

CHILDREN, RIGHTS AND THE LAW edited by Philip Alston, Stephen Parker, John Seymour, Oxford, Clarendon Press, 1992, 268pp, \$39.95, ISBN 0 19825 776 7

The papers in this book were drawn from contributions to a workshop with the same title organised by the Centre for International and Public Law at the Australian National University in July 1991. The United Nations Convention on the Rights of the Child formed the background to the contributions. Most of the contributors do not explore the sociopolitical dimensions of an integration of the rules which the Convention contains into the body of national law, with the exception of Frances Olsen's feminist critique of the approaches of the Convention. Besides several case studies, the majority of the papers contain a philosophical discussion of the concept of children's rights. Given the diversity of the contributions I shall limit myself to a discussion of this group of papers.

In a discussion of the will/interest dichotomy of the theoretical justification of rights, Tom Campbell takes the side of the interest theory, and argues that such theories that ground rights on the powers of rational autonomy, have to exclude persons who lack such autonomy from the ranks of right-holders. Children and mentally handicapped persons could then not be conceived of as having any rights as they lack the willpower to exercise them. But, he contends, as members of these groups are people they have to take part in the universal human rights. This can only be justified by a concept of rights based on legitimate interests that are ascribed to each member of society. He then goes on to analyse the legitimate interests of children and postulates that children's rights have to reflect the interests of children in their various stages of development. In his concept, children ought to be taken seriously as children and their rights should not be defined in the view of their future existence as adults. Hence, he is also strongly opposed to any advocatory definition of children's rights, whereby adults define the best interest of the child in the view of what this child as a future adult would want his present guardians to have decided for him or her, a concept also put forward by Eekelaar and Freeman in their contributions to this volume.

Onora O'Neill, on the other hand, argues that children's rights are best grounded on obligations and not on fundamental rights. Whilst she accepts that children have positive rights, she contends that a coherent justification cannot be based on fundamental rights of the child, the main reason being that there are imperfect obligations binding all agents, but owed not to all children and not to antecedently specified children. To such an obligation, she contends there is no corresponding right of the recipient. Furthermore, such imperfect obligations have a prime importance for the lives of children. Parents and teachers fulfilling only their perfect obligations, that is, those which correspond to specific rights of the child, would be doing less than what is expected of them. She then asks the question why the current discussion of ethical issues focuses on children's rights and not on others' obligations. She finds an answer in historical and political reasons, mainly in a politically drawn analogy to other powerless groups that were empowered by acknowledgement of their rights. O'Neill claims a fundamental difference between such groups (the working class, minorities, women) and children. Whilst members of these underprivileged groups may be empowered by the conferral of rights children,

are in a fundamental sense dependent. Their main remedy, in the eyes of O'Neill, is to grow up.

Behind this view, is a concept of agency that is based on rational autonomy as an empirical trait of the person. In O'Neill's view, it would be futile to award rights to minor children that do not have the intellectual capacity of rational agents. Eekelaar puts forth a strong counterargument. He argues, with reference to Feinberg, J, ("The Nature and Value of Rights", in Feinberg, J (ed), *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy*, (1980) at 151) that it is essential for the members of a community to respect each other as potential makers of claims. In this concept, the category of the person is intrinsically linked to the capacity to hold rights, to make claims, which in turn hinge on the exercise of choice. He explicitly rejects the idea that rights are based on interests because these, of necessity, are ascribed. In principle, they can collide with the person's own assessment of his or her interests. The problem that children may be too young or too inexperienced to make rational choices, is overcome by Eekelaar insisting that the character of rights is a construct, "an artefact constrained by the assumptions of full information and maturity" (p229). The empirical observation that some persons lack the ability to exercise choice rationally then becomes irrelevant. What is required is a hypothetical judgment of which duties children would want to be exercised towards them, if they were fully informed and of mature judgment. Recourse to the child's welfare, the best interest of the child, is not enough. Rather, "[w]e now need to think how the action could be one which the child might plausibly want" (p230).

In his paper, Freeman starts off with much the same argument as Eekelaar: "Those who may claim rights, or for whom rights may be claimed, have a necessary precondition to the constitution of humanity, of integrity, of individuality, of personality" (p56). He then develops a critique of O'Neill. His main arguments are that although children are a special case, they are not that different from other groups that have fought for their empowerment. There is considerable scope for empowerment of children. Moreover, there are fundamental interests of children to be protected in the same way as for adults. More fundamentally, he aims at O'Neill's preoccupation with finding determinate sets of rights or obligations. Whilst O'Neill contends that a theory based on rights is radically indeterminate, as it cannot show one set of copossible rights to be maximal, Freeman argues that such a condition is not necessary: "There are no right or necessarily even best answers to these questions" (p59). This does not react to O'Neill's point, though. Rather, one would have to argue that any system of obligations is just as indeterminate. Her conclusion is that the "construction of imperfect obligations commits rational and needy beings only to avoid *principled* refusal to help and *principled* neglect to develop human potentialities" (p35). The construction of these fundamental obligations is so indeterminate that it can ground an infinite set of concrete obligations. In fact, it is the counterpart to what O'Neill calls a "manifesto" right, a right that obliges no-one to anything unless specified by appropriate institutionalisation. The same is true for the fundamental obligations developed by O'Neill.

Freeman bases his arguments on Kant's and Rawls' concept of equality and autonomy. But, just as in Eekelaar's paper, autonomy is not to be seen as an empirical prerequisite but as a normative concept on which Rawls bases his

construction of a just society. Freeman argues that under the Rawlsian "veil of ignorance" the parties to a hypothetical social contract would

know of the very limited capacities of very small children and the rather fuller, if incomplete capacities of adolescents.... They would also bear in mind how the actions of those with limited capacities might thwart their autonomy at a future time when their capacities were no longer limited. (P67).

The protection of children as autonomous individuals, that is as holders of rights, then hinges on the question of what sort of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood. From this point, Freeman rightly states that the will/interest dichotomy to some extent is a "false divide" (p68).

Parker argues the case of a consequentialist approach to a theory of rights. He bases his arguments on Phillip Pettit's version of a welfare state theory ("Can the Welfare State Take Rights Seriously?" in Sampford, C and Galligan, DJ (eds), *Law, Rights and the Welfare State* (1986)). Pettit's belief that decision-makers can justifiably be bound by rights at the level of decision, is based on the essential by-products that rights can have and that maximise welfare. Non-rights balancing processes would be extremely costly (p157). Whilst Parker concedes that considerable work needs to be invested in identifying the component values of the welfare of children, he asserts that one item on the inventory can be readily identified: "the good enjoyed by a community which justifiably believes that the opportunities in life of all its members have not been impaired by the reasonably avoidable adverse consequences of past adult choices" (p157). He is very close to the theories of Freeman and Eekelaar who present a non-consequentialist argument. Both sides need an *ex-ante* evaluation of future welfare which in turn cannot be evaluated objectively because there are no hard and fast intersubjective standards. Hence, the value judgments involved of necessity have a subjective component. This means that they can only be assessed by all persons involved.

The paper's contained in this book present a good sample of the current philosophical debate of rights. It seems to me, though, that the foundation of the theories involved need further debate. In a secular world, values (rights and obligations) cannot be justified through recourse to authority, divine or otherwise. If objectification of persons is to be avoided, values can only be conceived of as the product of the interaction of people, that is of a communicative process which is governed by claims to truth, legitimacy and rightness. Basic moral and legal principles can be grounded in communicative reason without substantive morality or normativity being involved. It seems to me that consequentialist theories have to discuss the problem of how welfare can be measured without having recourse to the judgments of all involved, at which point a concept of a communicative process becomes necessary. On the other hand, foundational theories of rights face a problem of universal justification that can also only be solved in a communicative process.

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