

an alternative to the concept of children's rights . .

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1. Introduction

In the past few years discussion concerning the composition of children's rights seems to have oscillated between the conservative statements of such august bodies as the United Nations (1) and the extreme stand of those who advocate "kid power". (2) The meaning of the term "children's rights" has become obscured and is in danger of becoming a gimmicky catchphrase which ignores the broader framework of intertwining rights, interests and obligations that involve interaction between the child, the family, the State and other individuals and groups who have an interest in their welfare.

The tensions that such a broad framework of competing human rights create do not seem to have received the serious attention they deserve as most writers concentrate upon an enunciation of the child's fundamental rights and how effectively or otherwise they are being adhered to. Additionally there is the problem that many discussions become clouded by emotiveness and subjectivity because the topic is children which can ignore the fact that, although they quite properly have a special status, this does not, or should not permit them to be dealt with discriminately. (3) For instance although legal aid is available to many more adults than children the provision of adequate legal services to all people ought to be a requirement for equality before the law.

Undoubtedly children do have special needs but charters and bills of rights which isolate these from the needs of all groups ignore the tensions which undoubtedly do exist. There is a need to explore an alternative, to describe and relate the duties and rights of the community, the parent and child and crystallise how they do and ought to interact and integrate. For these reasons I suggest that the term "children's rights" should be avoided unless it is used to describe the special interests of a particular larger group, who because of their status ought to be vested with privileges, rights, interests and obligations which, although perhaps not always legally enforceable, do comprise a charter which includes specific rights and obligations that graduate with the

accretion of time and maturation and that minimise tension and conflict.

With these remarks in mind it is appropriate to discuss the position of the child or any other member of the group who will be affected by the enhancement of the privileges of another member of the unit (4) and the focus of this paper is twofold. Firstly to explore further the concept of rights and secondly to illustrate by examination of one particular area of the law relating to children how complex the evolution of meaningful rights becomes if these are placed in juxtaposition with those of a broader group.

II. The concept of rights

Individual rights, privileges, powers and immunities form part of a kaleidoscope, intertwining the interests and obligations of various groups which as indicated will inevitably collide at various points. One peak of tension which Eekelaar has isolated is that "the concept of parental rights may be coming into collision with the development of the countervailing rights of children." (5) Any discussion of children's rights in vacuo thus intensifies the tensions.

If society gives full recognition to the demands of special status groups then a clash of interests is predictable unless the possible areas of conflict are isolated and appropriate societal techniques are developed to establish checks and balances as a means of reconciliation and resolution. However any attempt to resolve these problems would be premature. These rights must be identified first and it is central and basic to precede this task by establishing what is meant by the word "rights".

Advocates of children's rights appear to be more comfortable when endeavouring to establish the nature and status of rights rather than defining how they interpret the word and as Gareth Evans has illustrated this confusion is heightened because "there is an obvious ambiguity about the term 'right': it is used both descriptively and normatively, to describe not only what is the case, but what **ought** to be. Lawyers and historians are most at home with the

former usage, reformers and moralists with the latter." (6)

When one pauses to consider how many different professional groups are interested in child and family welfare then it is understandable that there will be considerable confusion surrounding the meaning and quality of the term. Rather than confront the resolution of this complex but vital task there is a tacit understanding that the words are defined in a very broad and indiscriminate way with each professional group emphasising the specific needs which ought to be satisfied within their periphery. This approach categorises on a self interest basis only and fails to interlock the concept into a satisfactory whole. Thus children's rights are promoted without consideration of their effect on other groups.

To purport to undertake the task of interlocking the various interested groups without the benefit of those involved such as psychology, education, medicine and law enforcement would be both presumptuous and unrewarding. What is required is an ongoing examination to stipulate the substantive aims of child and family welfare coupled with a study of what are perceived as the immutable moral considerations, what the legal situation is and how reform would enhance the growth of family orientated interests and obligations.

An interdisciplinary approach would not necessarily result in the submergence of specialised agencies but on the contrary allow them to more creatively explore ways in which the needs of their groups could be fulfilled.

III. The scope and effect of the law relating to children

A. The scope

There are many areas of law applying to children and adults which are not usually seen as involving children. This narrow view of the legal process is primarily due to the fact that the child's involvement is more visible in the area of juvenile offending and neglect cases and there is a considerable amount of literature devoted to describing the defects of the present system. (7) Undoubtedly there is a need to describe how the state and adults treat children in these

categories but it is also most desirable that these matters be placed in the broader perspective of the family role and how the variety of people empowered by the state do intrude upon this relationship.

Another factor which inhibits comprehensive discussion is that there are a plethora of definitions of the word "child", a diversity of ages at which they are competent to act and many conditions imposed upon the power to intrude, not the least of these being the attitude that "both in law and in practice we often act as if the blood tie and 'natural' parenthood necessarily ensures satisfactory parenting". (8)

The following indicates some of the areas of the law (9) which apply to children and which also invest others with both rights and obligations:—

Child Care — neglect, maltreatment, health, foster care, education, child labour, smoking, tattooing of minors, alcohol.

Guardianship — custody on divorce and separation, court proceedings which result in the child being made a ward of the court or a ward of the state, adoption.

Contract — Void and voidable contracts, contracts for necessities.

Tort — The right to sue (prenatal and antenatal) actions because of fatal accidents to parents, seduction, workers compensation claims, actions against the child.

Treatment and punishment of juvenile offenders

Offences against children

Other laws which regulate the conduct of children and young persons for example with respect to the age of majority, marriage, inheritance and making a will, citizenship, right to vote.

In some of the above areas there has been some advancement. The Congenital Disabilities (Civil Liability) Bill (10) in England is designed to remove some of the difficult legal, medical and social problems that arose in the thalidomide tragedy. This bill in addition amounts to a charter for the unborn child, ensuring the legal right to claim for damages for pre-natal injuries. Further, the Sexual Law Reform Society in England has recommended the reduction of the age of

consent for both heterosexual and homosexual activities. In view of the earlier physiological and emotional development of the modern child this proposal deserves close examination. (11) (12)

Despite a few inroads into the tangle of competing interests the law relating to the child is a jungle of statute and common law which needs sweeping and comprehensive measures to modify and clarify its effect upon the child and others who have competing interests and obligations.

In order to illustrate how complex the resolution becomes the final part of this paper describes how the position of the child is considered in divorce actions. (13)

B. The effect

The main aim of legislation affecting the child is said to be to ascertain and apply the law with the interest of the child being the paramount concern. There has, however, been considerable debate about the meaning of this criterion. (14) Whether the law has, or can develop a satisfactory standard of assessing the matters which bear upon the welfare of the child is a moot point when the competing interests of parents are also involved. It has been stated that "what really should happen, and probably does happen in most cases is that the court will consider a large number of factors in any given situation. Such factors may include considerations affecting the parents. The court should relate all these to the child and view them in the light of how they will affect the child . . . in other words, the various subordinate considerations must be subsumed under the interests of the child." (15)

This conclusion was made with respect to questions relating to the custody of children arising out of matrimonial disputes and guardianship proceedings. The "subordinate considerations" which have been isolated are as follows:— (16)

- (a) guardianship contests between parents and strangers
- (b) disputes between parents
- (c) the conduct of the parties
- (d) the dictates of conventional morality
- (e) religion

- (f) separating the children
- (g) changes of custody
- (h) the wishes of the child.

It should be noted that these matters do not coincide with the factors proclaimed as being the fundamental rights of the child by the United Nations Declaration of the Rights of the Child. Nor, with the advent of the Family Law Bill might it be appropriate for the Family Court of Australia (17) to determine custody with reference to all these considerations. (18)

The court is actually in the uncomfortable situation of arbitrating upon the competing claims of parents without being adequately equipped to consider the consequences of decisions which may affect the physical, mental and social development of the child. Neither of the contestants might be entirely satisfactory guardians when evaluated by the normal standards of child care (19) but the court must determine that one is more appropriate than the other. From the child's point of view this may be an entirely unsatisfactory outcome and although the Family Law Bill extends the power to interpose on behalf of the child and includes the power to supervise the custody of the child on a permanent or temporary basis (20) it is not yet clear how effective these provisions will be. The other aspect is the extension of the right of the state to intrude upon the family relationship. Obviously this dilutes the rights of the parent, on the other hand it may enhance the opportunities of the child.

The Family Law Bill has other controversial features which may affect the child. One group has argued (21) that "any Family Law Bill must embody a strong concept of parental responsibility to protect the rights of children (and) . . . custody questions cannot be determined without reference to what may have been quite irresponsible conduct by one or both parents." The Family Law Bill does not apparently support this as Clause 43 (c) enunciates the "need to protect the rights of children and to promote their welfare".

However well intentioned this may be, coupled with the so-called "no fault" provision for dissolution of mar-

riage the result might be that there is a subtle shift from the court to the child in the decision making process. The Bill states that in making a custody order the court shall take into account the wishes of the child and "except where the court is satisfied that it is necessary to do so by reason of special circumstances, the court shall not make an order with respect to the custody of, or access to, a child who has attained the age of 14 years where the order would be contrary to the wishes of the child." (23) Thus although the court will refrain from judging the actions of the parties, the child seems to have the responsibility of deciding with which parent he or she will live. The past conduct of parents might be a factor in this respect, on the other hand the child may determine to live with a parent who has behaved quite irresponsibly but the court may not decide to intervene to prevent this decision. On this basis the no fault concept shifts the task of assessing responsibility for marriage breakdown in some circumstances from the court to the child. Surely it could be argued in some circumstances that this is a diminution of both the rights of parents and children.

Although the Bill states that "the court shall regard the welfare of the child as the paramount consideration. . ." (24) it does not define what this means. Although there is a considerable body of case law (25) which has concluded that the various subordinate considerations (26) must be subsumed under the interests of the child, failure to indicate what is meant by the terms "paramount consideration" and "subordinate considerations" makes the future of both parent and child uncertain. (27) A recent study of children of separated parents indicates the vulnerability of children exposed to parents in conflict, (28) add to this inadequate home facilities, supervision by overburdened welfare officers, an ill-defined future and the child is in danger of becoming at risk.

Although the apparent aim of this legislation is to protect the interests of the family it would seem that in some instances it may fail to achieve this.

One final matter which further complicates the fulfilment of the legislative

aims was touched upon earlier in this paper and must be confronted. Clause 43 of the Bill enunciates the principles to be applied by the Family Court of Australia in matrimonial matters and whilst there is considerable emphasis upon the need to foster and preserve the institution of marriage and family life, Clause 43(d) refers to the need to protect the rights of children. Section 51(xxii) of the Australian Constitution empowers the Commonwealth to legislate in "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants." Without subjecting the terms to judicial interpretation one cannot be certain but it would seem that the Commonwealth may not have the power to legislate in respect to children's rights in this context.

IV. Conclusions

In a recent study (29) Stradling and Zureich concluded that children appeared to have "accommodative" belief systems; they did not see that they could alter the present system nor could they offer a coherent or radical concept of freedom. Obviously the very young and many adolescents are unable to protect or advocate their interests without the intervention of a more mature person. Although the Berkeley Conference recommendations (30) indicate an awareness of the needs of children they fall far short of providing a cohesive system which encourages their recognition and enforcement, apart from relying upon the goodwill of all people.

Children are conditioned to authoritarianism in the home, kindergarten and school — for the convenience of adults and there has been no serious move towards democratization of decision making bodies (31) to allow children to participate. Although children may presently have "accommodative" belief systems there is no reason to believe that given the opportunities to express themselves in a non-repressive, non-authoritarian or paternalistic arena that they cannot do so. Of course in many instances the keystone to attainment of "rights" is the power to enforce them. If parents are unwilling or unable to do this then perhaps one solution may



be the establishment of a Human Rights Council and a Commissioner with wide conciliatory and arbitrary powers to settle applications as provided in the Human Rights Bill 1973. (32) But applications still have to be made and when infants and very young children are involved then the only viable alternative would be the intervention between parent and child by the state.

This paper has not attempted to define what is meant by the term "rights" or what these ought to be but rather to indicate that if we are to make substantial progress towards fulfilling the best interests of all people within a group, having some mutual foundations, then we must initially describe the group, how it interacts, what countervailing needs it produces and then proceed to examine what ought to be the situation and how the tensions which will emerge can be resolved.

As I have indicated by a sparse outline of the position of both child and parent in divorce actions where custody is an issue, the balance between the needs of the parent and child are precariously balanced and they are not presently evaluated in terms of their pragmatic consequences.

To produce a coherent and workable concept of "rights" necessitates examination of the interests of people. They can be grouped depending upon the basis of mutual interests, but the unit must be large enough to embrace those who will be affected at a primary level and to recognise the impact the assertion of these needs produces at a secondary level. Thus we could talk in terms of "family rights" and the rights of the state or other agencies, such as law enforcement authorities or welfare services.

If a broader basis is used it does not inhibit the discussion of the needs of children within the family group, in contrast it enhances the development of a cohesive, workable, but many faceted unit.

EDITOR'S NOTE:

This article was prepared for publication in March 1975.

While there have been changes in the legislation affecting some of the dates mentioned, the substance of the paper remains unchanged.

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1. See United Nations Declaration of the rights of the Child 1959 which originated from the charter of the International Union for Child Welfare, proclaimed as the Declaration of Geneva in 1923 and adopted by the League of Nations in 1924.
 2. For instance Appendix A — a summary of recommendations of the Workshop on the Rights of Children, Berkeley Conference, Revolutionary

Peoples Constitutional Convention, November 14-15, 1970.

3. See for further discussion: Edwards, Leonard. The Rights of Children, **Federal Probation** 37:2 (June, 1973) p. 34.
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4. Because of the many social and cultural changes which the family group has undergone in recent years, the concept of the family unit has altered. See generally, Krupinski, J. and Stoller, A., *The Family in Australia — Social, Demographic and Psychological Aspects* Pergamon Press, 1974.
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9. This list is not intended to be exhaustive.
10. For a short report of the implications of this Bill see "The Guardian" 31 August, 1974.
11. See for instance, Schofield, Michael, *The Sexual Behaviour of Young People*, Penguin Books, 1969.
12. Of course it is realised that any amendment of the law in this area erodes parental rights and obligations but it is outside the scope of this paper to examine the topic in detail.
In America forty-eight states have granted children the right to seek medical aid without parental consent for such problems as venereal disease, pregnancy, abortion, contraception and drug problems. Although the American reforms are based to a large extent upon constitutional rights not embodied in the Australian Constitution it is apparent there are very many areas which need to be explored.
13. At the time of writing the Family Law Bill was still being debated in the House of Representatives but I have no reason for believing that the passage of the Bill will change my remarks.
14. For a discussion of the American situation see: Goldstein, J. Freud, Anna. Solnit, A. J. *Beyond the Best Interests of the Child*. A Free Press Paperback, 1973. Chapter 8.
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15. *Ibid* p. 538
16. *Ibid* pp. 539 to 546. See also: Hansen. *The Role and Rights of Children in Divorce Actions*, **Journal of Family Law** 6:1 (1966).
17. As created by Part IV Family Law Bill 1974
18. See Part VII *ibid*. This part does not specify what arrangements are "proper in all the circumstances".
19. It is recognised that this is a notoriously difficult concept.

20. Clauses 62 and 64 Family Law Bill.

21. Social Responsibilities Commission of the Anglican General Synod. Public Statement, 16 September 1974.
22. Clause 48
23. Clause 64
24. Clause 64
25. Toose, Paul. Watson, Ray and Benjafield, David, *Australian Divorce Law and Practice*. The Law Book Company, 1968.
26. Outlined on page 7 of this paper.
27. For further discussion of this aspect see: Lees, Sue Custody without Care. **New Society** (15 June, 1972) p. 561.
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30. See Appendix "A"
31. Such as School Councils.
32. Human Rights Bill 1973 (Commonwealth) Parts IV. V & VI.

APPENDIX "A"

Rights of Children

Summary recommendations of the Workshop on the Rights of Children, Berkeley Conference, Revolutionary Peoples Constitutional Convention, November 14-15, 1970.

1. Our revolutionary children are entrusted with the responsibility for rediscovering the true human nature, perverted by thousands of years of racism, capitalism, so-called communism, sexism, nationalism, and false religion. Forced limitation of their experience, in the name of protection and love, has always been a central part of reactionary repression, especially for the bourgeois class. The destruction of human potential for love by repression in childhood must end now.

Children must be allowed self-regulation, encouraged to relate joyfully to their bodies without shame or sex-role prejudices, and their affectionate-sexual-sensual characters must be allowed full expression without so-called moralistic interference.

Development, self-discovery, and free expression of affection and exploration into revolutionary non-exploitative and nonoppressive new sexual modes of expression cannot occur where there is interference by imperialist Christian co-called moral laws, ridicule, or guilt, or when children are systematically kept ignorant of the varieties of human joy and pleasure in one another. Encouragement of adult-child affectionate exchange, liberation of spontaneous feeling, and rejection of puritan frigidity plays a vital part in the development of a revolutionary teaching, nurturing, and extended family environment.

2. Children are entitled to civil rights and liberties in no way inferior to those accorded to adults. Child-prisoners in the orphanages and so-called reform schools must be liberated and allowed to find their own place in the People's community.

3. Children are not property. No child shall be forced to stay within any biological family if it does not suit "co" (see paragraph 5). Children must have the chance to explore alternatives and to choose from a variety of structures, combining what we now call family, school, work and apprenticeship, summer vacation, etc.

The only final judge of the suitability of a particular family or environment for a particular child must be that child.

In this period before the end of repression there will undoubtedly be many situations in which the responsibility and experience of revolutionary adults will force them into some arbitrary limitations on the freedom of children in their care to protect both from reactionary repression. This need should be explained to and understood by the children, and they should be taught from an early age the skills necessary for survival under repression, such as how to lie without embarrassment when interrogated. In every revolutionary family the freedoms of individuals to some extent will be limited by the needs of other members, and the whole group, but we should always struggle to confine these limitations to rationally justified ones which are balanced by the advantages provided by belonging to the group. Like adults, the child should be free to judge that balance

for co-self and if co desires, co should be free to see an alternative family group to accept co, on cos terms.

A child's revolt, violence or thievery shows that the environment is not responsive to his or her needs. Materialist needs are exaggerated by capitalist advertising. The child's needs for people can never be satisfied by the nuclear family alone, but an extended family is necessary. A richness of particular forms is expected in revolutionary society as a value in itself, but also important for testing and trial, since in our present state we are limited in our knowledge of third-world alternative forms (reported to us by Western chauvinist anthropologists) and the full impact of a non-capitalist, ecologically sensitive, and humane technology remains unexplored.

4. The free movement of children in the world, exploration of life styles, city and country, the forms of useful work and labor (true education), will be possible only if children are economically independent. All children are entitled to their share of guaranteed income, fruit of the labor of all past generations, given to us in the form of the arts, sciences, technology, and capital, the last at present stolen from the people by the institutions of capitalism. The child should control co's food, shelter, and necessities of life. This is important to the individual freedom necessary for the maximum development of individual talents which will finally benefit all humankind.

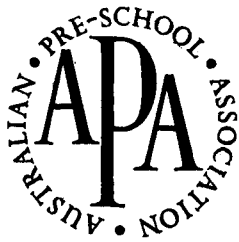
5. We urge all of our revolutionary brothers and sisters to become aware that the emotional overtones of imperialist language have a strong effect in conditioning children's minds to oppression, instilling Western chauvinism and cultural prejudices. These effects are difficult to overcome in even revolutionary adulthood since they are not ideas which can be corrected, but are feelings, fears and anxieties which can be overcome only by long struggle. This is prejudice of all kinds.

It is no accident that we have been tricked into using obscene words as insults. When we use these words as insults we teach our children that bodies are shameful, not beautiful, we make them frightened of their curiosity, and we

transmit to them our own inhibitions about non-conventional love expression.

In these recommendations we have tried to eliminate some of the sexism which has become embedded in the language by adopting the suggestions of Mary Orován of the New York Radical Feminists. In this usage instead of using the masculine personal pronouns like "he" or "his", when we really mean children of both sexes, we use the ancient alternative Indo-Euroean root word "co". Where sexist language would use "he", mean "he-she", "co" is used. "Co" is also used in place of "him" (for him-her), with the context making the difference clear. The old possessive "his" (for his-her) is replaced by "cos", and "co-self" replaces "himself". Humankind replaces mankind. Revolutionary language must reflect revolutionary consciousness and we believe this change is needed now in all communications and newspapers of the people, and is preferable to the awkward grammatical structures resorted to when we avoid the normal sexist usage. In speech we believe revolutionaries should lovingly teach their brothers and sisters the harmfulness of imperialist language, encourage change, and be tolerant of long-established habits which may persist. The consciousness is what is important, not perfect use, and this can often be advanced without raising defensiveness.

We believe these language changes will make an important contribution to the unity of the people, since they reflect and give evidence of the new sensitivity of our brothers and sisters to one another's oppression, and the new consciousness of humankind which is behind the revolution.



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