

Research articles

Exploring the role of domestic law in human rights education

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Abstract

The research underpinning this article has taken place in the context of a research project that seeks to improve children's legal capability. Discussions concerning the place of children's rights in this project led the author to engage with the HRE literature, where they discovered an affinity between the aims of the project and so-called 'transformative' HRE. This led to the central question this article explores: how might domestic law and domestic legal processes benefit or inform HRE? Basing its discussion around the familiar notion of HRE being education about, through and for human rights, the article recognises that the radically transformative approach it advocates may be considered too radical by some. Nevertheless, taking the topic of bullying in school as an example, it seeks to demonstrate that knowledge of domestic law and legal processes is essential to addressing the rights violations children experience in their everyday lives.

Keywords

Domestic law, human rights education, legal capability, bullying, legal literacy, children's rights education, human rights literacy, human rights violations

Introduction

The research underpinning this article has been carried out during the foundational stage of project FORTITUDE, funded by the European Research Council. The project aims to improve children's legal capability. In other words, it aims to improve children's ability to deal effectively with law-related situations they encounter in their day-to-day lives. Hitherto research into legal capability has focused on adults or those nearing adulthood, so the project's focus on children in this context breaks new ground (Denvir, Balmer & Pleasence, 2013; Parle, 2009). The project is based in England and considers the child's legal position in this jurisdictional context. However, a secondary aim of the project is to provide a framework for applying this research in other geographical contexts internationally. This means that England is being used as an example, rather than defining the case, both in this article and in our wider research activities.

A notable aspect of legal capability scholarship is its focus on 'justiciable' issues (those for which it is possible to seek a legal remedy by issuing proceedings in court). Although a child (or a group of children) is not permitted to issue proceedings themselves, they can do this via an adult (e.g., a parent or a solicitor) who is acting as their 'litigation friend' (UK Government, 2022). This prompted discussions among the research team as to whether children's rights under the UN Convention on the Rights of the Child (UNCRC) should be included in its activities, since for a child in England the UNCRC offers no direct legal remedy for a rights violation. For reasons explained further below, we concluded children's rights under the UNCRC should be included. But equally important for the purpose of this article, these discussions prompted the author to engage with the literature on human rights education (HRE), which in turn led to the central question which this article explores; the role of domestic law in HRE.

The article begins by providing some information concerning the context of this research and explains how the discussion concerning the relevance (or not) of the UNCRC was resolved. It then goes on to explore the role of domestic law in HRE, focusing on the common description of HRE as encompassing education and training *about, for* and *through* human rights (United Nations, 2011). Readers familiar with HRE will note the order of this description differs from the usual one - 'about, through and for human rights'. This deliberate disruption reflects the shape of the overall argument of this article, which focuses on exploring the role of domestic law in education about and for human rights, but which recognises (in the broader context of education through human rights) that the radically transformative approach it advocates may be considered too radical by some. The topic of bullying is used to illustrate aspects of the discussion, particularly in relation to education for human rights.

The context

As stated in the introduction, project FORTITUDE aims to improve children's ability to deal effectively with law-related situations they encounter in their day-to-day lives. This aim will be achieved by working with children and young people aged 15 years and under to co-create a range of game-based interventions (digital and non-digital) which both measure and improve aspects of their legal capability. Theories of play are central to these aims and this approach represents a generalisation of a successful game-based intervention created in the Law in Children's Lives ESRC-funded research project, where we created a digital game called 'Adventures with Lex' as a research tool to explore the everyday legal understandings of children aged 8-11 years (Watkins, Lai-Chong Law, Barwick & Kirk, 2016, 2018; Barwick, Watkins, Kirk & Lai-Chong Law, 2018; Lai-Chong Law, Watkins, Barwick & Kirk, 2016).

Three broad elements - knowledge, skills and attitudes - provide the conceptual framework for determining what we will both measure and seek to improve in the course of the project. This 'troika of knowledge, skills and attitudes' (Jones, 2010, p. 4) was adopted by the Public Legal Education Network (Plenet) in 2010 and its influence remains evident in the more complex frameworks of legal capability which have been developed since then (e.g., Collard, Demming, Wintersteiger, Jones & Seargeant, 2011; Mackie, 2013; Community Legal Education Ontario, 2016; Balmer, Pleasence, Hagland & McRae, 2019). This tripart approach emphasises the aim of public legal education (PLE) in facilitating access to justice; not only by making people aware of their legal rights, but also by developing the 'confidence and skills to assert them' (Law for Life, 2022).

As already stated, the traditional focus on justiciable issues in legal capability scholarship and PLE activities prompted discussions among the research team as to whether children's rights under the UNCRC should be included in our activities. A fortunate consequence of this discussion was that it prompted the author to engage with the HRE literature, where they discovered an affinity between the aims of project FORTITUDE and so-called 'transformational' or 'transformative' HRE (Tibbitts 2002 and 2017), influenced by the pedagogy of Paulo Freire (1921-1997) (Tibbitts, 2017; Bajaj, Cislighi & Mackie, 2016). This literature suggests that regardless of whether any direct legal remedy is available, increasing children's awareness of their human rights, when combined with opportunities to talk and think about their lived experiences (that which Freire termed 'praxis' [1970, p. 25]), can be instrumental in them recognising situations where their subjective reality is objectively unjust. For example, reflecting on their efforts to raise students' critical awareness of social justice issues in Mexico and the United States, Gibson and Grant (2017, p. 226) report positively on 'the power of a human rights framework' in developing students' consciousness and describe how students moved from a state of accepting 'normalised oppression' to raising questions concerning hitherto unquestioned practices within their communities.

In addition to helping learners identify ‘gaps between rights and actual realities’, transformative HRE seeks to provoke learners into discussing and considering ‘the concrete actions necessary to close these gaps’ (Bajaj et al., 2016, p. 3). In her study of the impact of HRE in India, Bajaj provides numerous accounts of school students taking direct action to confront human rights violations, drawing just on their knowledge of basic rights. The following extract from a student’s first-hand account provides a striking example:

... we learnt about the basic right to food, right to clothing, right to have clean water... one day... we got the food from the cook. We brought the food to her and said, ‘See this food, insects and stones are there, how can one eat this food? We won’t have this food; we also have rights. We should have clean food and water. But you are not providing clean or good food for us.’ Then, what she told us was, ‘I am working for the past 27 years. No one has ever asked me any single question. You children are asking me like this?’ We told her, ‘Yes, we have the right. See this [HRE] book.’ We also complained to the headmaster. She had to realize the mistake she was doing. Now... we are having good meals. (Bajaj, 2012, p. 89)

Drawing on this literature, we determined that for project FORTITUDE, whilst they are not justiciable, children’s rights under the UNCRC represent an accessible means by which children can begin to reflect critically on their lived experiences and identify situations where their rights have been violated. Likewise, they provide legitimate grounds for challenging these violations through informal, non-legal means. Furthermore, considering our intention to provide a framework for applying this research internationally, we recognise the UNCRC is incorporated into the domestic law of very many countries, emphasising its relevance to our broader aims.

Exploring the role of domestic law in HRE - education *about* human rights

In this section it is argued that including information concerning domestic law and domestic legal processes in education and training about human rights can serve to counteract the ‘rosy’ or ‘chicken-soup’ approach to children’s rights which some commentators (notably Lundy & Martinez Sainz, 2018) identify as being problematic. When Lundy and Sainz make their point concerning the ‘rosiness’ of some HRE programmes and policies, they do so in the context of emphasising that although international human rights standards ‘are intended to promote positive approaches to the treatment of children... Equally, and arguably more importantly, they exist to expose breaches of those standards and to enable states to be held to account for their actions.’ So, for Lundy and Sainz children need to be made aware that their rights can be ‘sources of conflict and tension’ as well as the bases for their protection and empowerment (2018, p. 15).

This view is not disputed in this article. Indeed, it has already been acknowledged that human

rights can play an instrumental role in alerting children to rights violations. However, the point made in this article concerning the need to counteract a rosy view of human rights is slightly different. It is suggested that a realistic or even perhaps a more honest account of human rights needs to include an explanation of when and how these rights are (and are not) justiciable, as well as the important role of domestic law in both situations.

The issue of justiciability

The issue of justiciability can be illustrated with reference to three highly significant human rights instruments: the Universal Declaration of Human Rights (UDHR), adopted in 1948; the UNCRC, adopted in 1991; and the European Convention on Human Rights (ECHR), adopted in 1951. The importance and influence of the UDHR cannot be questioned; it is described as ‘the first international agreement on the basic principles of human rights’ which ‘laid the foundation for the human rights protections that we have in the UK today’ (Equality and Human Rights Commission, 2021). However, because it is declaratory in nature the UDHR offers no direct remedy for a person whose rights have been violated. And, as already stated, there is no direct legal remedy available for children in England who claim their UNCRC rights have been violated. Rather, the extent to which England (as part of the UK) is meeting its obligations under the convention is assessed at regular intervals by the Committee on the Rights of the Child.

By contrast, the ECHR *does* include a mechanism through which a person can seek redress against the state for a breach of their ECHR rights, as proceedings can be issued in the European Court of Human Rights (ECtHR) in Strasbourg. An important point to note here is that in this situation, where an international legal remedy is available and legal redress is sought, it is expected that the process will commence in a domestic court, drawing on domestic law. This is recognised by the Human Rights Education Associates which, in response to the FAQ ‘I think my human rights have been violated. Where can I get help?’ states:

The regional and international mechanisms for human rights protections are based on the assumption that ‘domestic remedies have been exhausted’. Often local agencies can be of more immediate help in determining whether or not your rights have been violated and what steps should be undertaken. We suggest you contact a human rights organization in your community, your local human rights commission or social service agency for assistance. (HREA, n.d.)

As indicated here, domestic remedies must have been exhausted before a claim can be brought to the European Court of Human Rights, and ‘usually this will mean an application to the appropriate court, followed by an appeal, where applicable, and even a further appeal to a higher court such as the supreme court or constitutional court, if there is one’ (Council of Europe, 2021, p. 6). If the domestic appeals process is followed and exhausted, then the good

news is that cases brought to the ECtHR are dealt with free of charge, and there is no need for legal representation until the government is notified of the proceedings. However, this needs to be weighed against the fact that it is highly likely that legal representation will be required to pursue a claim through the domestic appeals process, and that where they do eventually reach the ECtHR ‘the great majority of applications are... declared inadmissible without being notified to the Government’ (Council of Europe, 2021, p. 9). The picture painted here is deliberately bleak, to emphasise just how challenging it is to bring a claim for a violation of a human right, even where an international human rights remedy is available.

The better news is that the possibility for seeking redress for a breach of the ECHR increased significantly when much of the convention was incorporated into UK law under the Human Rights Act 1998. This makes it possible for a person to seek redress for a violation of an ECHR right through an English domestic court. This will be discussed further in the following section (education *for* human rights). The important point for this section, which explores the role of domestic law in education *about* human rights, is that here domestic law played a crucial role in ‘bringing rights home’ (House of Commons, 1997) and the ongoing availability of this legal remedy is dependent on this domestic law remaining in force.

The limits of justiciability

It is important to note that even where human rights breaches are justiciable, claims can only be brought against a public authority (e.g., government departments, local councils, National Health Service Trusts and the police), or against a private person or organisation which is carrying out a public function (Human Rights Act 1998, s. 6). This does not mean that a person whose human rights are violated has no means of redress against a private person, but it does mean that they will need to rely on other domestic law provisions to take legal action directly against them. As Tibbitts notes, governments which are signatories to human rights treaties agree to uphold the principles enshrined in them, and to prevent human rights violations, ‘both through their own behaviour and through their ability to influence the actions of citizens whose conduct may be negatively affecting the rights of others’ (2017, p. 73). So, whilst it may not be possible to identify a justiciable human right in its purest form in domestic law, it may well be possible to discern its influence within a body of domestic law, comprising of multiple sources. Strenuous efforts by a former UK government to demonstrate how domestic legislation and policy have underpinned the implementation of the UNCRC in England provide a good example of this, with numerous legislative provisions set out against articles of the UNCRC in a very lengthy report (Department for Education, 2010).

The ‘complicatedness’ of justiciability

All of this is, of course, quite complicated. And especially when compared to the much more straightforward example provided earlier of children pointing to their rights in a HRE textbook

and persuading the school cook to change her behaviour as a result. Nevertheless, it is argued that this ‘complicatedness’ concerning the justiciability of human rights is an essential and unavoidable feature of them. Where this is acknowledged in education and training about human rights, this offers children the opportunity to gain a realistic and critical understanding of the nature of their rights, particularly regarding the extent of their enforceability. A more critical understanding of the nature of human rights may also assist children in gaining an understanding that the opportunities open to other children to enjoy and exercise their rights will vary widely according to their social, political and/or geographical contexts, as well as their legal jurisdiction. Whilst it is true to say that domestic law plays a crucial role in facilitating action to assist those whose rights have been violated in the UK, or in another liberal democracy, of course this is by no means the situation for children globally.

Exploring the role of domestic law in HRE - education *for* human rights

As argued by Lundy and Martinez Sainz, children’s experiences of injustice can be ‘key opportunities for children to develop the legal knowledge required to identify, handle and act on violations and breaches of their rights within and beyond school’ (2018, p. 16). And whereas a consideration of basic human rights can help children to appreciate or recognise a violation of their rights in general terms, an understanding of the relevant domestic law can then help them to ‘concretise’ the nature of this violation in specific legal terms. In turn, this presents them with opportunities to consider what actions may be taken to bring about change. As will be illustrated below, knowledge of relevant domestic law is important not only because it provides the basis for a legal claim to remedy an injustice, but because it signals the real potential or power to do so.

Bullying as an example

In the following discussion, the topic of bullying in school is used as a means to explore the role domestic law can and arguably must play in education for human rights. The topic is chosen because bullying ‘affects children everywhere’ (UNESCO Institute for Statistics, 2018). It has been shown that HRE can have a positive impact on the prevalence of bullying in schools (Sebba & Robinson 2010, p. 22; Greene 2006, p. 54). Nevertheless, bullying remains a global phenomenon and the literature suggests that even in contexts where HRE is actively promoted, bullying can continue to be recognised as a problem (Osler & Solhaug 2018, p. 279; Obiagu 2020, p. 7).

Imagine a scenario where an 11-year-old child has recently joined a senior school. On several occasions, during break times, they have been punched and kicked by another school pupil, but have not disclosed this to anyone. As Kolstrein and Jofré (2013, p. 47) observe, bullying behaviours such as these violate multiple human rights principles, including the fundamental

principle set out in Article 1 of the UDHR; ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ If we now suppose that fortunately, as a result of engaging in HRE, this victim of bullying becomes aware that their human rights are being violated. The following discussion envisages the steps that may be taken in response to this situation, highlighting the role of domestic law throughout.

Speaking up

Where a victim of bullying becomes aware that their human rights are being violated, our first hope would be that they speak to a trusted adult (e.g., a schoolteacher, or their parent or carer). Where this happens, it is possible they or their trusted adult might point to the right or rights concerned (e.g., Article 1 of the UDHR, cited above, or Article 3 of the ECHR ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’) and request that steps are taken in school to stop the bullying. Like the example given by Bajaj, cited earlier, this could be enough to resolve the situation. However, unfortunately, not all stories end this way. As Bajaj also reports, in another case where children brought a complaint about their food, ‘the headmaster, rather than supporting the student’s demands against the cook, beat the children who were complaining and threatened to expel them’ (2012, p. 89). Although it is unlikely that a child in an English school will be beaten for expressing concern that their rights are being violated, it is entirely possible that even where a school is notified about bullying, it may fail to adequately address the problem and the bullying will continue.

Drawing on domestic law to strengthen a complaint

Where an informal complaint is made to a trusted person, but no action is taken, then further steps will need to be taken, such as making a complaint to the school or its board of governors, requesting that adequate steps are taken to remedy the problem (Coram Children’s Legal Centre, 2021; Family Lives, 2021). Even though the complaint remains informal at this stage, possessing knowledge that a school’s failure to act is a legal issue, and reminding the headteacher or governing body of its legal responsibilities, can act to strengthen the position of the child making the complaint.

Being involved in litigation is both time-consuming and expensive, and a school (or its legal advisors) will certainly want to avoid it. This potential ‘strengthening’ role of legal knowledge is implied in online sources of advice to children and parents, which state ‘Your school must, by law, have an anti-bullying policy... Schools are required by law to protect and promote the welfare of children’ (Coram Children’s Legal Centre, 2021) and ‘Schools have a duty of care, and allowing a child to be continually bullied when the school has been alerted to the problem could be seen as a breach of that duty’ (Family Lives, 2021). The specific domestic legal provisions are not cited in this advice, but they most likely refer to the Education and

Inspections Act 2006, ss. 88 and 89 (setting out the responsibilities of school governors and headteachers regarding behaviour policies), the Education Act 2002, s. 175 (setting out duties to safeguard and promote the welfare of children), the Education (Independent School Standards) Regulations 2014 (relating to the responsibilities of independent schools to have effective anti-bullying strategies), and to the common law tort of negligence.

Taking legal action

Given the time and potential expense involved, nobody would be advised to issue court proceedings without having first fully explored all of the non-legal ways to resolve the problem. However, where a school is reminded of its legal obligations, but still fails to take effective action to address the bullying, then legal action may be taken. Of course, this significantly escalates the matter, and it is likely that if legal proceedings are issued, the school will be required to respond to the claim by a certain date, and both parties will be required to provide and exchange evidence in accordance with a timetable set by the court. Importantly, it remains open to the school (or its legal representative) to communicate with the person bringing the claim to find a way to resolve or settle the issue out of court. The court's externally imposed timetable can act as significant motivation towards achieving this outcome. Cases are frequently settled out of court. Indeed, analyses of court statistics confirm 'most civil claims are settled without a hearing' (Sturge, 2021, p. 12).

Some cases do, however, proceed to trial, and reported cases indicate that claims brought in relation to bullying have been based primarily in the tort of negligence; where the remedy is money (called 'damages' in the context of a civil court claim) to compensate the child for psychiatric or physical harm suffered as a result of the school's breach of its duty of care. For example, in *H v Isle of Wight Council* [2001] All ER (D) 315 a mother brought a claim against her local council, asserting that the headteacher of her daughter's former school (for which the council was responsible) had failed to protect her from being harassed and bullied by a group of girls who were also pupils at the school. Similarly, action was taken against a local council in *Bradford-Smart v West Sussex County Council* [2002] All ER (D) 167, where it was claimed that a school had failed to take action to address bullying which was taking place both inside and outside of school. Both of these claims were unsuccessful, and they demonstrate how challenging it is to evidence all of the discrete elements required to establish the tort of negligence. For example, it is necessary for the person making the claim to establish that a duty of care existed towards the pupil, that the school breached this duty of care, and that this breach caused the harm which the pupil suffered (*Bradford-Smart v West Sussex County Council* para. 38). And because this relates to school staff carrying out their professional duties, the standard they will be judged by is the so-called *Bolam* test - 'whether a responsible body of professional opinion would have taken that course' (para. 27).

As already noted, where a child is subject to bullying at school, then this is also potentially a breach of Article 3 of the ECHR ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment'). As explained earlier in this article, much of the ECHR was incorporated into the Human Rights Act 1998; meaning that a person can now seek redress for a violation of an ECHR right through a domestic court. An example is *Webster v Ridgeway Foundation School* [2010] All ER (D) 52, where a claim was brought against a state school, following an incident when a 15-year-old boy, Henry Webster, was seriously assaulted on school grounds. Henry had argued with another school pupil that day and they agreed to have a fight on the school tennis courts after school. Unknown to Henry, the other pupil had called his brother, who also came to the tennis courts, together with other friends and relatives, some of whom were adults. One of them attacked Henry with a hammer, causing him significant head injuries. The claim was again based primarily in negligence, arguing the school had breached its duty of care to take reasonable care to keep Henry safe while he was on the school's premises. It was further argued, under the Human Rights Act 1998, that the school was a public authority (as required by s.6 of the Act) and it had failed to protect Henry from the treatment prohibited in Article 3. Neither element of the claim was successful. The court decided, based on the complex facts of the case, that the elements to establish negligence on the part of the school had not been established. For the school to have breached its positive obligation to protect Henry from the treatment prohibited in Article 3, it would have been necessary for it to have known (or ought to have known) that there was a real and immediate risk of the attack taking place – which, on the facts, it did not.

Additional complications arise when we consider the position of independent, fee-paying schools. Where a child is subject to bullying at such a school, they are able to bring a claim based in negligence against the school – just as described in the cases already discussed. However, regarding Article 3 claims under the Human Rights Act 1998, fee-paying schools are private organisations and so arguably do not fall within the definition of a 'public authority' under s. 6. Nevertheless, case law from the ECtHR indicates that the UK government could still be held liable for a breach of Article 3 in this situation. *Campbell and Cosans v UK* (1982) 4 EHRR 293 and *Costello-Roberts v. UK* (1993) 19 EHRR 112 led to the UK government banning corporal punishment in state schools in 1987, and in fee-paying schools in 1999. In *Costello-Roberts*, the court emphasised 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals' (Para. 27). Arguably then, just as the state could be responsible for the acts of a headmaster inflicting corporal punishment in a fee-paying school, the state could be held responsible for a breach of Article 3 arising from its failure to protect a child from bullying in this environment.

But is domestic law actually effective here?

The cases discussed above indicate that where a child suffers psychiatric or physical harm from

bullying, and they (via a litigation friend) bring a claim based in negligence against a school, they face some very significant challenges in establishing the necessary elements of their claim. At first sight this seems counter-productive to the argument put forward in the article; domestic law is being advocated as a solution, but the reported claims have been largely unsuccessful. Three points can be made in response to this. Firstly, as already stated, most civil claims are settled out of court. Although they are certainly relevant and influential as precedents, the reported cases discussed here are not necessarily representative of how all claims are dealt with. Secondly, even if these cases are representative, then Middlemiss argues this lack of an effective remedy for children who are bullied in itself 'breaches their human rights and their rights under the UN Convention on the Rights of the Child 1989.' As a solution, he proposes 'the introduction of a new statute that provides civil remedies for victims of bullying' (2012, p. 253). In other words, domestic law is proposed here to resolve the insufficiency of the current domestic law to address this wide scale rights violation. Lastly, as will be discussed further below, domestic law provides the bases for other forms of legal action which children may not currently be aware of but can become aware of through HRE.

Other forms of legal action

In its advice concerning informal steps that can be taken to address a problem of bullying in school, one organisation advises that 'Bullying someone because of their gender, gender identity, sexuality, religious beliefs, race, skin colour or because they have a disability, is hate crime and against the law' (NSPCC, 2021). In these circumstances, this organisation recommends that a child or their parent report this to the police or contact Citizen's Advice or Childline for further advice and support (NSPCC, 2021). This is good advice, but arguably it should not be confined to incidents of hate crime. As this author has noted elsewhere (Watkins, 2016) the wide range of behaviours which constitute bullying (including cyberbullying) give rise to a correspondingly wide range of sanctions under Criminal Law, provided the person carrying out these behaviours is aged 10 years or over (the age of criminal responsibility under English law).

In light of the seriousness of the assault, readers may not be surprised that those involved in the attack on Henry Webster were convicted of causing grievous bodily harm with intent contrary to s. 18 of the Offences Against the Person Act 1861; and the person who wielded the hammer was sentenced to 8 years in a Young Offenders Institution. However, readers unfamiliar with Criminal Law may be surprised to know that it is possible to commit a criminal offence (known as 'common assault') with or without using physical violence. This is described succinctly as follows:

Common assault is when a person inflicts violence on someone else or makes them think they are going to be attacked. It does not have to involve physical violence.

Threatening words or a raised fist is enough for the crime to have been committed provided the victim thinks that they are about to be attacked. Spitting at someone is another example. (Sentencing Council, 2022)

Importantly, this can be a single incident. The ‘criterion of repetition’ which is inherent in definitions of bullying (Greene, 2006, p. 64) is a social construct rather than a legal one. So apart from prosecutions brought under the Protection from Harassment Act 1997, there is no need for bullying behaviours to form a pattern, or to be repeated, in order for the criminal law to apply to them (Middlemiss, 2012, p. 244).

Domestic law can also be relied on to bring a civil claim for damages (money) against the bully or bullies themselves, as in English tort law children are regarded both as being ‘capable of owing and being owed legal duties’ (Bagshaw, 2001, p. 148). For example, *Mullin v Richards* [1998] 1 WLR 1304 involved a claim brought in negligence on behalf of a 15-year-old school pupil, Teresa Mullin, against Heidi Richards, who was also aged 15. They had been involved in a play fight with plastic rulers at school. Heidi’s ruler snapped, and a piece of plastic flew into Teresa's eye, causing her serious injury. Although some elements of negligence were established (including, importantly, that a duty of care arose between the two pupils), the claim was not successful, as the court decided that the injury Teresa suffered was not ‘reasonably foreseeable’. The test applied was not whether Heidi’s actions ‘were such as an ordinarily prudent and reasonable adult... would have realised gave rise to a risk of injury’ but whether ‘an ordinarily prudent and reasonable 15-year-old schoolgirl in Heidi’s situation would have realised as much’ (*Mullin v Richards*, Per Hutchison LJ). This same test would apply in the context of any claim in negligence brought against a child, including a case where an injury has been caused as a result of bullying.

It is not suggested that in order to address the problem of bullying, all children who bully should be sued or criminalised. However, it is suggested that alongside a knowledge of their human rights, knowledge of the wide applicability of domestic law here could play a role in HRE, emphasising for children that all forms of bullying behaviour are potentially criminal acts or may give rise to civil liabilities, even where only a single incident occurs. In turn, it is hoped that rather than seeing bullying as something that ‘just happens’, children will speak up, raise new questions and take action to confront situations which they might otherwise have accepted as inevitable. Importantly, it is argued here that ‘taking action’ includes taking legal action, where necessary.

Exploring the role of domestic law in HRE - education *through* human rights

The description of HRE as being through human rights relates to HRE practice and recognises that ‘the *context* and the *way* human rights learning is organised and imparted has to be

consistent with human rights values' (Council of Europe, 2020, p. 19). Clearly, HRE is expected to take place in an environment where children's rights (including their participatory rights) are respected. On one level this can simply mean we design HRE activities in a way that fosters discussion and debate. Some of the domestic laws discussed in this article represent rich resources for these types of activities.

However, when we educate children about the steps that they can take to remedy an injustice, drawing on domestic law, we do so with the intention of making them more likely to act. This can result in disruption to the context where the learning takes place. As Mejias and Starkey observe, transformative HRE which takes place in a school can 'challenge many of the premises on which schools operate' (2012, p. 126), and it can become apparent that the school will need to make significant changes to its operations and culture for the human rights of all members of the school to be realised. Again, in the context of school, Rinaldi (2017) reports teachers' concerns about the disruption which may ensue if students are encouraged to act when they recognise a rights violation. Mejias' (2017) account of a student protest at a UK Human Rights Friendly School provides an example of this.

Admittedly then, the idea that transformative HRE should include educating children and young people to initiate domestic legal proceedings may be considered too radical by some, and perhaps inappropriate to some contexts. Nevertheless, this article has sought to demonstrate that there are contexts where this approach is not only appropriate but necessary. As Lundy and Martinez observe, 'Rather than providing protection, for many children school is a place where they are beaten, abused, bullied or attacked' (2018, p. 16) and, as Struthers (2021) has also emphasised recently in the context of HRE, we know that many children suffer abuse and neglect in their home environments. As Struthers concludes, 'Only through equipping children with accurate, detailed and comprehensive knowledge and understanding of their rights –and the protection mechanisms for those rights – will they be able to recognise and address violations of rights in their lived experiences' (2021, p. 58).

Conclusion

This article concludes by acknowledging that for scholars in HRE, the foregrounding of domestic law and domestic legal processes proposed in this article represents a significant challenge to the status quo. For those in the field of legal capability, with its traditional focus on justiciability and domestic law, the incorporation of children's rights under the UNCRC may be equally unsettling. Nevertheless, it is suggested that for scholars working in both fields, these challenges might be considered positively disruptive, or at least potentially beneficial.

As already discussed, an important element of transformative HRE is supporting learners to come to a realisation that their subjective reality is objectively unjust. This is also considered

an essential dimension in legal capability, although expressed in different terms (recognising a problem as a problem, and then as a problem with legal dimensions). Gibson and Grant describe this process as ‘get[ting] our students to see the water in which they swim’ (2017, p. 225) and this provides a useful illustration for the final point of this article. Gibson and Grant are referring here to a parable written by David Foster Wallace (1962- 2008). The full parable is as follows:

There are these two young fish swimming along, and they happen to meet an older fish swimming the other way, who nods at them and says, ‘Morning, boys. How’s the water?’ And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, ‘What the hell is water?’ (Wallace, 2005)

The parable reminds us that it is those practices we currently consider normal or ‘the way things are done around here’ require our constant critical attention. Indeed, the way the parable is written offers a further reminder of this. The term ‘morning, boys’ may well have unsettled the reader, as it seems to indicate an assumption that the protagonists in the story are male. Perhaps if he were writing this today, Wallace might choose more gender-neutral language to describe the young fish; or at least we might hope so. Just as Wallace said of himself, we are not the wise old fish in this parable (Wallace, 2005). We need to question the apparently unquestionable aspects of our thinking and our practice, and an underlying aim of the arguments set out in this article is to provide a basis for doing so.

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