

PLAYING THE GAME OF GROWN-UPS: CHILDREN AND RIGHTS UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD*

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To be a child, one does not have to be young...Childhood is...a social construction, a man-made phenomenon; it has not always 'existed'...Those in authority determine who is a child.¹

I. INTRODUCTION

Childhood is often regarded as a period of confusion--and children, a confused and confusing lot. The different stages of childhood are marked by confounded experiences of fun and work, freedom and responsibility, association and individuality, when a child may be considered as too young for one thing and too old for another. As a child, a person is thrust into an adventure of learning whatever is necessary to survive in a world where the rules have already been made by adults.

To a great extent, the same confusion and difficulty permeates any discussion on the issue of children and children's rights. Are children old enough to have rights? What rights do they have? How can these rights be exercised? How can children's rights be protected?

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¹Freeman, M., *Taking Children's Rights More Seriously*, in CHILDREN, RIGHTS AND THE LAW, ed. by SEYMOUR, J. AND PARKER, S., at 56 (1992).

II. THE CONVENTION

The past four decades saw a dynamism in the field of human rights which ushered in rapid changes in the promotion of the rights of women, refugees, workers, indigenous peoples and other oppressed groups. In the light of reports on child trafficking, maltreatment, neglect and abuse, a convention embodying the rights of children was apparently a matter of course.

However, it took more than ten years for a binding international document guaranteeing protection of rights of children to come into being. It was in 1978 when Poland presented the first draft of a convention in the form of a proposal to the Working Group of the United Nations (UN) Commission on Human Rights. The proposal was basically an adaptation of the 1959 Declaration of the Rights of the Child. After undergoing several revisions and lengthy discussions among its members, the Working Group finally arrived at a resolution and in 1989, the CONVENTION ON THE RIGHTS OF THE CHILD (hereinafter referred to as the CONVENTION) was adopted by the UN.²

Undoubtedly, the adoption of the Convention was a much-lauded effort in the promotion and protection of human rights. As of November 1995, this fundamental document embodying the rights of children all over the world is considered the most widely-ratified convention on human rights, with 181 states parties. The number may indicate that the protection of children's rights is a value of universal acceptance. To a certain extent, this observation holds true. However, formulating children's rights and working for their protection within the present human rights framework is not as elementary as it seems.

²Alston, P., *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights* in *THE BEST INTEREST OF THE CHILD*, at 2 and 10 (1994).

III. HUMAN RIGHTS AND THE CHILD

The basic premise underlying the concept of human rights is that there is a set of rights inherent in every *person* simply by virtue of his/her being human.³ such rights being universal and inalienable.⁴ Sheer membership in the human family⁵ already entitles a person to certain rights regardless of race, religion, sex and all other sources of discrimination. This principle is the foundation of the rights embodied in the Convention, as pronounced in the first three paragraphs of the Preamble.

That a child is a person and a member of the human family cannot be disputed; this is what the 181 states parties to the Convention recognize, at the very least. However, there cannot be an automatic application of all rights guaranteed to persons embodied in other human rights instruments. This is because the *person* contemplated in most human rights conventions is an adult, *i.e.*, one who is over the age of 18 years or one who has attained the age of majority according to the laws applicable to him.⁶ And ascribing to the child *all* rights embodied in, for instance, the International Covenant on Civil and Political Rights (ICCPR) or in the International Covenant on Economic, Social and Cultural Rights (ICESCR) can be a rather meaningless gesture since they do not necessarily address the particular situation of the child.

(I)t scarcely makes sense to apply some of the rights in the Universal Declaration (on Human Rights) to small children. Has a child the right to marry and found a family? The right to work? The right to democratic participation? The child has a present interest in none of these things... There are rights which everyone has at some stage in a normal life cycle

³Weston, *Human Rights* in HUMAN RIGHTS IN THE WORLD COMMUNITY, ed. by CLAUDE & WESTON, at 16 (1989).

⁴Weston, *id.*; KENT, A. BETWEEN FREEDOM AND SUBSISTENCE 6 (1993).

⁵The Universal Declaration on Human Rights declares in the Preamble the "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world x x x."

⁶CONVENTION ON THE RIGHTS OF THE CHILD, Art. 1.

but not at all stages of their existence. One of the stages often so excluded is childhood.⁷

Thus, in order to determine which rights are recognized in children, the necessary questions to ask seems to be: how much of a *person* is a child under international law? Where do we locate children in the schema of international human rights?

Under the Convention, it is established that children occupy a distinctive position in the human rights framework. As indicated earlier, the first three paragraphs of the Preamble state that the basis of the rights of children is their being persons and members of the human family. However, unlike other persons, the rights inherent in the membership of children are qualified by the succeeding preambular paragraphs. The fourth paragraph, "proclaim(ing) that childhood is entitled to special care and assistance," owing to the child's "physical and mental immaturity" (par. 10, Preamble), suggests that children are *persons in the process of becoming* whose full worth can only be realized once they reach a certain age--not a particular level of competence--appointed by law. Thus, they are not *yet* members of equal status with the rest of the human family. And neither can they attain such equality without being shed of childhood, so to speak, not by will or competence but by pure force of law.⁸

This distinction is all the more revealed in the next two paragraphs of the Preamble which place the child within the context of the family and guarantee the latter "necessary protection and assistance" as the group within which the child's personality *should* be fully and harmoniously developed. Unlike other persons whose autonomy and independence are absolutely guaranteed under international human rights, the scope of autonomy and independence recognized in children is limited to a large extent by parental authority.

⁷Campbell, O., *The Rights of Minor: As Person, as Child, as Juvenile, as Future Adult* in CHILDREN, RIGHTS AND THE LAW, at 17.

⁸See *infra* pp.14-15.

These parameters define the status of children in international human rights, the impact of which bears upon the rights of children recognized in the Convention.

IV. CHILDREN'S RIGHTS UNDER THE CONVENTION

The rights of children embodied in the Convention can be categorized, for purposes of the discussion, into four groups: rights as persons, rights as children, rights as future adults, and rights as "little adults".⁹ As will be shown, these categories best manifest the paradox of the issue of children's rights.

Rights as persons

The first category pertains to perhaps the simplest and least disputable set of rights. As a person, one has certain rights which transcend boundaries grounded on race, color, sex, religion and, yes, even age. Under the Convention, the child as a person has the inherent right to life (Art. 6); the right against discrimination of any kind (Art. 2); the right to a name and nationality (Art. 7); the right to health care (Art. 24); the right to rest and leisure (Art. 31); and the right against torture (Art. 37). So paramount and fundamental are these rights that the fact of childhood, together with all its incidents, cannot lend the rights-holder less qualified to such claim than any other person.

Rights as children

Pursuant to the Convention's principle that children occupy a special position in the human family, certain rights are provided

⁹Except if the source is otherwise cited, the bases for the categories of right utilized in this paper were the following articles included in CHILDREN, RIGHTS AND THE LAW (1992):

Campbell, *The Rights of Minor* at 1-23.

O'Neill, *Children's Rights and Children's Lives* at 26-51.

Olsen, F., *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child* at 192-220.

for in the Convention specifically addressed to the nature and incidents of childhood. This set of rights can be further divided into two sub-groups: the rights of the child, and the rights of the family relating to the child.

Under the first sub-group (the child's rights as a child), we include Articles 11 and 35 prohibiting the illicit transfer and trafficking of children; Article 19 extending protection to children against abuse, maltreatment and neglect or negligent treatment while in the care of parents or legal guardians; Articles 20-23, 38-39 involving children in special circumstances; Article 33 binding States to enact laws protecting children from illicit use of prohibited drugs; and Articles 32, 34 and 36 protecting children from all forms of exploitation prejudicial to their welfare.

Note that all these rights so far seek to protect the child from the abuse of adults (parents, the public and/or the State) exercising authority or power over them. It is readily evident, therefore, that the Convention concedes that the nature of childhood necessarily places the person/child under some form of authority which is ordinarily the family. Consequently, although the rights of the family with respect to the child (the second sub-group) under the Convention consist of only four particular provisions, the rights embodied therein are so expansive and vital.

The primacy of the right of the family over the child is clearly defined under Article 5 which states that:

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

The primary responsibility for the upbringing and development of the child belongs to the parents or the legal guardians, as the case may be (Art. 18). Thus, to ensure that the

child remains under the authority of his or her parents, Article 9 provides that, generally, "a child shall not be separated from his or her parents against *their* will." The exception being those situations wherein the best interests of the child--as determined by the State--dictate that he or she be separated from the parents. In either case, note that the decision of the child is not a primary factor in determining the issue of separation from the family/parents; at best, the child's will is only of minor influence in the State's determination of his or her best interests. This matter will be discussed in detail later in this paper.¹⁰ Suffice it to state at this point that under the Convention's conceptualization, the child cannot be left to his/her own devices to decide what is to his/her best interests.

Rights as future adults

Although the rights under the Convention relating to the particular nature of childhood are quite extensive, "the current interests of the child are often subordinated to the training needs of the future person".¹¹ Indeed, some subscribe to the view that the value of the child as a person lies in the fact of imminent adulthood.¹² Thus, following this thinking, the rights the child holds are essentially those relating to the process of maturity and development towards adulthood.

The rights of the child as a future person may be identified by considering which would not apply if we were to know that the child in question will never become an adult. Clearly this would not affect the child's right to life, but it might affect her right to a certain type of education, for instance. They are properly viewed as the rights of the child on two suppositions. The first supposition is that the child and the adult are the same person. The second supposition is that it is really the interests of the future adult

¹⁰See discussion on the "best interests of the child", *infra* pp. 15, *et. seq.*

¹¹*Campbell, id.*, at 20.

¹²*Id.*, at 18.

rather than society in general that is the basis for the development training in question.¹³

Under the Convention, these "developmental rights" are embodied in Articles 28 and 29 providing for the right to education directed to develop the child's personality, mental and physical abilities, cultural identity and social responsibility, among others. In essence, the education that the child is envisioned to receive should be adequate to enable the child to conform and adapt to the values of the society in which he or she is born and/or raised.

Rights as "little adults"

The bulk of the rights under the Convention comprises what can be conveniently called *rights of children as "little adults"*. The following rights make up this list:

- (1) right of a child capable of forming his or her own views to express those views freely in matters affecting him/her (Art. 12);
- (2) right to freedom of expression, to seek, receive and impart information through any form of media (Art. 13);
- (3) right to freedom of thought, conscience and religion (Art. 14);
- (4) right to freedom of association and peaceful assembly (Art. 15);
- (5) right to privacy (Art. 16);
- (6) right to have access to information from national and international sources (Art. 17);
- (7) right to periodic review of treatment in cases of children confined to health care facilities (Art. 25);
- (8) right to benefit from social security (Art. 26);
- (9) right to an adequate standard of living (Art. 27);

¹³*Id.*, at 19-20.

(10) right to enjoy his or her own culture, religion and language, in case of children belonging to indigenous groups (Art. 30); and

(11) right to be treated with dignity and in accordance with law, in case of children accused of having infringed penal laws (Art. 40).

The distinguishing feature of this set of rights is that these are essentially rights formulated by and recognized in adults in the pursuit of particular political or social values.¹⁴ For example, the rights to free expression, association and peaceful assembly empower a person to participate in political exercises and decision-making; the rights to privacy, freedom of thought, religion and culture respects an individual or a group's social and personal moral choices.

When translated in terms of children and childhood, most of these rights become virtually insignificant. Even if children have the rights to free expression and peaceful assembly, governmental and social institutions do not have mechanisms to accommodate the views of children in political and decision-making activities. And if so accommodated, it is highly doubtful if these views will be given much weight considering that even in cases involving the determination of their best interests, children's choices are not even of any definitive value.

On the other hand, the rights to privacy, freedom of thought, religion and culture are practically rights exercised by the family/parents (especially during the early childhood years when the child is entirely helpless) since it is upon the latter that the responsibility for the nurturing and development of the child's personality rests.

...(T)he Convention does not say that children have a right to choose a religion for themselves, or to change their religion. Instead, Article 14 has a paragraph which echoes Article 5, saying that parents have the right and duty to provide their children with guidance and direction in the exercise of freedom of religion and belief...

¹⁴Campbell, at 18.

(Further,) the main purpose of Article 16 is to ensure that children are treated by public officials and others in a way that respects their honor and integrity. Do children also have a right to privacy within their own families? They probably do, but this right is limited for two reasons. First, parents have a duty to protect children from harmful influences...The second reason is the right of the family to privacy, which means that outsiders should not interfere in the relations between children and their parents unless something is seriously wrong...¹⁵

V. THE PARADOX OF CHILDREN'S RIGHTS

Adults sitting around a table and deciding among themselves what rights children should and ought to have.

In the simplest terms, this seems to be the most likely backdrop against which the Convention was drafted, as revealed by the foregoing discussion on the rights of children under the Convention. And perhaps, at present, it could not have been done any other way.

The Convention is inevitably a product of the times, a reflection of the current world-view held by adults on children. Through the years, different perspectives and approaches on children and childhood have evolved. If these approaches were to be loosely situated in a spectrum, on one end would be paternalism¹⁶ while on the other is self-determinism. In between

¹⁵O'DONNELL, D., CHILDREN ARE PEOPLE, TOO at 70, 76 (1996).

¹⁶According to Freeman, paternalism, as between parents and children:

"...assumes that adults already relate to children in terms of love, care and altruism, so that the case for children's rights becomes otiose. This idealizes adult-child relations: it emphasizes that adults (and parents in particular) have the best interests of children at heart. There is a tendency for those who postulate such an argument to adopt a *laissez-faire* attitude towards the family." (see above note 1, at 55.)

With respect to the state, paternalism is best embodied in the principle of *parens patriae* with which the law adopts a protective stance over minor citizens.

"It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and

these two extremes can be placed several other theories (some of which will be discussed later) which aim to strike a balance between the rights of the different parties involved in children's issues.

Today, the prevailing view appears to be what has been called *justified paternalistic intervention*,¹⁷ the theory that considers a person's *capacity for autonomy*¹⁸ -- rather than actual autonomy -- as a justification for interventions in children's lives to protect them against irrational actions. Irrational actions being those which

manifestly undermine future life choices, impair interests in an irreversible way...and justify intervention only to the extent necessary to obviate the immediate harm, or to develop the capacities of rational choice by which the individual may have a reasonable chance of avoiding such harms.¹⁹

The approach seeks to circumscribe within the emerging scheme of children's rights the inveterate notion of paternalism. This is best reflected in the formula provided for--or lacking--in the Convention in determining the "best interests of the child." As earlier intimated, in most cases, the hierarchy of authority in determining the best interests of the child appears to be in the following order:

- (1) parents or extended family (Art. 18)
- (2) the State (Art. 3)

custody from their parents..." (BLACK'S LAW DICTIONARY, 6th ed. (1990), citing *Gibbs v. Titelman*, D.C.Pa., 369 F. Supp. 38, 54.)

Note that under this perspective, the focal point is not the rights of children but the duty--moral, legal or otherwise--of parents, guardians and governmental institutions to protect the child.

¹⁷Lowy, C., *Autonomy and the Appropriate Projects of Children: A Comment on Freeman in CHILDREN, RIGHTS AND THE LAW*, at 73.

¹⁸*Capacity for autonomy* involves the ability to select what it is we wish to do and to have, in the light of some information as to the alternatives and their consequences. (Campbell, *id.* at 19)

¹⁹Freeman, *id.*, at 67.

(3) the child, if capable of forming his or her own views, in accordance with age and maturity (Art. 12).

At the outset, it is established that parental authority takes precedence in most cases in determining the child's best interests.²⁰ In default thereof and in certain circumstances (e.g., abuse, neglect, maltreatment), the State figures in such determination. The indeterminacy of the "best interest" standard has been the subject of much debate and criticism. As Alston observed,

(I)f human rights norms in general can be said to be inherently indeterminate, the best interests principle is located by most of its critics at the most indeterminate outer margins even of that body of norms...²¹

But beneath the practical indeterminacy, what remains certain is that the child, even if he or she is already capable by age and maturity of forming his or her own opinion, is deemed incapable of determining his or her best interest. A child's capacity for autonomy is, thus, considered wanting or, at most, developing.

...(A) ruling in a case involving a dispute about a child's capacity to make an independent decision will rarely be made solely on the basis of the child's maturity and comprehension. Rather, the tendency will be to assess this capacity by reference to what is thought to be the child's best interests. If the decision is felt to be contrary to those interests, the most likely result will be a conclusion that the child lacks capacity to make it.²²

²⁰According to Alston, during the discussions in the drafting of the Convention, it was clear that "the drafters' preference for the indefinite rather than the definite article in the phrase ("a primary consideration") is intended to indicate that the child's best interests are not to be considered as the single overriding factor," except in cases falling under Arts. 21, 18(1) of the Convention. (see note 2, at 12-13)

²¹See above note 1, at 18-19.

²²Seymour, J., *An 'Uncontrollable' Child: A Case Study on Children's and Parents' Rights* in CHILDREN, RIGHTS AND THE LAW, 98-118, at 101.

VI. COMPETENCE, AUTONOMY AND RIGHTS

The concept of competence²³ or capacity for autonomy is founded on the nature of the person as an individual equipped with his or her own volition or will. This is central to the notion of rights. If one is deemed to have rights, he or she must necessarily be accorded some degree of autonomy for the exercise and protection of such rights. Thus,

(t)o believe in autonomy is to believe that anyone's autonomy is as morally significant as anyone else's. Nor does autonomy depend on the stage of life that a person has reached...To respect a child's autonomy is to treat that child as a person and as a rights-holder.²⁴

However, the dilemma lies in the fact that although adults recognize that children have rights, they have decided that children are not yet fully competent or capacitated for autonomy necessary to exercise certain rights. Within this schema of rights and as manifested in the Convention, certain sets of children's rights are *entrusted* upon the parents or family ideally in favor of the children until the time that the latter is fully emancipated. The result: a Convention that is "indeterminate insofar as it supports flatly conflicting and contradictory rights."²⁵ The most basic contradictions arise in situations where the child's rights which

²³The concept of legal competence was discussed by John Eekelaar in *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, in *THE BEST INTEREST OF THE CHILD*, at 54-55 and 57:

"...When, then, is a child competent?... (A)n autonomous decision is one wherein the desires chosen to be followed are consistent with (and intentionally so, not by accident) the individual's ultimate goals. Furthermore, the goals in which the desires are realized must be achievable within attainable social forms. Finally, a decision may be autonomous even if inconsistent with the decision-taker's self-interest...

We may express this element of competence thus: a child's wish or aspiration will not be competently expressed if it could not be realistically implemented or if its realization is extremely improbable in the time frame contemplated by the child."

²⁴Freeman, *id.*, at 64-65.

²⁵Olsen, *id.*, at 195, 213-214.

warrant him or her some amount of individuality (*e.g.* right to free expression, thought and religion) collide with the exercise of parental authority. On the surface, this may seem like the usual adolescence-related crisis; but transported into the sphere of rights where both camps, *i.e.*, parents *vis-a-vis* children, seek to assert their rights in a situation where the stakes are much higher (as in cases of child abuse within the family), the implications especially on the child suddenly assume the gravity of reality.

Precisely because of the complications involved in the conception of children as rights-bearers, Onora O'Neill formulated an alternative approach which focuses instead on the obligations of adults rather than on the rights of children. Her thesis is that the rights-theory is not appropriate nor adequate to deal with the specific circumstances of childhood. According to O'Neill, unlike the situation of other oppressed or minority groups which fit within the framework of rights or human rights, the condition of children is attended by a *dependence* which the rights-theory cannot suitably accommodate.

(T)he analogy between children's dependence and that of oppressed groups is suspect...Younger children are completely and unavoidably dependent on those who have power over their lives. Theirs is not a dependence which has been artificially produced (although it can be artificially prolonged); nor can it be ended merely by social or political changes...

Child-rearing and educational practices are often harsh and ill-judged. Yet they are fundamentally different from other exercises of power in that (with few exceptions) parents and educators seek to reduce (some or all of) children's incapacity and dependence. Even when they are reluctant to lose their power over children, they do not want specifically childish dependence to continue indefinitely...The crucial difference between (early) childhood dependence and the dependence of other oppressed social groups is that childhood is a stage of life, from which children normally emerge and are helped and urged to emerge by those who have most power over them.²⁶

²⁶O'Neill, *id.*, at 37-39.

O'Neill submits that the insistence on the classic fundamental rights-approach in dealing with children dissipates the efforts which can be of better use if employed to identify instead fundamental obligations. This does not call for a denial of fundamental rights of children; rather, O'Neill posits that "fundamental rights are best grounded by embedding them in a wider account of fundamental obligations, which can also be used to justify positive rights and obligations."²⁷

VII. CONCLUSION

The issues attending the matter of children's rights necessarily call for a greater understanding of the nature and circumstances of childhood. Strengthening the notion of children as rights-bearers proves to be inadequate to fully address the uniqueness of the situation of children in the human family. On the other hand, O'Neill's approach--as simple and ideal as it may seem--tends to revert to a predominantly paternalistic treatment of children. By highlighting the obligations of adults, it perpetrates the thinking that children are mere recipients of dole-outs rather than bearers of rights, and fails to earnestly appreciate the rights of children as persons.

Full resolution of the issues requires necessary adjustments in the present attitudes towards children and adulthood. At the core of the debate is the question of the value ascribed to children and children's lives. How will the world see the children? As future adults, "little adults"? As beings whose sole purpose is to complete a family? Or as persons like any adult member of the human family? Eventually, therefore, moral questions will have to be involved.²⁸

²⁷*Id.*, at 27.

²⁸Coady & Coady, *There Ought to be a Law Against it: Reflections on Child Abuse, Morality and the Law* in CHILDREN, RIGHTS AND THE LAW, at 132.

Hearing what children say must therefore lie at the root of any elaboration of children's rights. No society will have begun to perceive its children as rightholders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.²⁹

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²⁹Eekelaar, J., *Importance of Thinking that Children have Rights* in CHILDREN, RIGHTS AND THE LAW, at 228.

