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GLOBAL GOVERNANCE

The challenge to the UK's liberal democracy

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Global governance: the challenge to the UK's liberal democracy

'... since the end of the Cold War the notion of global governance has emerged as an intellectual orthodoxy with powerful support in the academy, the media, the law, the foreign policy establishment, the corporate world, and the bureaucracies that serve international institutions and non-governmental associations.

Global governance is a reversal of our existing political arrangements. It aims to take power from democratically elected parliaments and vest it in courts, NGOs and transnational bodies. Voters would increasingly find their representatives beholden to international treaties, international legal conventions and precedents, transnational bureaucrats and lawyers. Government policy would be decided less by open debate in the national media and more in the comparatively closed world of international conferences, academic seminars, consultant reports, learned journals and legal judgments.' ¹

In recent years a new discourse has come to the fore: global governance. It takes its force from United Nations rights based treaties such as the Convention on the Rights of the Child ('the Child Convention') the International Covenant on Economic, Social and Cultural Rights ('the Economic and Social Covenant') and the International Covenant on Civil and Political Rights ('the Civil and Political Covenant'). Global governance relies on these documents to create human rights laws and standards that can shape and challenge the laws and public policies of national parliaments and governments. The term 'global governance' aptly describes a discourse that is global in the sense that the laws regulating public policy are in effect decided not by the nation state but by a movement that seeks to insulate itself from democracy.

Just as global governance cannot be captured in any concise definition, it cannot be illustrated via a set of neatly bounded and aligned examples. Rather it is an amorphous phenomenon that manifests at different times in different ways in a surprisingly wide range of policy contexts. Reflecting this, we have deliberately selected examples from high policy (questions of legal policy) and low politics (media coverage that indicates the political intentions behind the policy instruments currently being deployed).

We begin by describing how global governance has influenced law and policy in the UK. The paper then considers the challenge that global governance poses to three key elements of liberal democracy: national self-government, the moral equality of a nation's citizens and the rule of law. We argue that global governance is changing the character of liberal democracy into something best described as a managed therapeutic state. It is a state with less self-government

and less personal responsibility. These ends are achieved by expanding the law to such an extent that what is described as the rule of law is now better described as the rule of *the* law, which from the average citizen's vantage is drifting too near rule by judges.

The rise of global governance in the UK

Global governance has become particularly prevalent in the UK at three levels. It has become an influential principle in the Supreme Court, it is embedded in government policy making and it is beginning to play a more explicit role in broader politics. Consider this triplet of recent Supreme Court decisions where domestic law and policy has been effectively rewritten by the court so as to conform to the Child Convention. In 2011 the court decided that the Child Convention could trump a decision to deport an unlawful immigrant by requiring the Secretary of State to have regard to the best interests of the immigrant's child ('the deportation case').² The following year the court allowed a fugitive to rely on the same international treaty to trump the Polish state's attempt to extradite her ('the extradition case').³ And in 2015 a child claimant of welfare benefits was able to rely on the Child Convention and the Convention on the Rights of Persons with Disabilities to trump a domestic law that required the termination of a welfare benefit ('the child welfare case').⁴

With this triplet of cases the Supreme Court has established an approach that enables general principles derived from the Child Convention and other human rights treaties to be used to challenge the specific objectives of other laws and policies.⁵ This is so even though the impugned specific law or policy has been determined by an elected legislature or government. Over the last five years the Supreme Court has allowed global governance to have a significant influence on public policy.

Courts do not operate in political vacuums and parliament began the process of subjecting public policy to global governance several years before the Supreme Court followed suit. Legislation requiring certain public bodies to apply the spirit of the Child Convention was first passed in 2004.⁶ The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the Child Convention concerning immigration matters. The government lifted that reservation in 2008 and then passed legislation in 2009 that obliged the Secretary of State to make arrangements for ensuring that immigration matters 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.⁷ By incorporating the spirit of global governance into domestic law parliament steered the Supreme Court towards applying the Child Convention and other UN rights based treaties to effectively rewrite domestic laws and policies.

From 2010 onwards parliament became a mere bystander to a pincer movement that ensured that all laws and policies conformed not just to the spirit of the Child Convention but to its precise language. This movement was led by government. In December 2010 the Children's Minister, Sarah Teather MP, committed the government to ensuring that it would give due consideration to the Child Convention when making policy and legislation.⁸ Another minister, Edward Timpson MP, explained how this empowered the Cabinet Office to apply a mangle to new laws and policies:

'we have the Cabinet Office guidelines that before any legislation starts on its journey through parliament, it has to have gone through the various articles of the [Child Convention] to make sure that it is compliant with them.'⁹

The Supreme Court followed the government's lead of ensuring that laws or policies were compliant with the Child Convention, only it did so with an even more rigorous approach. Hence the triplet of cases that dealt with immigration (2011), extradition (2012) and welfare (2015) were ones in which the legislature's statutes were interpreted by the Supreme Court so as to be compliant with the Child Convention.

Although the Child Convention has been spearheading the march of global governance, at a broader political level other UN human rights treaties have also come to the fore. In 2014 a UN Special Rapporteur, Raquel Rolnik, relied on the Economic and Social Covenant to call on the UK government to immediately suspend the bedroom tax (spare room subsidy). In 2015 a UN Committee, under the auspices of the Disability Convention, carried out a confidential investigation into the effects of the UK coalition government's welfare cuts. The Committee was reported to have concluded that government policy had caused 'grave and systematic violations' of the human rights of disabled people.¹⁰

An increasingly large number of issues can be considered by the UN, which establishes a separate committee to oversee implementation of each of its principal human rights treaties. In 2015 the UN's Human Rights Committee, drawing on provisions in the Civil and Political Covenant, took the UK's free speech laws to task by expressing concern about the prevalence in the UK media 'of racist and xenophobic expressions' and 'the publication of material containing extremely negative stereotypes of ... migrants and asylum seekers'. It called on the UK government to 'strengthen its efforts to prevent and eradicate all acts of racism and xenophobia'.¹¹

Human rights activists have not been slow to use global governance as a lever to challenge policies they do not like. For example, the UK's Equality and Human Rights Commission made a submission to the UN, that was leaked to the Guardian, claiming the government's new contract for junior doctors was

‘potentially illegal’ for not adequately considering the Economic and Social Covenant.¹²

In February 2016 the UK had its first significant encounter with a Working Group set up by the UN’s Commission on Human Rights. The Working Group found that Julian Assange was being deprived of his liberty by choosing to live in an embassy. It reached this conclusion by applying two UN instruments: the Universal Declaration of Human Rights and the Civil and Political Covenant. Due to these ‘human rights breaches’ the Working Group called on the UK to end Assange’s ‘detention’ and offer him compensation.¹³

At each of these three levels – judicial, governmental and political – global governance is on the march. The point of this paper is to explain how the march of global governance challenges the UK’s liberal democracy by seeking to turn it into a managed therapeutic state, which is neither liberal nor democratic.

Yet despite the serious challenge that global governance poses to UK’s liberal democracy there has been little serious discussion of it. The three Supreme Court cases that distorted UK policy on immigration, extradition and welfare have received little attention, despite their significance. And although the UN reports concerning the bedroom tax and Julian Assange were dealt with (mostly) critically by politicians and the media, other UN reports are now being received uncritically. For example, in April 2016 a UN special rapporteur on the right to freedom of assembly, Maina Kiai, was critical of the UK government’s Prevent programme on countering Islamist extremism. His claim that ‘Prevent could end up promoting extremism, rather than countering it’ was given prominent and sympathetic media coverage.¹⁴ What matters here is not the content of the comments but the fact that UN inspectors are increasingly being treated as having a right to influence UK public policy. The sympathetic media response to Maina Kiai’s comments, in contrast to the hostile response to Raquel Rolnik’s, suggests that if UN inspectors select their subjects carefully then their attempts to influence UK public debate will be accepted.

The shift from liberal democracy to a managed therapeutic state

This paper considers the challenge that global governance poses to three principles that are central to Western liberalism:

- democratic self-government,
- the moral equality of citizens,
- law as servant of the people.

First, the relationship between liberalism and democracy has changed over time but with the advent of universal suffrage liberal democracies have viewed self-

government, in the sense that the people must be free to determine the laws that govern them, as fundamental. Global governance challenges this view by requiring states to adopt laws and policies that conform to externally imposed requirements. The triplet of Supreme Court cases shows the extent to which global governance, by drawing particularly on the Child Convention, is now impacting on national law and policy. Unless the march of global governance is reversed more restrictions on self-government from other international human rights treaties will result. Self-government is yielding to global-governance: that is, national democracy is yielding to undemocratic supra-nationalism.

Second, liberal democracies are premised on the moral equality of their people: a principle that sees all adults with capacity as being treated as having the same agency to determine their actions so that they are all equally responsible for their actions. Public policy under this liberal model seeks to incentivise desirable behaviour and to deter undesirable behaviour. And it does this with policies that enshrine principles of expected behaviour such as: irregular migrants of a specified culpability will be deported, fugitives of a specified culpability will be extradited and welfare must not undermine self-reliance. By treating individuals as morally equal this liberal model of public policy expects each individual to abide by the same minimum standard of behaviour. The standard is fixed by law or policy and individuals are expected to use their agency to meet it. For example, the migrant without a right to remain in a country can expect to either leave or face deportation.

But global governance challenges this view of public policy by focussing not on the moral equality of all but on the inequality of outcomes that may result from behaviours of equal culpability. Global governance, for example, focusses on the fact that deportations have different impacts on different people, as do extraditions and denials of welfare payments. In particular, the deportation or extradition of a parent will have a greater impact (because of the impact on the child) than the deportation or extradition of a childless person. Two adults may be equally culpable but whereas one who is childless may be deported the one with a child may be allowed to remain. By focussing on these different outcomes global governance requires public policy to treat the same actions differently.

Global governance challenges the transformative role that public policy should play. For instead of setting a standard that all are expected to reach global governance pushes domestic policy to apply a variable standard, a standard that varies if a UN convention, such as the Child Convention, happens to be in play. Public policy is undesirable when it yields to special pleading so that not all irregular migrants of a specified culpability will be deported, not all fugitives of a specified culpability will be extradited and welfare may be paid even if it undermines the morally important principle of self-reliance. Under global governance public policies lose their ability to incentivise desirable behaviour and to deter undesirable behaviour. With this model of public policy the standard is not fixed by law or policy and the individuals are not expected to use their agency

to meet it; it is the law or policy that is expected to yield to accommodate individual circumstances. This public policy model is best described as therapeutic, rather than liberal. Instead of focussing on the moral equality of all it seeks an equality of outcomes facilitated by a state that is constantly intervening and adjusting legal standards to suit an individual's particular circumstances.

These guiding principles of global governance – supra-nationalism and a therapeutic approach – are held together by the new role of law. Instead of being the servant of democracy, as in a liberal tradition, law tends to challenge democracy in the managed therapeutic state. Instead of bolstering personal responsibility, this new role for law tends to undermine it.

This paper concludes by considering how global governance can be challenged. Global governance has its supporters on the left and right of politics, which is why its forward march has continued despite changes of government from New Labour, to Liberal-Conservative through to Conservative. Some, particularly on the right, seem uncomfortable with the direction of much of this new public policy but lack the understanding to criticise the framework or discourse that shapes it. Hopefully, this paper will stimulate debate about a form of governance that bears a strong resemblance to the human rights discourse which is overseen by the Council of Europe and by the European Court of Human Rights applying the European Convention on Human Rights. But whereas there has been much discussion about the problems created by this European human rights discourse,¹⁵ there has been little discussion about the problems caused by that same discourse on a global rather than European scale. Ultimately, the march of global governance can only be reversed by re-energising the project of Western liberalism with a belief in democratic self-government and the moral equality of its citizens as a guide for public policy. And in order to secure these ends, law must revert to being the servant of democracy, a force that bolsters personal responsibility.

1. Democratic self-government challenged by supra-nationalism

The source of global governance can be traced to UN sponsored human rights treaties. They set out the norms that inform global governance and they give rise to the organisations that oversee them. The oldest is the Universal Declaration of Human Rights dating from 1948, but since then the UK has ratified nine major UN human rights treaties. The following dates refer to the year of adoption by the UN General Assembly.

- International Convention on the Elimination of All Forms of Racial Discrimination 1965
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social & Cultural Rights 1966
- Convention on the Elimination of All Forms of Discrimination Against Women 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
- Convention on the Rights of the Child 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990
- International Convention for the Protection of All Persons from Enforced Disappearance 2006
- Convention on the Rights of Persons with Disabilities 2006

It is convenient to refer to the treaties as 'human rights treaties' because they impose obligations on states over how they treat their populations. But the key point about these treaties is that they make national policy subject to an international framework. It is one thing to make an international issue (such as collective defence, trade or shipping on the high seas) subject to a treaty but quite another to make a national issue (such as deportation, extradition and welfare) subject to a treaty. Whereas the former secure national benefits that require international co-operation, the latter increasingly curtail a nation's self-government in ways that were neither anticipated nor desired at the time they were established.

The impact of these international human rights treaties is supra-national in the sense that they can override the right of a nation to make its own laws and policies. Furthermore, whereas an act of parliament can be amended or repealed in accordance with the will of the nation's people, international treaties impose a fetter on national democracy. They can normally only be amended if all signatory states agree and this impractical requirement places the aggrieved state in the position of having to either comply with the treaty or withdraw from it (or denounce it, a term that means the same). Even this 'choice' does not always exist

as some human rights treaties such as the Civil and Political Covenant do not contain a provision that would allow a state to withdraw.¹⁶

More to the point, it is only in recent years that these international human rights treaties have challenged the sovereignty of liberal democracies. The treaties were drafted mostly by Western nations with a view to promoting the liberal democratic values that non-Western states lacked. Accordingly, they were drafted by confident and upstanding nations that had moral authority in the world. The drafters did not intend these treaties to require liberal democracies to change their laws and policies, which by the standards of the time were considered to be rights-respecting and compliant with best practice.

It is only in recent years that these international human rights treaties have come to challenge the democratic self-government of Western states. Broad statements of an amorphous nature, such as 'the best interests of the child', are now being interpreted in ways that were not envisaged when drafted and that have little connection with the law-makers' intentions (as opposed to the law-interpreters' preferences). Treaties that were intended to be declaratory expressions of Western moral authority are now used to weaken the democratic sovereignty of Western states. This is particularly so in the UK.

Prisoner votes

Consider the issue of prisoners being disenfranchised, as they are in the UK. During the Cold War Western states were keen to insert into the Civil and Political Covenant an obligation giving 'every citizen ... the right and the opportunity ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage'.¹⁷ In other words voting was seen as a right that went to those able to exercise personal liberty; few, if any, took the right to vote to encompass and include felons or the insane. Yet in the 21st century this provision is being used against a liberal democracy like the UK that denies the vote to convicted prisoners. The tussle between the UK and the European Court of Human Rights on this issue is well known.¹⁸ But the United Nations is also seeking to persuade the UK to change its laws on prisoner votes, despite parliament and the people being firmly in favour of the status quo. In 2010 the Prime Minister, David Cameron, said it made him 'physically ill even to contemplate having to give the vote to anyone who is in prison'.¹⁹ In 2011 MPs overwhelmingly voted, by 234 to 22, to keep the ban on prisoner voting. And when, two years later, the Prime Minister said that prisoners would not be getting the vote under his government,²⁰ he received 'widespread political and popular support for that position'.²¹

Yet three months after the Conservatives won the 2015 general election the UN Human Rights Committee urged the UK to 'amend its legislation that denies any convicted prisoner the right to vote, with a view to ensuring its full compliance

with' the Civil and Political Covenant.²² This covenant does not stipulate that convicted prisoners must (or even should) have a right to vote. But the fact that the UN now interprets the document in this way shows how human rights treaties, drafted as means of celebrating the moral strength of liberal democracy, can now be used to challenge the right of a liberal democracy to practise the paramount right of self-government. Moreover, much of the pressure for this sort of undemocratic change comes from human rights lawyers and special interest groups who seek to use the force of international law to make up for what they lack in popular legitimacy and vote-winning policies.

Child convention

Prisoners do not generate the same sympathetic response as children. So it is not surprising that article 3.1 of the Child Convention has become particularly powerful as a means of curtailing the effective freedom of the UK parliament and government to determine its laws and policies.

Article 3.1 of the Child Convention states:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

In a world where many children are denied the most fundamental of rights the United Nations sponsored the Child Convention in 1989. But its original sponsors could never have envisaged that in less than 30 years its provisions would be treated by the UK government and courts as a licence to micro-manage the details of British laws and policies, including ones that have widespread political support.

It is also inconceivable that the Conservative government in 1990, when it ratified the Child Convention, thought it was approving a treaty that would enable a parent to cheat deportation or extradition or to enable a child to claim a welfare benefit that other specific legislation denied him. Yet this is what global governance has now established. When an international human rights treaty is used by the UK Supreme Court to produce these sorts of outcomes – to reshape the law of the land – then one consequence is that the elected national legislature has little or no scope to decide and act otherwise unless it embarks on the fraught exercise of withdrawing from or amending the treaty.

The problem here is political in that the UK's governing elite has lost faith in itself, lacking the confidence to draft a law or policy without supra-national constraints. It is content to invest a single sentence in an abstract international human rights treaty with so much authority and potential that later interpreters can force the existing laws and policies on immigration, extradition, welfare and more to conform to it.

An assured governing elite would ask itself whether a particular policy needed to give special consideration to children. No doubt certain laws would. The Children Act 1989, for example, states that in court proceedings 'the child's welfare shall be the court's paramount consideration'.²³ But a law such as this, which is specifically concerned with children, is one thing. A law concerned with wider interests is quite another. In 1989 the UK's governing elite was confident enough in itself to make such distinctions and decisions by passing an Act that limited the paramount importance of a child's welfare to circumstances that were specific, limited and known in advance. Nearly thirty years later it is not: for due to the pincer movement noted above all laws and policies must now respect the best interests of the child, on the say-so of a sentence in an international human rights treaty (as interpreted by judges and other international bodies).

Expansion into other areas of economic & social policy

The current situation is bad but due to the legal principle developed by the Supreme Court of interpreting national laws in compliance with international human rights treaties the curtailment of democratic self-government could go much further. Article 3.1 of the Child Convention is likely to be of wide application because it applies to 'all actions concerning children'. As Lord Hughes observed when criticising the application of this principle to the welfare benefit cap:

'all manner of court decisions may fall within [article 3.1]; a planning decision relating to housing development might be one, whilst the making of a possession order against a tenant who has children, or the enforcement of money judgments against the family motor car, or the sentencing of him for a serious criminal offence might be others.'²⁴

In a recent case that challenged the government's flagship policy of capping household benefits ('the benefit cap case') some judges were prepared to allow the Child Convention to trump it. Lady Hale noted that government policy on this issue 'would probably be supported by most of the population' (§190). But when law conflicts with the will of the people the law must win. The only reason why a majority of Supreme Court judges (by 3 votes to 2) decided that the benefit cap was lawful was because the impugned benefits were not specifically paid for the benefit of children but were paid to their parents. This was a technical success for the government that shows the fragility of the boundary between public policy issues that can be determined by an elected government and those where the Supreme Court may have the last word by applying principles drawn from international human rights treaties.

Unless the nettle of this problem is grasped quickly by policy makers the Child Convention could be pleaded in legal actions against a variety of government bodies such as the Ministry of Defence (a military action risked the lives of children), the NHS (more resources needed for child welfare) and the Treasury

(cuts harmed the welfare of children). And neither should it be thought that global governance will be limited to challenging only government policy. Article 3.1 clearly applies to 'all actions ... whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies'. Unless the potential sweeping reach of this approach is addressed, local authorities, housing associations, the prison service, youth justice services, the Children and Family Court Advisory and Support Service (Cafass) and a great many other agencies could face legal proceedings founded on the Child Convention.

In recent years the Supreme Court and the United Nations and its committees have been in a dialogue whereby statements by the UN in favour of more global governance have been applied by the Supreme Court, which has in turn enabled the UN to push for yet more global governance. The United Nations Committee on the Rights of the Child regularly makes 'General Comments' about the application of the Child Convention, which have been cited and relied on by judges in the Supreme Court, including in each of the triplet of cases considered above (the deportation, extradition and child welfare cases). For example, the Supreme Court in the deportation case had regard to a General Comment from 2005 which stated that when considering whether to return unaccompanied children to the care of parents in their countries of origin the child's best interests' considerations could only be overridden by 'rights-based' arguments. The General Comment stated that 'non-rights based arguments such as those relating to general migration control, cannot override best interests' considerations.' Accordingly, the Supreme Court focussed on 'rights-based' arguments, rather than any general desirability of migration control, before concluding in the deportation case that the irregular migrant could not be removed.

The latest UN Committee on the Rights of the Child report from June 2016 commented that 'the Committee regrets that the right of the child to have his or her best interests taken as a primary consideration is still not reflected in all legislative and policy matters and judicial decisions affecting children, especially in the area of alternative care, child welfare, immigration, asylum and refugee status, criminal justice, and in the armed forces'.²⁵ Having previously cited and had regard to comments from UN reports the Supreme Court could cite and apply this latest comment when expanding the reach of global governance into more areas of national law and policy. It is a ratchet exercise heading only in one direction, ever-greater judicial oversight of law and policy.

To date the Supreme Court's willingness to give legal effect to international human rights treaties has been mostly²⁶ confined to issues arising from the Child Convention. But there is no reason why other international human rights treaties should not be more prominent in future legal claims as legal activists, continue to realise the true significance of global governance as a powerful legal tool with which to challenge laws and policies that they do not agree with.

For example, the Economic and Social Covenant has the same legal status as the Child Convention and article 11 obliges states to:

‘recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’²⁷

It also ‘recognises the fundamental right of everyone to be free from hunger’ by the taking of state action. What the Child Convention does for children in terms of giving them a legal right to special consideration the Economic and Social Covenant could do for adults in terms of giving them a general legal right to welfare.

The Supreme Court has not yet been asked to apply article 11 of the Economic and Social Covenant, but if it is then there is no reason in principle why it should not be given the same legal relevance as article 3.1 of the Child Convention. In the meantime the then Shadow Equalities Minister, Kate Green MP, has sought to turn the right to adequate welfare into an explicit legal obligation when she argued that ‘it is time for us to debate the introduction of a legal duty on the UK government to ensure an adequate standard of living for all.’²⁸ This is the sort of background noise that could hasten the Supreme Court to find that the Economic and Social Covenant has already established a legal right to an adequate standard of living that could trump government law and policy.

Unless policy makers wake up to the problematic nature of global governance the UK may soon find that the freedom to draft domestic laws and policies in the elected legislature without undue second-guessing by the unelected judges will be heavily circumscribed by the Child Convention and other international human rights treaties. Legal activists have taken on board the scope for restricting laws and policies through global governance so as to put them beyond effective democratic control. The triplet of Supreme Court cases illustrate how the UK’s status and reputation as a self-governing democracy may already have been tarnished.

2. Moral equality challenged by moral inequality

Western liberalism recognises that individuals have moral agency. But it also recognises that public policy plays an important role in shaping individual behaviours. This is where law plays a role, for laws establish the boundaries of acceptable conduct. They codify sound principles that individuals can understand and respond to. And when these boundaries are crossed the law holds the individual to account. It is the individual's moral agency that enables the law to hold him/her to account: the law recognises that the individual had a choice and in making the wrong choice he or she must bear the consequences. So the law does not instruct individuals on how to behave, indeed it respects their right to think for themselves. But the law does set boundaries on acceptable behaviour and by holding transgressors to account the law plays a central role in helping and incentivising the autonomous individual to act in an acceptable way. Hence, in the Western liberal tradition public policy plays a positive transformative role for society.

Central to this moral agency approach is the notion that individual responsibility is an absolute, in the sense that everyone has it and is capable of demonstrating it to an equal degree. All are treated equally in the eyes of the law because they have the same capacity to make good or bad choices and to act accordingly in response to the requirements laid out by particular laws and public policies. The exceptions prove the rule because the law views the behaviour of those lacking capacity, such as children or those with a mental impairment, differently. They are treated differently because they lack the agency or competence of ordinary adults. Subject to these exceptions all adults are treated equally because they have the same capacity.

The liberal model of moral equality is challenged by global governance, which is concerned not with the moral equality of all but with the inequality of individual circumstances. With this model, laws and policies do not operate as a norm against which the actions of an individual must be measured, rather, laws and policies are expected to adapt to an individual's circumstances. One of the problems with this model is that the ability of public policy to play a beneficial transformative role for society is weakened as every exception to a rule creates a loophole through which an individual may avoid responsibility. The moral equality of all is replaced under the influence of global governance by a model that treats individuals as morally unequal.

Whereas liberalism puts the morally autonomous and equal individual at the heart of public policy, global governance puts the morally flawed and unequal individual (and his or her unique and particular circumstances) at its heart. This latter model is best described as therapeutic in the sense that laws and policies are designed to accommodate the flawed individual. Under global governance a

transformative model of public policy is replaced with a therapeutic one. In other words it is not the individual that must change to meet a standard, it is the law that must change to meet a particular need. The therapeutic model of public policy is not unique to global governance, for it is increasingly prevalent in all public policies, but it is central to international human rights treaties for two reasons.

The personalisation of laws and policies

First, international human rights treaties are premised on individual rights, rather than collective interests. With some human rights treaties, such as with article 3.1 of the Child Convention, the rights are stated in absolute terms in that they are not balanced against collective interests. With other human rights treaties the focus is on the rights of the individual but those rights are then balanced against collective interests. For example, the Economic and Social Covenant establishes a number of individual rights such as to work and to receive social security but then makes these rights subject to such limitations as are for the 'purpose of promoting the general welfare in a democratic society'.²⁹

The focus on individual rights, whether or not they are absolute, tends to force states to personalise their laws and policies, often by exercising discretion at the expense of rules. As Lord Judge put it in the extradition case 'what is required is a proportionate judicial assessment of sometimes conflicting public interests'.³⁰ In other words with a therapeutic model judges need to be able to decide for themselves where a public interest lies (in relation to another public interest or individual right) and this can only happen if judges have the discretion to decide this on a case by case basis. This means that the judges' take on what is proportionate or reasonable ends up prevailing, rather than that of the legislature or executive.

This individualised approach to public policy is now required by UK law whenever human rights are raised. As Lady Hale put it: 'to comply with the Child Convention, policy on the benefit cap needed to consider the best interests, not only of children in general, but also of the particular child or children directly affected by the decision in question'.³¹ In another benefit case, this one being concerned with a law that stopped a particular benefit after a child's 84th day in hospital, the Supreme Court unanimously adopted an individualised approach. Lord Wilson noted that 'decisions founded on human rights are essentially individual' and hence the Court found that, having regard to this child's particular circumstances, the law that required a particular benefit to be stopped after his 84th day in hospital breached the state's duty owed under the Child Convention. The government was ordered to repay the deducted sum.³²

When the Supreme Court holds, in a unanimous decision, that 'decisions founded on human rights are essentially individual' it is requiring the state to accommodate to the individual's circumstances. This represents a significantly

different approach to that of the liberal state, which expects the individual to meet standards set by the needs of society as a whole. This personalisation of laws and policies excuses the individual from the responsibility of adapting his or her behaviour and expects the law to adapt to meet a particular personal need.

Judges, not parliament, as law makers

The second reason why global governance tends to promote a therapeutic approach to public policy is because global governance limits democratic (i.e. legislative and executive) control in favour of judicial control. Policies formulated democratically are likely to focus on the collective needs of society. Parliament starts with a blank sheet of paper and asks: what laws does society need? The government likewise asks: what policies does society need? This doesn't mean that legislatures and governments are immune to the needs of individuals but it does mean that individual rights are properly balanced against collective interests.

Yet, as we have seen above, global governance takes power away from democratic institutions and places it in the hands of judges. Judges do not start with a blank sheet of paper for they start with limitations imposed both by the nature of their role and function and by how international human rights treaties are understood and interpreted. Over time these international treaties give rise to precedents that need to be followed. Moreover, judges do not face the collective influence of an electorate. In fact they are often faced with the emotionally powerful claims for special pleading being made by the individual litigants who appear before them.

These two factors were particularly influential in the triplet of Supreme Court cases that have given so much weight to global governance in recent years.

Although the UK has signed several international human rights based treaties, the one that has had most impact on domestic law and policy is the Child Convention. This is because children can readily be portrayed as vulnerable and in need of special treatment. Article 3.1 of the Child Convention, that makes the best interests of the child a primary consideration, has been used by the Supreme Court for this purpose. Of course, children cannot be held responsible for the misdeeds of their parents. But it does not flow from this that a child's moral innocence should be used to trump the moral culpability of an adult.

As noted above, the Children Act 1989 made the best interests of the child paramount when a court is deciding issues such as a child's contact and residence arrangements when the parents cannot agree. But these are issues that necessarily have the child's welfare as a central and direct concern. Yet, under the influence of global governance this paramount principle, or something very close to it,³³ is being applied to several issues where the child's welfare is not and should not be the central focus of law or policy.

Issues of immigration, extradition and state funded welfare are concerned with broader issues than child welfare. Immigration is focussed on controlling a nation's borders. Extradition is directed towards crime prevention. And since welfare benefits are not paid to children they are concerned with the behaviour of adults and their responsibility for their children. The following sections show how the triplet of cases in the Supreme Court, decided by applying article 3.1 of the Child Convention, have challenged a transformative model of public policy with a therapeutic one.

Immigration & extradition

In the deportation case the mother, a citizen of Tanzania, arrived in the UK in 1995. Over the next ten years she made six claims for leave to remain in the UK, all of which were unsuccessful. Two of her six claims were fraudulent because she used false identities and claimed to be Somali. Yet the Supreme Court concluded that the UK could not remove ZH back to Tanzania having regard to the best interests of the two children she had given birth to in 1998 and 2001, from a relationship with a British citizen. The mother was able to avoid deportation even though the court accepted that her decisions to have her children were 'in some measure motivated by a belief that having children in the United Kingdom of a British citizen would make her more difficult to remove.'³⁴

The mother's culpability was clear: she had no moral right to enter the UK (her legal right arising from an asylum claim that failed no less than three times) and no moral right to remain in the UK. Her moral turpitude was aggravated by her two fraudulent asylum claims. And yet the Child Convention enabled the mother to avoid the legal consequence of deportation. Her moral responsibility was trumped by the Child Convention. In the Supreme Court Lady Hale described the mother's children as 'innocent victims of their parent's choices' (§21) and she cited another case³⁵ in which it had been stated that 'a child is not to be held responsible for the moral failures of either of his parents.' Lord Hope supported the conclusion that the mother should not be deported after describing the children as 'innocent of the mother's shortcomings' (§42).

The immigration case provides a textbook example of a therapeutic approach to public policy. By requiring a rule to be punctured according to the needs of a child every irregular migrant now knows that s/he may be able to escape removal by becoming a parent. Individuals need not be held responsible for their blameworthy behaviour because they can hide behind, in the words of Lady Hale and Lord Hope, the 'innocence' of their children. This right to evade the consequences of one's actions even exists when the irregular migrant knowingly has children for the purpose of making removal harder.

Having introduced the 'best interests of a child' defence to deportation it was not surprising that within a year of that judgment the Supreme Court had to consider whether this defence might also be used by a fugitive to avoid extradition. The

court unanimously concluded that it could. Ms Filipek-Kwasny was alleged to have committed multiple offences of dishonesty, including eight frauds, in Poland between 1997 and 2001. A British judge concluded that Ms Filipek-Kwasny fled to the UK in 2002, with her family, in order to avoid prosecution by the Polish authorities. However, a seven-judge Supreme Court unanimously concluded that she should not be returned to Poland given the weight it attached to the best interests of her children who were born after she fled to England.

Ms Filipek-Kwasny's moral culpability was clear: she was a fugitive, namely, somebody on the run to avoid trial in another state. But, as if to stress the global nature of UN governance, Lord Wilson cited a judgment from the Constitutional Court of South Africa on the purpose of article 3.1 of the Child Convention in which Sachs J had said it was 'to protect innocent children' (§171).

In this extradition case the notion of childhood innocence and the absence of culpability was bolstered by the children's professed vulnerability. As one advocate put it:

'international human rights instruments, including the Universal Declaration of Human Rights and the [Child Convention], have recognised the special and unique status of children. This involves not only a negative duty to avoid doing them harm but also positive obligations to promote their development into adulthood. In this they are different from adults, even vulnerable adults, because adults have passed the growing-up stage while children need special attention in order to grow up' (§25)

Lady Hale noted that the children of another fugitive who she (in the minority) would not have extradited were 'all in a highly vulnerable group' (§63). And the youngest child was described not by her age but as 'still at the most vulnerable age' (§77).

There is substance in the notion of childhood vulnerability and it is also true to say that children are not morally responsible for their parents' wrongdoing. But, none of this can lightly be allowed to trump the wider collective interests in play. A policy decision to allow a fugitive to escape justice is one of such significance that if it is considered to be in the public interest then it should be debated in parliament and provided for by a legislature that is accountable to the people. However, parliament has not passed such a law. This situation has come about by the decision of a court that has applied zeitgeist notions of global governance to the benefit of particular litigants but with insufficient regard to wider collective interests.

Welfare

The problem of perceived vulnerability being used to challenge moral autonomy is particularly prevalent in the field of welfare where global governance has challenged the legislature's ability to tackle welfare dependency and, more generally, to determine the allocation of limited public resources.

In the benefit cap case the mother and youngest child of three lone parent families challenged the policy that capped the amount of benefit that a family can receive in non-working benefits. One of the government's key justifications for the cap was that it would incentivise work and promote long term behavioural change. In other words the government sought to tackle the problem of welfare dependency by incentivising different behaviour. As the government put it, it wanted 'to achieve long term positive behavioural effects by changing attitudes to welfare and work and encouraging responsible life choices, which will benefit adults and children alike'. The government fixed the cap at the level of average earnings for working people on the grounds that 'it did no service to welfare claimants if they were seen to be receiving amounts of money from the state that exceeded the average earnings of people who were working' (§33). In other words the cap codified the principle that benefit claiming should not be seen as more remunerative than work.

In her critique of the welfare benefit cap Lady Hale said 'the prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need.'³⁶ This statement encapsulates a key element of the therapeutic model that informs global governance: a belief that public policy should adapt to the 'needs' of the individual. In other words if an individual presents with a need then the state should meet it. 'Need' is presented as immutable, something that individuals cannot be expected to meet by their own endeavours.

Lady Hale reiterated her belief that the state should accommodate itself to individual need when saying: 'it cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life.' (§226). Lord Kerr shared Lady Hale's view that presenting needs, namely needs that disregard the possibility that they could have been avoided, should be met by the state (§269).

In fact Lady Hale and Lord Kerr are saying something profound about public policy for they are denying its transformative role: its ability to improve individual behaviour. The thrust of the government's case before the Supreme Court was that the benefit cap was motivated by a desire to incentivise work and wean individuals off a culture of benefit dependency. But if individuals are seen as lacking in moral agency then this objective needs to be sacrificed to the purpose of protecting the vulnerable. Public policy is dumbed down; it becomes reactive and therapeutic rather than transformative.

By requiring the state to protect the vulnerable and by making decisions specific to the individual and their circumstances the law becomes unable to set and uphold a consistent standard that morally autonomous individuals might rely upon and be expected to meet. For under this approach it is not the individual that must change to meet a standard, it is the law that must change to meet a particular need. The state accommodates to individual need and becomes expansive and therapeutic, rather than limited and liberal.

As noted above, a hallmark of Western liberalism is the value it attaches to moral agency. So, a society that values and incentivises moral behaviour may well want to break the link between benefit and need on the grounds that the state is entitled to say: 'we have capped your benefit because we do not want to encourage or promote certain actions or decisions.'

The Supreme Court has developed the therapeutic model by relying principally on the Child Convention. Other examples drawn from broader politics indicate how this model could expand by drawing on other international human rights conventions. The Economic and Social Covenant could apply to adults and the UN's Special Rapporteur on the Right to Food, Olivier de Schutter, relied on it to criticise food banks on the grounds that the provision of such food is the state's responsibility.³⁷ Moreover, the UN's Special Rapporteur on Adequate Housing, Raquel Rolnik, also referred to this legal provision to criticise UK welfare policy and in particular to call for the immediate suspension of the removal of the bedroom tax (spare-room subsidy) so that its 'negative impacts on the general well-being of many vulnerable individuals and households' could be considered.³⁸ In an interview for The Guardian her perception of vulnerability as leading to this conclusion was palpable:

'Rolnik said she was disturbed by the extent of unhappiness caused by the bedroom tax and struck by how heavily this policy was affecting "the most vulnerable, the most fragile, the people who are on the fringes of coping with everyday life".'³⁹

The therapeutic approach to public policy taken by Lady Hale and Raquel Rolnik shows where it might end: anyone with a need that can be allied to vulnerability may expect it to be met not by their own endeavours but by the state.

Global governance is pushing a therapeutic model of public policy. It is a model that incentivises the use of children to evade laws on immigration and extradition and it undermines the incentive to work as an alternative to welfare entitlement. This model challenges the moral equality of all that is central to the liberal public policy model. But then, as explained above, global governance can only get a hold on public policy by elevating supra-nationalism over democratic self-government. The supra-nationalism of global governance is the means by which the moral agency of Western liberalism can be replaced with a therapeutic model of public policy that ends up incentivising undesirable behaviour.

3. From the rule of law to the rule of *the* law

Liberal democracy celebrates the rule of law but it cleaves to a particular view of the law marked by three features, each serving to limit law's reach. First, in a liberal democracy law is servant of the people in the sense that the people are free to determine their own laws and policies without externally imposed constraints. Thus, law is restricted by democracy. Second, law celebrates and respects liberty by establishing boundaries within which the individual is given considerable freedom. The boundaries to this freedom are delineated by bright-line rules that respect the moral equality of all. These bright-line rules act as clear boundaries between what is and is not expected of the individual. Third, law is based on reason and understanding. This has been a hallmark of all progressive societies since Ancient Greece which have followed Aristotle's view that 'the law is reason, free from passion'.⁴⁰ Thus, law is fettered by reason and understanding. These three features combine within a liberal democracy to ensure that law plays a bounded, albeit important, role in a liberal society.

But in the managed therapeutic state the law's role changes profoundly. Adherents of this form of governance celebrate the rule of law but what they celebrate is more accurately described as the rule of *the* law. Each of the three features that restricts law in a liberal democracy is challenged in the managed therapeutic state informed by global governance.

First, law is not limited only to laws that are acceptable to the demos. On the contrary, the essential feature of global governance is that laws are imposed from above on a supra-national basis so that the demos has no effective say over them. The people of the UK are unable to have immigration, extradition and welfare laws of their choosing because all these laws have to conform to the requirements of the Child Convention (as interpreted by the courts) and in years to come, quite possibly, to other human rights treaties as well. With this concept of the rule of the law: democracy does not restrict law, for law restricts democracy.

Second, law in the therapeutic state does not respect the moral equality of individuals. On the contrary it rejects the very idea of legal boundaries within which the individual must adapt his behaviour and in its place it poses legal boundaries that are fluid depending on a variety of needs and circumstances, such as those of the child. This requires law to play an expansive role as every case becomes one in which the particular needs of individuals have to be carefully considered against a variety of possible harms. In the therapeutic society moral responsibility moves from the individual and passes to the law. An act that would ordinarily, on account of the individual's behaviour, warrant deportation or extradition may not result in such action under a therapeutic system. The law assumes a key role for overseeing this therapeutic system. With this view of the rule of the law, the boundary between behaviour and outcome is not marked with a clear bright-line rule setting expectations. Instead, the law is expected to be flexible and accommodating of individuals and circumstances in order to avoid particular consequences on a case by case basis.

Third, law in a therapeutic state is not based on a reasoned understanding of society. On the contrary law is informed by compassion and empathy rather than reason and understanding. Long-term societal consequences may have to be disregarded in the interests of short-term individually focused empathy. The particular circumstances of an individual litigant will be considered by the court before judgment is passed and the lawful judgment is likely to be one that unduly adapts to the circumstances of the individual rather than demonstrating an understanding and recognition of the good of society. From a reasoned perspective laws that allow or incentivise individuals to avoid immigration or extradition by becoming parents are clearly undesirable. But law in the therapeutic state operates differently by focussing on how the interests of those individuals, and their children, can be recognised and promoted. As above, with this concept of the rule of law bright-line rules are out and discretion exercised on a case by case basis is in.

In a liberal democracy the key agent of control is the individual. In a managed therapeutic state the key agent of control is the law. Global governance stems from international human rights treaties which are used to empower – and impose, through the courts – a particular view of the law in nation states. Adherents of global governance speak of the importance of the rule of law, but the specific and contestable view of law that they seek to promote is best described as rule of *the* law. For in the managed therapeutic state law has few limits and its coercive nature is used to control the development of public policy and domestic legislation.

Conclusion: what is to be done?

In some ways it is surprising that global governance has secured such a hold on the UK, an established liberal democracy. There are two reasons for this, which are institutional and ideological.

The institutional nature of global governance

At an institutional level the UN has been successful in leveraging its influence by fostering relationships with domestic human rights organisations and individuals, which the UN describes as ‘civil society groups’ such as ‘human rights defenders; networks [promoting] women’s rights, children’s rights, environmental rights; professionals [such as] humanitarian workers, lawyers, doctors and medical workers’ etc. The UN makes no secret of its relationship to these groups and on becoming UN Commissioner for Human Rights in 2008, Navi Pillay described the writing of a handbook called ‘Working with the UN Human Rights Programme’ as ‘one of my first acts’ because ‘my Office’s collaboration with civil society remains a strategic priority, as it bolsters our shared objectives’.⁴¹ The Handbook is expressly not aimed at global governance sceptics since it ‘is addressed to the civil society actors who, every day in every part of the world, contribute to the promotion, protection and advancement of human rights’.

One human rights insider notes how there are three types of person who ‘avoid the queues by flashing their permanent passes at the main entrance’ at the UN offices: government delegates, UN staff and ‘NGO activists based in Geneva’ whereas ‘the rest ... form an orderly line at the side entrance’.⁴² NGO activists both in the UN and in the UK play a central and increasing role in promoting the impact of global governance.

For example, implementation of each of the main human rights treaties is overseen by a UN committee which considers periodic reports from nation states. In 2016 the UN Committee on the Rights of the Child scrutinised the UK’s 5-yearly report. The UN press release noted how the committee’s evaluation of the government’s submission would be based on ‘information from the UK’s Children’s Commissioners and civil society groups’. It then listed possible issues for discussion as including the need to take ‘best interests of the child into account in decisions involving migrant, asylum-seeking or refugee children’ and a consideration of ‘child poverty and the impact of recent welfare reforms on children’s rights’.⁴³

Campaigners are increasingly seeking from the UN committee system what they cannot secure by democratic means. For example, in July 2015 the Chancellor announced in the budget that certain benefits would no longer be awarded for third and subsequent children born after 6 April 2017. This prompted the SNP MP Alison Thewliss to write to the UN Secretary General, Ban Ki-moon, asking the UN to investigate whether the policy proposal of the newly elected

government breached the Child Convention.⁴⁴ The Secretary General responded by noting how the relevant UN committee would consider whether the government's 'recent welfare reform, including the cap on household benefits and other reductions in benefits' was consistent with the Child Convention.⁴⁵ The Guardian captured the sentiment by reporting that the 'UN asks government to explain two-child cap on child tax credits'.⁴⁶ Whilst a human rights professor referred in the Huffington Post to how the 'UN grills UK on its child rights record'.⁴⁷

The organisations noted above draw their power from global governance. Their essential purpose is to interpret, apply and promote human rights based treaties of global governance. They provide a key link between the international nature of global governance and the national nature of politics. Yet what they lack is any form of democratic accountability. Indeed their defining characteristic is their insulation from democratic accountability. Global governance is premised on two things: laws, hence something that must be applied and laws that are international hence beyond reform by a nation state. An appeal to global governance by an NGO, civil society group or human rights campaign is always an appeal to a law that must be applied and which is beyond national debate.

Global governance needs institutional actors who have a national presence and these domestic purveyors of international laws and norms are able to operate from behind a veil that shields them from domestic political debate. If the NGO criticises a national policy on the grounds that it is contrary to some view or law espoused by a UN Committee or treaty, then the body politic can respond in one of two ways. Either by accepting the terms of debate as constrained by global governance or by rejecting them and focussing instead on the merits of any particular policy or law. The UK government has adopted the former.

The ideological nature of global governance

For all the power that the institutions of global governance have, the truth is that the UK government has, since its passage of the Children Act 2004, allowed these groups to play an influential role. The problem here is ideological in the sense that the UK's political elite lacks any proper understanding of global governance and of the challenge and risk that it poses to the UK's liberal democracy. Policy makers tend to see issues from a global governance perspective by accepting the influence of international human rights treaties and by desiring a public policy that is therapeutic, rather than one that recognises the moral equality of all.

Accordingly, there has been no governmental criticism of global governance since the landmark Supreme Court decision in the deportation case in 2011 in which five judges decided unanimously that the Child Convention needed to trump a public policy. In fact, since this landmark decision the government has actually strengthened the grip of the Child Convention on UK public policy:

- In July 2012 the Home Office responded to the immigration case by introducing new Immigration Rules to codify the best interests of the child in immigration decisions by reference, in particular, to length of a child's residence.⁴⁸
- In March 2014 the Children and Families Act 2014 received royal assent. This Act amended the Children Act 2004 and could have repealed s11 of the Children Act 2004. Such a repeal would have been desirable because 'the spirit [of art 3.1 of the Child Convention], if not the precise language, has ... been translated into our national law [by s11 of the Children Act 2004]'.⁴⁹ Yet there was no repeal.
- In April 2014 the Children and Families Act 2014 imposed on the Children's Commissioner specific legal obligations to (a) to monitor the implementation in England of the Child Convention and (b) to 'have regard to the United Nations Convention on the Rights of the Child'.⁵⁰
- In May 2014 UK legislation broke new ground in that for the first time the Child Convention was made a reference point in that 'the Welsh Minister must, when exercising any of their functions, have due regard to the requirements of [the Child Convention]'.⁵¹
- In May 2014 the government submitted a periodic report to the UN Committee on the Rights of the Child in which it noted how 'all legislation introduced to parliament is assessed to ensure it is ... compatible with our obligations under the [Child Convention]'.⁵²
- In February 2015 the Children's Minister, Edward Timpson MP, stated 'that there was no "block" upon incorporation [of the Child Convention], but rather that the position of the government is that it was "confident that the laws and policies that ... [the government] ... has in place already are strong enough to comply with the Convention"'.⁵³
- For the duration of the coalition government, that ended in May 2015, the government proclaimed its support for the Child Convention 'by making sure UK government policies take account of the [Child Convention]'.⁵⁴
- In May 2016 the government told the UN Committee on the Rights of the Child that the UK 'wholeheartedly believed that the [Child] Convention should provide a guiding light for legislative implementation across the United Kingdom and that was why in 2010 the government had publicly declared its commitment to consider the Convention in promulgating all new legislation.'⁵⁵

The sixth quote above shows that the coalition government was not concerned to deal with the problems posed by the Child Convention and that if anything the government might consider incorporating it into domestic law.

And despite the interference in UK affairs from Raquel Rolnik and the Working Group looking at Julian Assange's 'detention', the UK government remains

committed to allowing global governance to play an increasing role in UK politics. For example, in its core document submission to the UN of November 2012 the government notes how 'the UK co-operates fully with the United Nations human rights mechanisms and welcomes visits from all Special Procedures'. In other words there is a standing instruction from the UK that allows the UN to send its Special Rapporteurs to consider UK policies. And despite the government's public sector austerity this submission also notes how the 'UK currently gives the Office of the High Commissioner for Human Rights £2.5 million annually as a voluntary contribution, in addition to our regular budget contribution to the United Nations.'⁵⁶

When the Conservative government won the general election of May 2015 it might be thought that - freed of any constraints imposed by its former coalition partners, the Liberal Democrats - it would address the problem of global governance. The need for such action had become clearer because in March 2015 the government narrowly avoided having its benefit cap policy declared unlawful and in July 2015 one of its benefit policies was trumped by the Child Convention (the child welfare case). But the final quote in the above list shows how the Conservative government has in fact continued with the approach of the preceding coalition government.

In October 2015 the government amended the ministerial code by removing six words (shown in italics):

'the overarching duty on ministers to comply with the law *including international law and treaty obligations*'

This caused some to believe that the government was beginning to wrestle with the problem of global governance. An article in the Spectator claimed that the removal of the six words 'is the first step in taking Britain out from under the international rule of law'.⁵⁷ The community of legal activists got so worried that they tried (without success in the High Court) to judicially review the change. However, the government's publicly expressed view is that it should not challenge global governance and a Cabinet Office spokesman said that the amendment made no substantive difference because the obligation on ministers to 'comply with the law' includes compliance with international law.⁵⁸

Global governance is a political problem that the government has not addressed; indeed it seems unable to articulate it as a problem, even when measures such as amending the Ministerial Code gave it an opportunity to raise the matter. The government is as committed to global governance as the Supreme Court, the main difference between the two is that the Supreme Court's reasoning and endorsement of global governance is given openly whereas the mainstreaming of global governance into policy making by the government keeps the public in the dark about the laws and policies that are abandoned or changed as required by international human rights laws before seeing the light of day. The public is

unlikely to know how many deportations or extraditions would have happened had it not been for civil servants running a case through the mangle of these treaties before deciding to allow somebody to cheat the nation's borders or the criminal justice system of another country. Neither will the public know how many welfare or other policies will be abandoned on the drawing board as being incompatible with the Child Convention or some other international human rights treaty.

On the day the new Ministerial Code was released the Attorney General, Jeremy Wright MP, gave an address about the importance of international law in which he noted that he had been struck in his first years as Attorney General 'just how central [international law] is to the daily work of government'. He also noted that it was 'all-pervasive'. He made no specific mention of international human rights treaties although he did observe how the European Convention 'touches on nearly every aspect of our lives and our work as government lawyers'.⁵⁹

The opaque and undemocratic nature of global governance is certainly recognised by the activists and public officials who promote this approach either in court or by making representations to government committees, where they often hold much sway. At one such recent committee, the Joint Committee on Human Rights, the process of mainstreaming global governance by stealth was made into a virtue by the outgoing Children's Commissioner, Dr Maggie Atkinson. When asked if the Child Convention should be incorporated into UK law she said it was not necessary given that its provisions can all but acquire that status by stealth:

'What you do—almost by stealth, setting precedents from the High Court and Supreme Court benches—is nibble away.'⁶⁰

As we have seen, this nibbling away has been particularly effective in mainstreaming global governance into UK law and policy. What the Supreme Court does openly the government does by stealth. Even though global governance denies parliament effective democratic control over its laws and places the government in a straitjacket, these are restrictions that parliament and government are content to accept.

The framework of global governance is prevalent in the Supreme Court, the legislature and executive. Moreover, there are many non-governmental organisations, charities and lawyers who subscribe to this ethos, but they are mostly its overseers and beneficiaries. Outside of this elite world that Keith Windschuttle so aptly described in the quote at the beginning of this paper, global governance does not have popular support. Hence, the purveyors of global governance prefer stealth to openness and the coercive force of law to the persuasive force of democratic debate. The recent vote to leave the European Union has made plain that global governance cannot be insulated indefinitely from the voters. Many people in the UK want and expect core social policy issues

to be made by the elected legislature, not re-directed by global governance into something under which the role and input of elites, supranational bodies and unelected judges are significantly increased. The recent Brexit vote has challenged an essential feature of global governance, namely its insulation from the demos. If the norms of global governance were capable of winning majority support then it would not be necessary for them to be insulated from democratic pressure.

The likelihood is that judges, members of parliament and other public officials would throw off the shackles of global governance if they could see where it is taking the UK's liberal democracy. This paper is intended to serve as a basis for understanding what global governance really means. Yes, the language of these international obligations may be broad, abstract and, without scrutiny, unobjectionable. It would, after all, be the impulse of most to try and alleviate the suffering of innocent children or other vulnerable members of society.

But behind the fluffy language there are some fundamental problems with global governance: it is undemocratic, it undermines moral agency and equality and it subjects society to a new form of expansive law. In short, it poses a challenge to the UK's liberal democracy by seeking to replace it with a managed therapeutic state that is neither liberal nor democratic and where the rule of law morphs into the rule of the law.

There is an antidote to global governance but it requires re-energising the project of liberal democracy. It means re-establishing the democratic link between legislators and the people and celebrating the moral agency and equality of citizens. With this approach, law can return to its proper limited role as a facilitator of democracy and liberty. This is a project that needs support in the academy, the media, the judiciary and the legal profession. But most of all it needs support from UK people whose interests are being short-changed by the mostly un-noticed march of global governance.

Endnotes

1 | Keith Windschuttle, *Quadrant*, May 2012, p5.

2 | *ZH (Tanzania) v Home Secretary* [2011] UKSC 4; [2011] 2 AC 166. Hereafter, 'deportation case'.

3 | *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338. Hereafter, 'extradition case'.

4 | *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250. Hereafter, 'child welfare case'.

5 | International treaties are not, unless incorporated by statute, enforceable in domestic law but the Supreme Court overcame this limitation by holding that alleged breaches of the European Convention on Human Rights (which has been incorporated into domestic law by the Human Rights Act 1998) may have to be resolved by applying other international human rights treaties (that have not been incorporated). The Supreme Court has applied the principle, drawn from Strasbourg jurisprudence, which is that the European Convention on Human Rights:

'cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken ... of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights.'

Neulinger v Switzerland (2010) 28 BHRC 706, §131, applied in the deportation case §21.

6 | Children Act 2004, s11, as considered in the deportation case, §23.

7 | Borders, Citizenship and Immigration Act 2009, s55.

8 | The UK's compliance with the UN Convention on the Rights of the Child §19.

9 | The UK's compliance with the UN Convention on the Rights of the Child §20.

10 | UN investigating British Government over human rights abuses caused by IDS welfare reforms - Independent.

11 | UN Human Rights Committee §10, 17 August 2015.

12 | Equality watchdog warns junior doctors' contract is potentially illegal - The Guardian, 28 April 2016.

13 | Human Rights Council Working Group on Arbitrary Detention, 22 January 2016.

14 | Prevent strategy 'could end up promoting extremism' - The Guardian, 21 April 2016.

15 | See for example, *Lord Sumption and the Limits of the Law*, NW Barber, Richard Ekins & Paul Yowell (Eds), [2016].

16 | Final Clauses of Multilateral Treaties Handbook. More generally see Part IV of the Vienna Convention on the law of treaties, 1969.

17 | Article 25.

18 | See John Finnis, *Prisoners' Votes and Judges' Power*, Oxford Legal Studies Research paper no 58/2015.

19 | HC Deb 3 November 2010, col 921.

20 | David Cameron, speech given on 13 December 2013, Darlington.

21 | Murray Hunt, *Introduction*, in *Parliaments and Human Rights*, ed Murray Hunt, Hayley J Hooper & Paul Yowell [2015], p4.

22 | Concluding observations on the fifth periodic report of the UK of Great Britain and Northern Ireland, 17 August 2015.

23 | Children Act 1989, Section 1.

24 | *R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, §151. Hereafter, 'the benefit cap case'.

25 | Concluding observations on the fifth periodic report of the UK of Great Britain and Northern Ireland, 3 June 2016, §25.

26 | In the child welfare case the Supreme Court also relied on the Convention on the Rights of Persons with Disabilities.

27 | International Covenant on Economic, Social and Cultural Rights.

28 | *Food Poverty: UN Special Rapporteur Finds Austerity, Food Bans and Working Poor in UK 'Extremely Worrying'*, 19 February 2013, The Huffington Post.

29 | Article 4: International Covenant on Economic, Social and Cultural Rights.

30 | Extradition case §125.

31 | Benefit cap case §226.

32 | Child welfare case §49.

33 | Lord Kerr observed that 'primary' in the Child Convention tends to mean 'paramount' because 'the notion that there can be several primary consideration (or even more than one) [is] conceptually difficult' (Extradition case §143).

- 34 | Deportation case §42.
- 35 | *EM (Lebanon) v SSHD* [2009] AC 1198, §49.
- 36 | Benefit cap case §180.
- 37 | *Food Poverty: UN Special Rapporteur Finds Austerity, Food Bans and Working Poor in UK 'Extremely Worrying'*, 19 February 2013, The Huffington Post.
- 38 | UN Report 30/2/13, §80(b), 30 December 2013.
- 39 | 'Shocking' bedroom tax should be axed, says UN investigator - The Guardian, 11 September 2013.
- 40 | Aristotle, *Politics*, Book III, 1287.a32.
- 41 Working with the United Nations Human Rights Programme A Handbook for Civil Society [2008].
- 42 | Rosa Freedman, *Failing To Protect: The UN And The Politicisation Of Human Rights* [2014] p47.
- 43 | UN Committee to review UK's record on children's rights, 18 May 2016.
- 44 | Letter to Ban Ki-moon, 1 February 2016.
- 45 | UN reply to letter to Ban Ki-moon, 20 April 2016.
- 46 | UN asks government to explain two-child cap on child tax credits - The Guardian, 21 May 2016.
- 47 | Confusion Grows as UN Grills UK on Its Child Rights Record - Huffington Post, 23 May 2016.
- 48 | Report of the UK Children's Commissioners UN Committee on the Rights of the Child Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland §4.6.
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