making child care a national priority in the U.S. as well.

Bibliography

- Almefeldt, Lena, Memorandum re. Conversation with Deputy Assistant Under Secretary of Swedish Ministry of Education, March 22, 1999. (on file with author)
- Clawson, Dan and Gerstel, Naomi, "Caring for Our Young: Child Care in Europe and the United States," Contexts, vol. 1, no. 4 (Winter, 2002).
- Clearinghouse on International Developments in Child, Youth and Family Policies, Columbia University, "Issue Brief: New 12 Country Study Reveals Substantial Gaps in U.S. Early Childhood Education and Care Policies" (Summer 2001).
- Committee on the Rights of the Child, General Guidelines for Periodic Reports, U.N. Doc. CRC/C/58 (20 Nov. 1996).
- Davis, Nicole, "Welfare Organizing at the Grassroots," ColorLines, vol. 3(3), Applied Research Center (Fall 2000).
- Dialogue with Citizens: Duration of Maternity Leave, <http://europea.eu.int/scadplus/citisens/eu/d4.htm>
- Family and Medical Leave Act, 29 U.S.C. § 2601-2654 (1999).
- Ignatieff, Michael, "No Exceptions?" Legal Aff. 59 (May-June 2002).
- Mitchell, Anne, Storey, Louise, and Dichter, Harriet, "Financing Child Care in the United States: An Expanded Catalog of Current Strategies," Ewing Marion Kaufman Foundation (2001).
- Nevada v. Hibbs, 123 S.Ct. 1972 (2003).
- O'Holloran, Debbie, "Ireland Emerges Last in European Table for Paternity Leave," www.exp.ie/advice/paternityrelease.html (Aug. 6, 2002).
- Programme of Action of the United Nations International Conference on Population and Development, A/CONF.171/13 (1994).
- Thomas, Dorothy Q., "Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy," 9 Harv. Hum. Rts. J. 15 (1996).