



Little Angels

An International Legal Perspective
on Child Discrimination

ANNE-MARIE MOONEY COTTER

LITTLE ANGELS

*To my wonderful parents
William & Virgilia
And
To my little angels
Bill & Jill
My pride and joy.*

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An International Legal Perspective
on Child Discrimination

ANNE-MARIE MOONEY COTTER
The Social Security Disability Law Firm, USA

ASHGATE

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Published by

Ashgate Publishing Limited

Wey Court East

Union Road

Farnham

Surrey, GU9 7PT

England

Ashgate Publishing Company

Suite 420

101 Cherry Street

Burlington

VT 05401-4405

USA

www.ashgate.com

British Library Cataloguing in Publication Data

Cotter, Anne-Marie Mooney.

Little angels : an international legal perspective on child discrimination.

1. Children – Legal status, laws, etc. 2. Age discrimination – Law and legislation.

I. Title

341.4'8572-dc23

Library of Congress Cataloging-in-Publication Data

Cotter, Anne-Marie Mooney.

Little angels : an international legal perspective on child discrimination / by Anne-Marie Mooney Cotter.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-4094-2980-7 (hardback : alk. paper) – ISBN 978-1-4094-2981-4

(ebook) 1. Children (International law) 2. Children's rights. 3. Age discrimination – Law and legislation.

I. Title.

K639.C682 2012

342.08'772-dc23

2012002355

ISBN 9781409429807

ISBN 9781409429814

III



Printed and bound in Great Britain by the
MPG Books Group, UK.

Contents

<i>List of Tables</i>	<i>vii</i>
<i>Biography</i>	<i>ix</i>
1 Introduction to Little Angels	1
2 Little Angels in Child Discrimination	7
3 Little Angels in the United Nations	43
4 Little Angels in Australia and New Zealand	103
5 Little Angels in Africa and South Africa	133
6 Little Angels in Canada, Mexico and the United States	173
7 Little Angels in the North American Free Trade Agreement	207
8 Little Angels in the United Kingdom and Ireland	251
9 Little Angels in the European Union	305
10 Conclusion to <i>Little Angels</i>	361
<i>Bibliography</i>	<i>363</i>
<i>Index</i>	<i>371</i>

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List of Tables

4.1	Employment statistics for Australia by age, showing underage employment.	104
4.2	Employment statistics for New Zealand by age, showing underage employment.	119
5.1	Employment statistics for South Africa by age, showing underage employment.	150
6.1	Employment statistics for Canada by age, showing underage employment.	174
6.2	Employment statistics for Mexico by age, showing underage employment.	189
6.3	Employment statistics for the United States by age, showing underage employment.	192
8.1	Employment statistics for the United Kingdom by age, showing underage employment.	252
8.2	Employment statistics for Ireland by age, showing underage employment.	281

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Biography

Dr Anne-Marie Mooney Cotter, Esq. is a Montrealer, fluent in both English and French. She earned her Bachelor's degree from McGill University at age 18, her Juris Doctor law degree from one of the leading civil rights institutions, Howard University School of Law, and her Doctorate degree (Ph.D.) from Concordia University, where she specialized in Political Economy International Law, particularly on the issue of equality. Her work experience has been extensive, Chief Advisor and later Administrative Law Judge appointed by the Prime Minister to the Veterans Review and Appeals Tribunal in Canada; Supervising Attorney and later Executive Director for the Legal Services Corporation in the United States; National Director for an environmental network in Canada; Faculty for Business Law at the Law School, Law Society of Ireland; Associate at the law firm of Blake, Cassels and Graydon LLP with a secondment as in-house counsel with Agrium Inc. in Canada; Attorney with the Disability Law Center of Alaska; and solo practitioner of the Social Security Disability Law Firm. She is also a gold medallist in figure skating. Dr Cotter is the wife of Mark Badger and the proud mother of Bill and Jill.

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Chapter 1

Introduction to *Little Angels*

So we come here today to dramatize a shameful condition. In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every (human) was to fall heir. This note was the promise that all ... would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness ... A check which has come back marked insufficient funds. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.¹

In our universal quest for justice in general and for respect for our children and their rights in particular, and in the fight against child discrimination in *Little Angels*, we may learn from the immortal words of one of the greatest civil rights leaders and human rights activists, Dr Martin Luther King Jr. This book, *Little Angels*, focuses on the goal of child equality, and the importance of the law and legislation to combat child discrimination in these troubling times. This book examines child discrimination, specifically looking at the issue of child labor and the laws enacted to prevent underage labor for the protection of the most vulnerable of society, the children, the 'Little Angels'. Its overall aim is to better understand the issue of inequality and to improve the likelihood of achieving child equality in the future and ending child inequality. *Little Angels* examines the primary role of legislation, which has an impact on the court process, as well as the primary role of the judicial system, which has an impact on the fight for child rights. This is the tenth book in a series of books on discrimination law. Other titles in the series are *Gender Injustice*, dealing with gender discrimination, *Race Matters*, dealing with race discrimination, *This Ability*, dealing with disability discrimination, *Just A Number*, dealing with age discrimination, *Heaven Forbid*, dealing with religious discrimination, *Ask No Questions*, dealing with sexual orientation discrimination, *Pregnant Pause*, dealing with maternity discrimination, *Culture Clash*, dealing with ethnic discrimination, and *Class Act*, dealing with class discrimination. A similar approach and structure is used throughout the series to illustrate comparisons and contradictions in discrimination law.

Fundamental rights are rights which either are inherent in a person by natural law or are instituted in the citizen by the State. The ascending view of the natural law of divine origin over human law involves moral expectations in human beings

1 King Jr, Dr Martin Luther, *March on Washington*, 1963.

through a social contract, which includes minimum moral rights of which one may not be deprived by government or society. The competing view is that courts operating under the Constitution can enforce only those guarantees which are expressed. Thus, legislation has an impact on the court system and on society as a whole. Internationally and nationally, attempts have been made to improve the situation of all groups and outlaw discrimination.

In looking at the relationship between children and the law, the book deals comprehensively with the issue of child discrimination throughout its chapters by outlining important national legislation in the area affecting the overall country examined, with no particular position argued necessarily but with the intent to give the reader the knowledge to make up their own mind; also, for the most part, the countries examined were chosen because of their predominant common law background, because of their predominant use of the English language in legislation and case law, and because of their predominant role in the fight against discrimination: Chapter 1 introduces the reader to the core area of child inequality; Chapter 2 covers child inequality and rights around the world; Chapter 3 looks at the United Nations; Chapters 4 and 5 examine child inequality in Australia and New Zealand, and Africa and South Africa, respectively; Chapters 6 and 7 examine child inequality in Canada, Mexico and the United States, and the North American situation with the North American Free Trade Agreement as to its impact on child inequality, respectively; Chapters 8 and 9 examine child inequality in the United Kingdom and Ireland, and the European situation with the European Union Treaty as to its impact on child inequality, respectively; and Chapter 10 concludes this overview of child inequality. Statistics will be included in each chapter to show the extent of child labor.

In terms of the global estimate of 12.3 million victims of forced labor, 40–50 percent are estimated to be children and youths under 18 years.² The globalization process and the various economic agreements have a direct impact on people's lives as key players in the labor market today. This study seeks to comparatively analyze legislation impacting child equality in various countries internationally. It also examines the two most important trade agreements of our day, namely the North American Free Trade Agreement and the European Union Treaty in a historical and compelling analysis of equality. Although an important trade agreement with implications for labor, the North American Free Trade Agreement has a different system from the European system in that it has no overseeing court with jurisdiction over the respective countries. Further, the provisions for non-discrimination in the labor process are contained in a separate document, the North American Agreement on Labor Cooperation. On the other hand, the European Union Treaty takes a different approach, by directly providing for non-discrimination, as well as an overseeing court, the European Court of Justice, and the treaty is made part of the domestic law of every Member State, weakening past

2 International Labour Organization.

discriminatory laws and judgments. The European process actively implements child equality by way of European Union legislation.

North America, as the new world with its image of freedom and equality, is considered to have made great strides in civil rights. However, the American philosophy of survival of the fittest and the pursuit of materialism have slowed down the process. With the advent of the European Union, the coming together of nations has had a very positive influence on the enforcement of human rights, much more so than that of North America, because of the unique European approach. All parties must cooperate, and governments need to work with businesses, trade unions and society as a whole, and together, they can create an environment where people of all groups can participate at all levels of political life and decision-making. Indeed, combating child inequality and achieving child equality requires a strong 'child matters' focus in constitutional, legal, judicial and electoral frameworks for people of all groups to be actively involved at the national and international levels.

According to liberal democracy, the rule of law is the foundation stone for the conduct of institutions. *Little Angels* offers a defense of the notion that social reform is possible through key institutions, which include the legal system and its use of the law. For liberal democracy, the legislative system is the core for the governance of society in the way it functions toward social equality of opportunity. The law is of central importance in the debate for change from inequality to equality. Actionable and enforceable rights are legal norms, which represent social facts demarcating areas of action linked with universalized freedom.³ Law is a powerful tool, which can and must be used to better society. Law is a rule of conduct enforced by sanctions, and administered by a determinate locus of power concentrated in a sovereign or a surrogate, the court. Therefore, the justice system and the courts play a vital role in enforcing the law.

Legitimacy has subjective guarantees of internalization with the acceptance and belief in authority, and objective guarantees of enforcement with the expectation of reactions to the behaviour.⁴ Therefore, law must recognize equally all members of society, including minority women, in order for it to be effective. Further, in order for a law to be seen as legitimate from society's point of view and accepted by the people in general to be followed, a process of inclusive interaction by all affected must first be realized. When creating laws, this means that input from diverse groups is critical. Thus, laws have two components, namely, facts, which stabilize expectations and sustain the order of freedom, and norms, which provide a claim of approval by everyone. Law makes possible highly artificial communities whose integration is based simultaneously on the threat of internal sanctions and the supposition of a rationally motivated agreement.⁵ Discrimination and injustice can be undercut through the effective use of both the law and the courts.

3 Habermas, Jurgen, *Between Facts and Norms*, 1998, p. xii.

4 Fried, Morton, *The Evolution of Political Society*, 1967, p. 23.

5 Habermas, Jurgen, *Between Facts and Norms*, 1998, p. 8.

Laws can go a long way in forbidding inequality and providing for equality; where one ends the other begins. There are two ranks of law, namely ordinary law of legislation, administration and adjudication, and higher constitutional law affecting rights and liberties, which encompasses the constitutions of the various nations as interpreted by the supreme courts. Law holds its legitimacy and validity by virtue of its coercive potential, its rational claim of acceptance as right. The legitimate legal order is found in its reflexive process; therefore, we must all believe that equality is a good and necessary thing, which is essential to the very growth of society.

Thus, conflict resolution is a process of reasoned agreement where, firstly, members assume the same meanings by the same words; secondly, members are rationally accountable for their actions; and thirdly, mutually acceptable resolutions can be reached so that supporting arguments justify the confidence in the notion that the truth in justice will not be proven false.⁶ Disenchantment with the law and the legal process only serves to undermine the stabilization of communities. By legitimizing the legal process and holding up the ideals of equality in the fight against child discrimination, the law and the courts can bring about change.

People of all backgrounds have had to fight in the formulation of laws and in the enforcement of equality in the courts. Class rests on economic determination and historical change, and inequality in the distribution of private property among different classes of people has been a characteristic of society; the ruling class loathes that which it is not, that which is foreign to it, and this has traditionally been youth and minorities. The patriarchal system has freely fashioned laws and adjusted society to suit those in power, and this has traditionally been white Anglo-Saxon Protestant men; they are context- and time-specific but changeable. There are important criteria for analysis, including child and age, ethnicity and race, gender, poverty and class, disability, religion, and sexual orientation, and hence all these can, alone or combined, amount to discrimination.

The concept of equality is the ignoring of difference between individuals for a particular purpose in a particular context, or the deliberate indifference to specified differences in the acknowledgement of the existence of difference. The notion of rights and of equality should be bound to the notion of justice and fairness. While injustice involves a constraint of freedom and a violation of human dignity through a process of oppression and domination, justice involves the institutional conditions necessary for the development and exercise of individual capacities for collective communication and cooperation.⁷ Discrimination is the withholding from the oppressed and subordinated what enables them to exercise private and public autonomy. The struggle must be continued to bring about psychological, sociological and institutional changes to allow all members of the human race to feel equal and to recognize one another as being so.

6 Ibid., at p. xv.

7 Habermas, Jurgen, *Between Facts and Norms*, 1998, p. 419.

Though humans are mortal and civilizations come and go, from Biblical times to our days, there has been a fixed pivot for the thoughts of all generations and for men of all continents, namely the equal dignity inherent in the human personality.⁸ Even Pope John XXIII described the United Nations Declaration of Human Rights, in his 1963 Encyclical *Pacem in Terris*, as ‘one of the most important acts of the United Nations’ and as ‘a step towards the politico-judicial organization of the world community’; ‘In social life, every right conferred on man by nature creates in others (individuals and collectivities) a duty, that of recognizing and respecting that right.’⁹ Further, Pope John Paul II described the importance of work and of just remuneration in his 1981 Encyclical *Laborem Exercens*:

Work bears a particular mark of ... humanity, the mark of a person operating within a community of persons ... While work, in all its many senses, is an obligation, that is to say a duty, it is also a source of rights on the part of the worker. These rights must be examined in the broad context of human rights as a whole, which are connatural with man, and many of which are proclaimed by various international organisations and increasingly guaranteed by the individual States for their citizens. Respect for this broad range of human rights constitutes the fundamental condition for peace in the modern world: peace both within individual countries and societies and in international relations ... The human rights that flow from work are part of the broader context of those fundamental rights of the person ... The key problem of social ethic ... is that of just remuneration for work done ... Hence, in every case, a just wage is the concrete means of verifying the justice of the whole socio-economic system and, in any case, of checking that it is functioning justly.¹⁰

An improvement in equality of opportunity is sought rather than a utopian state of equality. No one should misunderstand this. Clearly, oppression exists. Rather, this book, *Little Angels*, seeks to add to the list of inequalities to be considered, and does not rule out other forms of injustices besides child inequality. Generalities are not presumed nor are they made here, for this would detract from the very purpose of this book, to bring to the forefront of discussion the reality of injustice, not to create further injustice.

8 Cassin, René, *From the Ten Commandments to the Rights of Man*, France, 1969.

9 Pope John XXIII, *Pacem in Terris*, Rome, 1963.

10 Pope John Paul II, *Laborem Exercens*, Rome, 1981.

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Chapter 2

Little Angels in Child Discrimination

Introduction

In the quest for respect for our children and in the fight against child discrimination in *Little Angels*, this chapter will examine discrimination, looking at the United Nations Millennium Declaration; the World Conference on Human Rights; the Equal Remuneration Convention (No. 100); the Discrimination (Employment and Occupation) Convention (No. 111); the Employment Policy Convention (No. 122); Minimum Age (Industry) Convention (No. 5); Night Work of Young Persons (Industry) Convention (No. 6); Forced Labour Convention (No. 29); Abolition of Forced Labour Convention (No. 105); Minimum Age Convention (No. 138); the Worst Forms of Child Labour Convention (No. 182); and the Hague Global Child Labour Conference, Towards a World Without Child Labour. Governments and others must not only refrain from violating human rights, but must work actively to promote and protect these rights.

This book examines child discrimination, specifically looking at the issue of child labor and the laws enacted to prevent underage labor for the protection of the most vulnerable of society, the children, the 'Little Angels'. In general, the word discrimination comes from the Latin 'discriminare', which means to 'distinguish between'; discrimination is action based on prejudice resulting in unfair treatment of people. Unlawful discrimination can be characterized as direct or indirect: direct discrimination involves treating someone less favorably, because of the possession of a prohibited attribute such as class, than they would treat someone without the prohibited attribute who was in the same circumstances; and indirect discrimination involves setting a condition or requirement that a smaller proportion of those with the prohibited attribute can comply with than those who do not have the prohibited attribute without reasonable justification. Forms of invidious discrimination include distinctions based on age, class, gender, race, ethnicity, disability, religion, and sexual orientation. If the justification is rational, then the discrimination is not invidious. Many governments have attempted to control discrimination through civil rights legislation, equal opportunity laws and institutionalized policies of affirmative action. Within the equal opportunities / individual merit approach can be found a spectrum of tests for discrimination: at one end of the spectrum, there is the 'equality as mere rationality', where arbitrary and unreasonable behaviour is deemed discriminatory, but justifications for discrimination are accepted at face value; at the other end of the spectrum, there is the 'equality as fairness', where justifications are examined critically, the possibility of indirect discrimination is recognized, and burdens of proof may be shifted; and a third concept of equality is

the ‘equality of opportunity’, which argues for institutional and structural changes to remove the barriers to equal participation of people belonging to different groups.

Further, prejudice is the process of pre-judging something, and refers to existing biases toward the members of certain groups, based on social stereotypes. Many prejudicial behaviors are picked up at a young age by children emulating their elders’ way of thinking and speaking. Overall, equal opportunity refers to the idea that all people should start out in life from the same platform, in that all should have equal opportunities in life, regardless of where they were born or who their parents were. Egalitarianism is the moral doctrine that equality ought to prevail throughout society, and according to legal egalitarianism, everyone ought to be considered equal under the law. Tokenism occurs when a small group is chosen to participate in an initiative to demonstrate that a program is progressive or to show someone has consulted the constituency, but in fact has ignored their views, which is discriminatory in itself.

Standards or rules of behavior are norms, which help us to predict the behavior of others and, in turn, allow others to know what to expect of us, with our culture defining what is proper and improper behavior, what is right and wrong, and what we are expected to do and not to do.¹ The concept of the minority group has provided a valuable frame of reference for understanding the experiences of groups of people in society who are singled out, based on some cultural or physical characteristic, such as age, for discriminatory treatment; in terms of class and culture, they are a cross-cutting determinant, since cultural values and traditions determine to a large extent how a given society views class.² Specifically, Section 4 of the Mission Statement enunciates that there must be immediate and concerted action by all to create a peaceful, just and humane world based on human rights and fundamental freedoms ...

The implementation of principles of equality, including through national laws, strategies, policies, programs and development priorities, is the sovereign responsibility of each State, in conformity with human rights and fundamental freedoms.³ While the Beijing Platform for Action came out of the World Conference on Women, many of its core values can be extended to include the rights of children. There must be immediate and concerted action by all to create a peaceful, just and humane world based on human rights and fundamental freedoms, including the principle of equality for people and from all walks of life, and to this end, broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice. Success will require a strong commitment on the part of governments, international organizations and institutions at all levels, and will also require

1 Harris, Diana K., *Age Norms*, in Erdman B. Palmore, Laurence Branch, Diana K. Harris, *Encyclopedia of Ageism*, The Haworth Press, Inc., New York, 2005.

2 Wirth, L., *The Problem of Minority Groups*, in R. Linton (ed.), *The Science of Man in the World Crisis* (pp. 347–72), Columbia University Press, New York, 1945.

3 United Nations, Beijing Platform for Action.

adequate mobilization of resources from multilateral, bilateral and private sources for the advancement of all humans for strengthening the capacity of national, sub-regional, regional and international institutions; a commitment to equal rights, equal responsibilities and equal opportunities for the equal participation of all regardless of class issues in all national, regional and international bodies in the policy-making processes; and the establishing or strengthening of mechanisms at all levels for accountability to the world's population. As globalization continues to influence economic opportunities worldwide, its effects remain uneven, creating both risks and opportunities for different groups. For many, globalization has intensified existing inequalities and insecurities, often translating into the loss of livelihoods, labor rights and social benefits.

Only a new era of international cooperation among peoples based on a spirit of partnership within an equitable international social and economic environment, along with a radical transformation of the relationship to one of full and equal partnership will enable the world to meet the challenges of the twenty-first century. Actions to be taken at the national and international levels by all governments, the United Nations' system, international and regional organizations, including international financial institutions, the private sector, non-governmental organizations (NGOs) and other actors of civil society, include the creation and maintenance of a non-discriminatory as well as youth-sensitive legal environment through review of legislation with a view to striving to remove discriminatory provisions. It will be critical for the international community to demonstrate a new commitment for the future to inspire a new generation to work together for a more just society.⁴

Therefore, governments and corporations should develop leadership training and opportunities to encourage all to take leadership roles both as students and as adults in civil society; develop appropriate education and information programs, particularly in conjunction with the mass media, that make the public, particularly parents, aware of the importance of non-discriminatory education for children and the equal sharing of family responsibilities by girls and boys; promote lifelong education and training to ensure the availability of a broad range of educational and training programs that lead to ongoing acquisition by women and girls of the knowledge and skills required for living in, contributing to and benefiting from their communities and nations; and finally, create flexible education, training and retraining programs for lifelong learning that facilitate transitions between women's activities at all stages of their lives. Overall, the promotion and protection of all human rights and fundamental freedoms is essential for the creation of an inclusive society for all. Obstacles affecting peoples and countries must be overcome in order to realize the full potential of opportunities presented for the benefit of all. The advancement of all children and the achievement of child equality are a matter of human rights and a condition for social justice.⁵

4 Ibid.

5 Ibid.