

## Chapter 8

### The theory of children's rights - an overview

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#### 1 INTRODUCTION

The question whether legally recognised rights should be afforded to children, and what the nature and extent of such rights should be, has been the topic of vigorous debate in courts, legislators and scholarly and popular journals since the sixties.<sup>1</sup> The children's rights movement can be attributed to increased societal concern over individual rights, the recognition of child abuse as a major problem, the loss of faith by many in courts, schools and other institutions dealing with children, and the changing structure and role of families in modern society.<sup>2</sup>

It should be noted from the outset that the term "right" can denote various legal concepts. In terms of South African private law, all legal subjects<sup>3</sup> (including children) are the bearers of so-called "subjective rights", which subjective right can be enforced against all other legal subjects.<sup>4</sup> Subjective rights are classified with reference to the different types of legal objects to which the rights relate. The following five classes of legal objects are distinguished:<sup>5</sup> things (the right to a thing is called a real right), personality property (the right to personality property is called a personality right), performance (the right concerned

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<sup>1</sup> Freeman in Freeman & Veerman (eds) *Ideologies* 3; Wald 1979 *UCDLR* 255.

<sup>2</sup> Wald 1979 *UCDLR* 255-256.

<sup>3</sup> A legal subject can be defined as an entity that can function as subject in the law. In modern legal systems, all natural persons are recognised as legal subjects (Van der Vyver & Joubert *Persone- en familiereg* 36 *et seq*; Van Zyl & Van der Vyver *Inleiding* 373).

<sup>4</sup> Joubert *Grondslae* 119; 1958 *THRHR* 104 *et seq*; Neethling *et al Delict* 50-51.

<sup>5</sup> For a detailed discussion of the doctrine of subjective rights, see ch 3 par 7.3 above.

is called a personal right), immaterial property (the right concerned is called an immaterial property right), personal immaterial property (the right concerned is called a personal immaterial property right).<sup>6</sup>

“Right” is also used (inaccurately) to denote a private law competence or capacity (*kompetensie*), which can be defined as a “juridiese in-staat-wees; dit wil sê, die vermoë om op ‘n bepaalde wyse aan die regsverkeer deel te neem”, for example: “A sixteen-year old person has a right to make a will”. Legal capacity (ie the competence to have rights, duties and capacities), and capacity to act (ie the competence to perform valid juristic acts) are examples of competences.<sup>7</sup>

Lastly, “right” is sometimes used as a synonym for the concept “power”, which is distinguished from the concept “competence” as set out above. “Power” (*inhoudsbevoegdheid*, or *beskikkings- en genotsbevoegdheid*) can be defined as that which a legal subject may do (or is entitled to do) with a legal object by virtue of his or her subjective right to that object, for example: “An owner has a right to drive her car”.<sup>8</sup>

In addition to the various meanings given to the concept “right” in the traditional private law sphere set out above, “right” is also a central concept in the field of public law, which regulates relations between the state and its citizens. The fundamental or human rights of citizens, which are constitutionally guaranteed and protected against undue interference by the state or other citizens, is especially important for this study. The rest of this chapter is mainly concerned with fundamental rights, and that is mainly the sense in which I use the term “children’s rights”, although I occasionally use the term in the sense of “power” or

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<sup>6</sup> Traditionally only the first four classes of rights are recognised (*Universiteit van Pretoria v Tommie Meyer Films* 1977 4 SA 376 (T)). However, Neethling *et al Delict* 52-53 identified a possible fifth category of rights, ie personal immaterial property rights.

<sup>7</sup> Van Zyl & Van der Vyver *Inleiding* 414. Also see ch 3 par 1 above.

<sup>8</sup> Du Plessis *Introduction* 141; Joubert *Grondslae* 119; 1958 *THRHR* 111; Van Zyl & Van der Vyver *Inleiding* 414. Also see ch 3 par 1 above.

“competence”.

The idea of children having legally recognised rights is a revolutionary one in many ways. Historically, children have been under the control of their parents. Since children are presumed by law to lack the capacity of adults, they are denied full participation in the political, legal and social processes. In lieu of most rights, children are afforded special protection by the state. Today, however, many consider this control (and the special protection that accompanies it) to be harmful, and even oppressive, to children.<sup>9</sup>

There is an immense volume of scholarship regarding the various ways of giving expression to the notion that children can have rights, and the actual formulation and content of these rights.<sup>10</sup> At the extreme, some children's rights advocates (eg Farson<sup>11</sup>) call for a total change in policy, giving children total freedom to decide for themselves what is best for them. However, not everyone shares the views of these children's rights advocates. Goldstein, Freud and Solnit<sup>12</sup> are some of the most prominent proponents of limited rights for children and expanded parental authority. Others (eg Hafen<sup>13</sup>), who fear that the notion of children's rights will undermine the family structure to the detriment of children and society as a whole, have expressed similar views.

That there is as yet no coherent theory of children's rights is hardly surprising. The demand for the recognition and enforcement of children's rights calls into question certain basic beliefs of our society. The implementation of many of the rights being claimed on behalf of children could involve substantially altering the role of the state towards parents and

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<sup>9</sup> Wald 1979 *UCDLR* 256-257.

<sup>10</sup> Fortin *Children's rights* 3; Human in Davel (ed) *et al Introduction* 150.

<sup>11</sup> Farson *Birthrights* (1974), as analysed by Wald 1979 *UCDLR* 257. See further ch 8 par 6.1 below.

<sup>12</sup> Goldstein *et al Before best interests*. See further ch 8 par 2.3.5, 3, 4.2 & 4.3 below.

<sup>13</sup> Hafen 1976 *BYULR* 605. See further ch 8 par 6.5 below.

children, and the role of parents towards children.<sup>14</sup> The protection of children's rights could create the perception that parental authority and family values are suppressed, and that the state abdicates its role as protector of children in favour of total freedom to a child.<sup>15</sup>

One hurdle in the formulation of a coherent theory of children's rights is the fact that, in giving meaning to children's rights, it is important to accommodate the status of the child both as an individual and as a member of the family group. This presents a challenge to the law's inexperience in formulating legal principles that apply to a group of people, such as family members, as well as to the members of such a group as individuals.<sup>16</sup>

Another difficulty in establishing a theoretical model for the concept of children's rights is the fact that the nature of the proposed rights of children go well beyond what is normally understood as legally recognised and protected rights. Foster and Freed, for example, include the right "to receive parental love and affection" in their proposed "Bill of Rights for Children".<sup>17</sup> Many of the "rights" claimed for children are merely claims (*aansprake* or entitlements, as opposed to *eise* (which are personal rights)) based on ideas concerning the way children should be treated.<sup>18</sup> To complicate matters, there is considerable uncertainty regarding the content of such individual claims. The right to adequate care of a baby, for example, differs vastly from the right to adequate care of an adolescent.<sup>19</sup>

## 2 THE PHILOSOPHICAL UNDERPINNINGS OF CHILDREN'S RIGHTS THEORY

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<sup>14</sup> Wald 1979 *UCDLR* 259.

<sup>15</sup> Human 2000 *THRHR* 394.

<sup>16</sup> Human in Davel (ed) *et al Introduction* 150.

<sup>17</sup> Foster & Freed 1972 *FLQ* 347.

<sup>18</sup> Human in Davel (ed) *et al Introduction* 151.

<sup>19</sup> Human in Davel (ed) *et al Introduction* 151.

## 2.1 The will theory of rights

### 2.1.1 Introduction

“Capacity” (used here in the sense of “capacity for reasoned decision-making”) is a core concept in modern children’s rights theory. Philosophers of the 17<sup>th</sup> and 18<sup>th</sup> centuries taught that, because of their incapacity for reasoned decision-making, children could not be the bearers of rights. This viewpoint is still found in modern children’s rights theory. It forms the basis of the “will theory” of rights (also called the “power theory” of rights<sup>20</sup>), that is the refusal to award rights to children merely because they do not have the capacity for reasoned decision-making. If it is assumed that the majority of children do not have the competence to make choices and claim rights, it follows that children cannot be said to have rights.<sup>21</sup> The origin of the “capacity principle”, which forms the basis of the “will theory” of rights, and denies or limits the existence of children’s rights, is investigated in what follows.

### 2.1.2 The paternalism of Hobbes, Locke and Mill

Hobbes, who wrote in the 17<sup>th</sup> century, argued that children are only protected because they can serve their fathers. The relationship between father and child is seen as one of mutual benefit. According to Hobbes,<sup>22</sup> the relationship between father and child is based on fear, and children are in a position of extreme dependence. He teaches that rational citizens who contract with the sovereign for their own protection, have to obey the orders of the sovereign in exchange for this protection. Children do not have the capacity to conclude contracts with other members of society, or to understand the consequences of

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<sup>20</sup> Fortin *Children's rights* 15; Jones & Marks 1994 *IJCR* 270-271.

<sup>21</sup> Human in Davel (ed) *et al Introduction* 151.

<sup>22</sup> Thomas Hobbes *Leviathan* (1651), as analysed by De Villiers 1993 *Stell LR* 291; Federle 1993 *Depaul LR* 987-990; Worsfold 1974 *Harvard ER* 144.

these contracts. Therefore children have no natural rights, and no rights in terms of the social contract. Children have to accept their fathers as sovereign instead, and fathers have the power of life and death over their children. Hobbes refers only to the relationship between father and child, and not the relationship between mother and child.

John Locke, who wrote later in the same century, argued that freedom, and the liberty to act according to one's own free will, depended upon reason. According to Locke, children are in a temporary state of ignorance and irrationality. However, this state is temporary, and will later make way for reason and the freedom to exert their wills. Children are temporarily under the control of their parents, until they can cast off their dependency when they become adults. This temporary state of inequality exists in the interest of the child. But in direct contradiction to Hobbes, Locke refuses to accept that parents have an absolute power of control over their children. He accepts that children, like adults, have certain natural rights which need to be protected.<sup>23</sup>

In the 19<sup>th</sup> century, John Stuart Mill<sup>24</sup> espoused a different kind of paternalism.<sup>25</sup> The libertarian persuasion usually associated with Mill did not extend to his thinking about children. There is no sign of Mill's principle of individual liberty, which states that an individual "cannot rightfully be compelled to do or forbear because in the opinions of others to do so would be wise or even right".<sup>26</sup> On the contrary, it appears as if he propagates the absolute power of society over children. Mill explicitly states that his doctrine of the ultimate value of personal choice does not extend to children. Paternalism is acceptable in the case

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<sup>23</sup> John Locke *Second treatise of civil government* (1689), as analysed by De Villiers 1993 *Stell LR* 291; Federle 1993 *Depaul LR* 990-993; Worsfold 1974 *Harvard ER* 144-145.

<sup>24</sup> John Stuart Mill *On liberty* (1859), as analysed by De Villiers 1993 *Stell LR* 292; Federle 1993 *Depaul LR* 997-999; Jones & Marks 1994 *IJCR* 268 *et seq*; Worsfold 1974 *Harvard ER* 145-146.

<sup>25</sup> "Paternalism" is based on the view that an adult person is in a better position to take care of the interests of a child, and to act on behalf of a child in a way that serves the child's interests (Haupt & Robinson 2001 *THRHR* 25 fn 10).

<sup>26</sup> John Stuart Mill *On liberty* 135 (1963), as cited by Worsfold 1974 *Harvard ER* 145.

of children because they are incapable of deciding what is in their own and society's best interest, and parents must do so and act on their behalf.

### 2.1.3 *Worsfold's reaction to the paternalism of Hobbes, Locke and Mill*

Worsfold<sup>27</sup> regards these three philosophers' attitude towards children as negative, albeit coherent. As one progresses from Hobbes's theory through Locke's to Mill's, the strict paternalism of Hobbes is replaced by an emphasis on benevolence in the treatment of children. Despite this, Worsfold points out that all three philosophers regard the child as someone to be moulded according to adult preconceptions. None of these philosophers would have considered seriously the perspective of children themselves in determining their own best interests. None accorded children rights of their own.

## 2.2 **An emerging theory of children's rights**

### 2.2.1 *Necessary features of children's rights according to Worsfold*

Worsfold identifies three essential features which are necessary in any scheme justifying children's rights. These features were first proposed by Maurice Cranston in justifying individual rights in general:<sup>28</sup>

- Firstly, children's rights must be practicable, which means that they must be theoretically possible, or acceptable within some larger conception of the good society.
- Secondly, they must be genuinely universal, in other words appropriate for all children everywhere. However, there may be misunderstandings about the

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<sup>27</sup> Worsfold 1974 *Harvard ER* 146.

<sup>28</sup> Maurice Cranston "Human rights, real and supposed" in Raphael (ed) *Political theory and the rights of man* (1967), as analysed by Worsfold 1974 *Harvard ER* 149-151.

implications of this characteristic for different age groups. It may be argued, for instance, that preschoolers should not have rights while adolescents should, or that in any event the rights of the two groups should not be the same. The concern with including this criterion is more a concern with establishing a generally applicable philosophical doctrine of capacity, than it is a concern with the particular practical domain in which these rights are exercised by children themselves. This distinction is analogous to the distinction between capacity and the exercising of specific rights which is made in the broader context of the legal system. All persons do not enjoy the same legal rights, but all are presumed to have the same capacity for rights.

- Thirdly, children's rights must be of paramount importance. When fair treatment is accorded to children as a right, it must override all other considerations in society's conduct towards children, for example, the consideration that children should have fun. This feature serves to override the utilitarian objection that when we act in children's best interests we should be concerned less with their protection and more with their pleasure or satisfaction.

### 2.2.2 *Children's rights in terms of Rawls's theory of justice*

Worsfold eventually finds an adequate philosophical justification for children's rights in John Rawls's theory of justice. According to Rawls's ideal system of justice each individual should be permitted to act according to a personal conception of his or her own best interests, but not at the expense of others. Rawls's just society is based on two fundamental principles of justice, namely:<sup>29</sup>

- that each person should have a personal liberty compatible with a like liberty for all others (No one should be any freer than anyone else in society to

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<sup>29</sup> John Rawls *A theory of justice* (1972), as analysed by Worsfold 1974 *Harvard ER* 151 *et seq.*



pursue his or her own ends.)

- that societal inequalities should be arranged in such a way that all individuals share whatever advantages and disadvantages the inequalities bring (This principle is intended to preclude discrimination against those who are born into poverty and disability.)

According to Rawls, children are participants in the formation of the initial social contract to the extent that they are capable of participating. In order to participate fully in this process, one must be rational, in other words one must have attained the “age of reason”. Rawls does not attempt to define this age rigidly. Instead, Rawls seems to imply that as children’s competencies develop, their participation should increase. Rawls points out that the capacity for accepting the principles of justice determines who is a member of society. He further writes that a person who has this capacity (ie the capacity for a sense of justice) receives the full protection of the principles of justice, whether or not the capacity is fully developed.<sup>30</sup> Until fully developed, children’s interests are protected by adults (parents) acting on their behalf. This element of Rawls’s theory is unacceptable to Freeman, who asks the question how it can be accepted that children, who cannot participate fully in generating the principles necessary for a just society (because their capacity for a sense of justice has not yet fully developed), should nevertheless be accorded the same rights as adult participants.<sup>31</sup>

Worsfold points out that, even though Rawls’s scheme is more libertarian than its predecessors, it still has one possible problem:<sup>32</sup>

“Whenever adults act on behalf of a child, doing for the child what they would wish done for them

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<sup>30</sup> De Villiers 1993 *Stell LR* 292; Worsfold 1974 *Harvard ER* 153.

<sup>31</sup> Freeman 1980 *CLP* 20.

<sup>32</sup> Worsfold 1974 *Harvard ER* 155.

if they were in the child's place, they do so without any mechanism available for children to question their judgment or dispute the correctness of their decisions.”

An analogous objection is raised to the best interests of the child standard as it is applied in legal proceedings. Rawls anticipated this objection, and addresses the problem directly:<sup>33</sup>

- Firstly, he states that “paternalistic intervention must be justified by the evident failure or absence of reason and will”. By this he means that there is a presumption of rationality, that is of the full ability to decide for oneself. Only when this presumption has been rebutted is it fair to act on another's behalf.
- Secondly, he suggests that any paternalistic intervention must be guided by the principles of justice and by what is known about the subject's more permanent aims and preferences. This suggests that children should be consulted about their aims and preferences. These preferences should weigh more heavily if the child is old enough to think rationally about the choices presented.

## 2.3 The interest theory of rights

### 2.3.1 Introduction

Some authors provide an interest theory of rights. This theory can be summarised as follows:<sup>34</sup>

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<sup>33</sup> Worsfold 1974 *Harvard ER* 155-156.

<sup>34</sup> Jones & Marks 1994 *IJCR* 271.

"... [T]he interest theory of rights has the advantage that it does not hold that rights are to be determined by the moral capacity to act rationally. This theory argues that children, as humans, have rights if their interests are the basis for having rules which require others to behave in certain ways with respect to these rules."

### 2.3.2 *Children's rights according to Freeman and Barry*

Freeman<sup>35</sup> is of the opinion that Worsfold's attempts to find the philosophical justification for children's rights in Rawls's principles of justice are unsuccessful.<sup>36</sup> He argues convincingly that any "will theory" of rights is an inadequate explanation of the basis of children's rights, since children who still lack the capacity to form a will are not in a position to assert these rights at all. As Freeman correctly points out, children have interests that justify protection before they develop wills to assert their rights. He finds Brian Barry's theory more acceptable.<sup>37</sup> Barry<sup>38</sup> argues that one acts in another's interests if one helps that person to get what he or she wants. He argues further that one is not justified in frustrating children's present wants, just as one is not justified in trying to alter their character. Children should thus be given the opportunity to develop their rational powers.

Freeman focuses on the child's potential capacity, which babies possess, but not animals, and argues that the child has rights whether or not he or she is capable of exercising them. Freeman's viewpoint is that "[t]o bring children to a capacity where they are able to take full responsibility as free, rational agents for their own system of ends, in Kantian language, for them to be sovereigns in the kingdom of ends, children must be accorded two types of rights", namely the right to equal opportunity and the right to liberal paternalism.<sup>39</sup>

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<sup>35</sup> Freeman 1980 *CLP* 20.

<sup>36</sup> See ch 8 par 2.2.2 above.

<sup>37</sup> Freeman 1980 *CLP* 21. See further Freeman 1992 *IJLF* 58.

<sup>38</sup> Brian Barry *Political argument* (1965), as analysed by Freeman 1980 *CLP* 21.

<sup>39</sup> as cited by Jones & Marks 1994 *IJCR* 275. Also see Fortin *Children's rights* 7,12 & ch 8 par 6.2 below.

### 2.3.3 MacCormick's approach

It must be conceded that rights require the imposition of duties, but for MacCormick the existence of a right precedes the imposition of a duty.<sup>40</sup> It is because children have a right to be cared for and nurtured that parents have the duty to care for them. MacCormick also deals with moral rights. He defines a moral right as the right to treatment which is "a good of such importance that it would be wrong to deny, or withhold it from, any member of [a given class]".<sup>41</sup>

According to Fortin,<sup>42</sup> it is difficult to conceive how one will be able to determine what interests will lead to moral rights and what moral rights can be translated into legal rights. Adoption of MacCormick's theory would inevitably lead to controversy over the "wrongness" of denying the importance of many potential interests, particularly the right to autonomy or self-determination.<sup>43</sup> Fortin points out that this theory has an attractive logic and simplicity to it, although it is a very open-ended basis for determining which interests are worthy of protection as legal rights.

### 2.3.4 Raz's theory of duties

According to Raz's theory, "... a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty ...".<sup>44</sup> Raz's theory requires a subtle examination of the public perception of the purpose of the law when he argues that "[t]o be a rule conferring a right it has to be motivated by a belief in the fact that someone's (the rightholder's) interest should be

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<sup>40</sup> as pointed out by Bainham *Children* 84.

<sup>41</sup> MacCormick *Legal right* 160.

<sup>42</sup> Fortin *Children's rights* 15-17. Also see Jones & Marks 1994 *IJCR* 271.

<sup>43</sup> See ch 8 par 6.1 below.

<sup>44</sup> Raz 1984 *Oxford JLS* 13-14.

protected by the imposition of duties on others".<sup>45</sup>

### 2.3.5 *Eekelaar and the interest approach to children's rights*

Relying on Raz's analysis of rights,<sup>46</sup> Eekelaar sets the following two preconditions to the conceptualisation of rights:<sup>47</sup>

- first, the social perception that an individual or class of individuals has certain interests
- secondly, these interests must be capable of isolation from the interests of others.

Eekelaar<sup>48</sup> explains the second precondition with the following example: A father might, for example, believe that it is in his daughter's interest that he (and not she) take decisions concerning her medical welfare. But the father's interest, or right, to make such decisions is not identical with her interests. The father might make stupid or even malicious decisions. The child's interest is that the father should make the best decisions for her. He is nothing more than the agent for fulfilling her interests. Eekelaar<sup>49</sup> warns that one should be careful when one talks about rights as protecting interests, that one conceives as interests "only those benefits which the subject himself or herself might plausibly claim in themselves". This point is of great importance in the context of modern assertions of the right to parental autonomy. Goldstein, Freud and Solnit<sup>50</sup> argue that the right to family integrity is a combination of the three liberty interests of direct concern to children, namely

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<sup>45</sup> Raz 1984 *Oxford JLS* 14.

<sup>46</sup> See ch 8 par 2.3.4 above.

<sup>47</sup> Eekelaar 1986 *Oxford JLS* 169.

<sup>48</sup> Eekelaar 1986 *Oxford JLS* 169-170.

<sup>49</sup> Eekelaar 1986 *Oxford JLS* 169-170.

<sup>50</sup> Goldstein *et al Before best interests* 9, 14. Also see par 3, 4.2 & 4.3 below.

the right of parents to autonomy, the right of children to autonomous parents and the rights of both parents and children to privacy. Eekelaar<sup>51</sup> asks the question whether any of these things can plausibly be claimed by children in themselves. He points out that if they are claimed it will be because they are believed to advance other desirable ends (like material and emotional stability), which are the true objects of the claims.

Eekelaar's formulation refers to the claims that children "might plausibly make", and not what they actually claim. The reason for this is the fact that children often lack the information or ability to appreciate what will serve them best. Therefore, it is necessary to make some kind of imaginative leap and guess what the child might retrospectively have wanted once it reaches maturity. In doing this, adult values will inevitably come into play. This state of affairs should be accepted as it encourages debate about these issues.<sup>52</sup>

### 3 ARE RIGHTS IMPORTANT FOR CHILDREN?

Although the moral importance of rights in general is generally accepted, there are still those who deny the need to think in terms of rights when it comes to children.<sup>53</sup> Their viewpoint is based on one or more of the following arguments:

- The first view, to which brief reference has already been made,<sup>54</sup> idealises adult-child relations. It emphasises that adults, particularly parents, have the best interests of their children at heart. Goldstein, Freud and Solnit<sup>55</sup> adopt this *laissez-faire* attitude towards the family. The only right which they appear to accept is the child's right to autonomous parents. They maintain that a policy of minimum coercive

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<sup>51</sup> Eekelaar 1986 *Oxford JLS* 169-170.

<sup>52</sup> *Ibid.*

<sup>53</sup> Freeman in Freeman & Veerman *Ideologies* 30.

<sup>54</sup> See ch 8 par 2.3.5 above.

<sup>55</sup> Goldstein *et al Before best interests* 9.

intervention by the state accords with their “firm belief as citizens in individual freedom and human dignity”.<sup>56</sup>

To illustrate that it is parent's dignity and freedom, rather than children's interests in general, including their freedom and dignity, that is protected by the aforementioned approach, Freeman<sup>57</sup> asks the question “... *whose* freedom and *what* dignity does this uphold?”. He adds that

“... it is somewhat unfortunate that in an age when so much abuse is being uncovered that (*sic*) governments and writers should cling to the ‘cereal packet’ image of the family”.

- The second argument sees childhood as a golden age, as “the best years of your life”. Childhood is seen as synonymous with innocence, a time when we are spared the troubles of adult life, a time of freedom, joy and play. Just as we avoid the responsibilities of adulthood when we are children, so too should there be no necessity to think in terms of children's rights.<sup>58</sup> As Freeman correctly points out, this view represents an ideal state of affairs, one which does not accurately reflect the lives of many of today's children and adolescents, which are filled with poverty, disease, exploitation and abuse.<sup>59</sup>
- Thirdly, there is the argument that the importance of rights and rights terminology can be exaggerated, that there are other morally significant values such as love, friendship, compassion, and altruism, and that these values can raise relationships (eg the parent-child relationship) to a higher level than can the mere observance of

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<sup>56</sup> Goldstein *et al* *Before best interests* 12. Also see ch 8 par 4.2 & 4.3 below.

<sup>57</sup> Freeman in Freeman & Veerman *Ideologies* 30; Freeman 1992 *IJLF* 55-56. Also see Fortin *Children's rights* 9; Haupt & Robinson 2001 *THRHR* 24-25.

<sup>58</sup> Fortin *Children's rights* 7; Freeman in Freeman & Veerman *Ideologies* 30-31.

<sup>59</sup> Freeman in Freeman & Veerman *Ideologies* 30-31. Also see Haupt & Robinson 2001 *THRHR* 25.

duties.<sup>60</sup> It is therefore unnecessary, so the argument goes, to regulate the relationship between parents, children and the state on a legal basis. As Freeman correctly points out, this might be true in an ideal world, but the world is far from ideal, especially for children.<sup>61</sup>

- In the fourth place, it is argued that children are different. They have lesser capacities, are more vulnerable, and need nurturance and protection. Since children lack the necessary wisdom and experience to make rational choices, and are consequently always at risk to make mistakes, double standards can be justified. These double standards are deeply embedded in our social practices and legislation. Double standards result in one set of rules for adults, which enable them to exercise their rights and capacities, and a different set of rules for children, providing them with protection and ensuring that they are subject to the control and authority of adults.<sup>62</sup> As Freeman convincingly argues, it is difficult to justify double standards based on considerations such as rational conduct, experience and/or understanding, since the same considerations can exclude adults as rights-holders.<sup>63</sup>
- The fifth point of criticism is that children's rights interfere with family integrity. Woodhouse, writing from an American law perspective, puts it as follows:<sup>64</sup>

“... much of the blame for the breakdown of the traditional family has been laid at the door of excessive individualism.”

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<sup>60</sup> Freeman 1992 *IJLF* 55; Human in Davel (ed) *et al Introduction* 153.

<sup>61</sup> *Ibid.*

<sup>62</sup> Freeman in Freeman & Veerman *Ideologies* 34-36; Human in Davel (ed) *et al Introduction* 154.

<sup>63</sup> Fortin *Children's rights* 7; Freeman 1992 *IJLF* 58; Freeman in Freeman & Veerman *Ideologies* 34-36; Montgomery 1988 *MLR* 323.

<sup>64</sup> Woodhouse 1993 *BYULR* 497.



This point is so important that it will be dealt with separately at a later stage.<sup>65</sup>

From the above it is clear that the arguments of those who deny the importance of children's rights fail to withstand critical evaluation. Contrary to the views expressed above, a study of the theory of children's rights is of critical importance for various reasons. Without a sound set of theoretical principles justifying the protection of children's rights, assertions or legislation will fail to be persuasive, the idea of children's rights will be challenged by notions of unfettered parental authority, and the concept of children's rights will "... succumb to the romantic fallacy of adult decision-makers always acting in the best interests of children".<sup>66</sup> In the words of Federle:<sup>67</sup>

"Rights ... mitigate the exclusionary effects of power by allowing the powerless to access existing political and legal structures in order to make claims. Permitting ... rights claims also has the salutary effect of redistributing power and altering hierarchies. Herein lies the real value of rights, for rights require that we respect the marginalized, empower the powerless, and strengthen the weak."

Furthermore, the emerging children's rights movement is one of the factors that currently stimulates the articulation of theoretical questions about law and the family. The following statement by Freeman<sup>68</sup> is true of current South African law:

"Lawyers who remain technicians cannot contribute to the important debates currently raging about the family".

The scarcity of thought on the family pertains to both the philosophical underpinnings of the

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<sup>65</sup> See ch 8 par 4 below.

<sup>66</sup> Human in Davel (ed) *et al Introduction* 151.

<sup>67</sup> Federle 1993 *DLR* 986.

<sup>68</sup> Freeman 1985 *CLP* 154.

system and the creation of a coherent set of rules. In order to address this issue properly it is necessary to move beyond the public/private law dichotomy,<sup>69</sup> beyond outdated ideological perceptions about “privacy” and “interference”, and most important of all, beyond entrenched patterns of prejudice.<sup>70</sup>

## 4 THE PUBLIC/PRIVATE DICHOTOMY

### 4.1 Introduction

In recent times the distinction between so-called public and private law has come under intense scrutiny. This holds true especially for the categorisation of family law as part of private law. The distinction between that which pertains to the state (the public sphere), and that which does not pertain to the state (the private sphere) can be traced back to Aristotle's distinction between the *polis* and the *oikos*. According to Aristotle, only men were by nature intended to live in the *polis*, where the highest good could be attained. Women, children and slaves, on the other hand, were confined to the *oikos*, where a lesser good could be achieved. After the Industrial Revolution, liberal economic thought dictated a clear divide between the economic world of the market and the non-economic home sphere. Home life was perceived as a privileged private sphere where the state should refrain from intervention.<sup>71</sup>

When studying children's rights theory, a recurrent theme is the aforementioned debate

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<sup>69</sup> See ch 8 par 4 below.

<sup>70</sup> Boshoff 1999 *TSAR* 277.

<sup>71</sup> Freeman 1985 *CLP* 166-167. See further Boshoff 1999 *TSAR* 277.

about the private/public dichotomy, which centres around the limits of state intervention into family life. Is the state entitled to exercise a maximum degree of intervention, or should the state only be allowed to interfere in family life, and consequently the parent-child relationship, in exceptional circumstances? Various viewpoints are expressed in favour of and against the aforementioned views. These arguments are dealt with below.

## 4.2 A case for non-intervention

Above<sup>72</sup> it was pointed out that one of the points of criticism against children's rights, is the concern that if children's capacity for autonomy were promoted by the state, this would involve close monitoring of the way parents bring up their children with the consequent undermining of their authority. The most famous proponents of this argument are Goldstein, Freud and Solnit, who represent traditional liberal values. They couched the concept of parental authority and family autonomy in terms of children's rights rather than parents' rights. In their view it was the child who had a fundamental right to autonomous parents and family integrity. They put it as follows:<sup>73</sup>

"... a child's need for continuity of care by autonomous parents requires acknowledging that parents should generally be entitled to raise their children as they think best, free from state interference. This conviction finds expression in our preference for *minimum state interference* and prompts restraint in defining justifications for coercively intruding on family relationships."

Goldstein, Freud and Solnit treat the family as a private area outside the law. They justify their view with reference to psychological and philosophical grounds. The authors' view is

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<sup>72</sup> See ch 8 par 3 above.

<sup>73</sup> Goldstein *et al* *Before best interests* 4.

in part based on their notion of psychological parenthood, which they developed in an earlier work.<sup>74</sup> The concept of psychological parenthood requires day-to-day interaction, companionship and shared experiences. However, this relationship requires the privacy of family life, under guardianship by parents who are autonomous. When family integrity is infringed by state intervention, the child's developmental progress is detrimentally affected.<sup>75</sup> Goldstein, Freud and Solnit also provide philosophical justification for their view. A policy of minimum coercive intervention by the state accords with their "firm belief as citizens in individual freedom and human dignity".<sup>76</sup>

In accordance with their policy of minimum state intervention, Goldstein, Freud and Solnit are of the view that interference in parental care of children should be confined to the most extreme cases of physical harm. Damage to a child's emotional well-being would never justify such intervention.<sup>77</sup>

Goldstein, Freud and Solnit are not alone in formulating a philosophy of minimum state intervention in family matters. Wald,<sup>78</sup> a prominent American child lawyer, has also questioned the wisdom of coercive state intervention, mainly on the ground that it does more harm than good.

### 4.3 A case for intervention

The theory of Goldstein, Freud and Solnit is vehemently criticised. Freeman<sup>79</sup> criticises what he calls their "rather simplistic view of autonomy". According to Freeman, Goldstein,

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<sup>74</sup> Goldstein *et al* *Beyond best interests* 17-20. Also see *Before best interests* 39-57.

<sup>75</sup> Freeman 1983 *JSWL* 71.

<sup>76</sup> Goldstein *et al* *Before best interests* 12.

<sup>77</sup> Goldstein *et al* *Before best interests* 75.

<sup>78</sup> Wald 1976 *Stanford LR* 668 *et seq.*

<sup>79</sup> Freeman 1983 *JSWL* 72.

Freud and Solnit take the concept autonomy for granted. To them it is “there”. They ignore the ways in which autonomy is constructed and regulated by the law. As Freeman points out, the law is a cultural underpinning of autonomy. Parents have only as much autonomy as the law allows them.

Eekelaar<sup>80</sup> is of the view that Goldstein, Freud and Solnit's identification of children's rights with parental autonomy bodes danger for children's rights. According to Eekelaar, the theory of Goldstein, Freud and Solnit is not a theory about children's rights at all. He puts it as follows:

“To make a case for the existence of rights is to argue for a principle. But this proposition is not one of principle. It is partly a theory about how society should be organised and partly an expression of opinion about matters that are contingent to possible rights, not about the rights themselves.”

Above<sup>81</sup> it was pointed out that one of the preconditions to the conceptualisation of rights that Eekelaar sets, is that the rights must be capable of separation from the rights of others. Eekelaar<sup>82</sup> doubts whether it can be said that children can claim the right to parental autonomy *in themselves*. If the right to parental autonomy is claimed, it will be because it is believed to advance other desirable ends (eg material and emotional stability), which are the true objects of the claims.<sup>83</sup>

Another perspective to this argument is added by a school of thought known as critical feminist theory. According to critical feminist theory, non-intervention by the state into so-called “private matters” serves to protect and reinforce existing oppressive power

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<sup>80</sup> Eekelaar 1984 *HRA* 84-85.

<sup>81</sup> See ch 8 par 2.3.5 above.

<sup>82</sup> Eekelaar 1986 *Oxford JLS* 169-170.

<sup>83</sup> Freeman 1983 *JSWL* 72.

relations, such as the dominance of men over women and adults over children.<sup>84</sup> Feminists argue that boundaries between state and society are socially and historically constructed, rather than fixed by nature. Using public or private terminology creates the misguided perception of inevitability and inhibits social change.<sup>85</sup>

The most important criticism against non-intervention, in my view, comes from those who emphasise the fact that non-intervention does not always serve the interests of the child. Children must be protected against parents who fail to consider their interests.<sup>86</sup> To argue that parents always have their children's interests at heart is clearly a fallacy. It has been shown by many writers how the concept of family privacy or family integrity (as it is sometimes called) has operated to "perpetuate structures of disadvantage by hiding them from public scrutiny".<sup>87</sup>

Montgomery,<sup>88</sup> writing from an English law perspective, illustrates this with reference to the example of domestic violence. The ideology of family privacy prevents intervention by the police. However, the interests which a policy of non-intervention protects, are those of the family members who are in a position of power and not those of all family members equally. It is for this reason that Montgomery argues that "lines of intervention" must be drawn to protect the interests of the vulnerable. However, he prefers to call this a policy of "regulation" rather than "intervention". What is provided, is a definition of the private area, which definition is imposed by the state. No zone of privacy exists until this construction process has occurred.

## 5 THE MATURATION FACTOR

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<sup>84</sup> Freeman 1985 *CLP* 169.

<sup>85</sup> Boshoff 1999 *TSAR* 277-278.

<sup>86</sup> Montgomery 1988 *MLR* 328.

<sup>87</sup> Montgomery 1988 *MLR* 332.

<sup>88</sup> *Ibid.*

A recurrent theme when children's rights theory is at issue, is the so-called "maturation factor". Many authors are concerned that the liberationist view (ie that children should enjoy adult freedoms<sup>89</sup>) fails to accord sufficient attention to the physical and mental differences between childhood and adulthood. These authors opine that liberationists appear to ignore the fact that children are different from adults in development, behaviour, knowledge, skills, and in their dependence on adults. According to Freeman, "the assertion of the irrelevance of age does not square with either our knowledge of biology or economics".<sup>90</sup>

Closely related to the above, is the view expressed by many authors that drawing the line between childhood and adulthood at a precise age (eg 18) by setting an age of majority, is arbitrary, "a carry over from feudal times".<sup>91</sup> However, there seems to be a general consensus that the age limit must be drawn somewhere, and that legislators and courts are not unreasonable in setting an average age requirement where a particular function is concerned, as long as the age set is not completely out of touch with custom and *mores*.<sup>92</sup>

Although it is obviously impossible to set a single age when all children can be deemed competent to reach any particular type of decision, it seems clear that the relatively slow development of children's cognitive processes makes the majority of children unfit to take complete responsibility for their own lives before they reach mid-adolescence.<sup>93</sup> As Freeman points out:<sup>94</sup>

"Both in moral and cognitive development, many children reach adult levels between twelve and

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<sup>89</sup> See ch 8 par 6.1 below.

<sup>90</sup> Coons & Mnookin in Baxter & Eberts (eds) *Child and courts* 392; Freeman 1980 *CLP* 17, 18. Also see Fortin *Children's rights* 6; Human 2000 *THRHR* 395.

<sup>91</sup> Foster & Freed 1972 *FLQ* 345; Freeman in Freeman & Veerman *Ideologies* 34-35.

<sup>92</sup> Eekelaar 1986 *LQR* 9; Foster & Freed 1972 *FLQ* 345.

<sup>93</sup> *Ibid.*

<sup>94</sup> Freeman 1992 *IJLF* 59, 67.

fourteen, though the ability to reason improves quite obviously through adolescence. We expect adolescents to be criminally responsible at the age of fourteen ..., but we are less willing to accept the correlativity of responsibility and rights.”

As will be pointed out below<sup>95</sup> children have a whole range of rights. Many of these rights (eg the right to care and protection) have little to do with autonomy. Acknowledging these rights may be much more important to young children than acknowledging any claimed right to autonomy. Autonomy rights are more meaningful the older the child is. Children soon move out of dependence and into a phase where their capacity for taking responsibility for their own actions should be encouraged, always keeping in mind Freeman’s warning that if a young child is denied the protection of nurturance rights,<sup>96</sup> he or she may never reach the stage of being in a position to assert or exercise the sort of autonomy envisaged by the liberationists.<sup>97</sup>

The so-called “maturation factor” was recognised by the House of Lords in the well-known case of *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS*.<sup>98</sup> In 1980, the then Department of Health and Social Security issued a notice to the effect that, although it would be “most unusual”, a doctor could in exceptional circumstances, lawfully give contraceptive advice or treatment to a girl under 16 years of age without prior parental consultation or consent. In so doing, the doctor would be required to act in good faith to protect her against the harmful effects of sexual intercourse. Victoria Gillick, a Roman Catholic mother with five daughters then under 16 years of age, objected to this advice and sought assurances from her area health authority that no minor daughter of hers would receive such advice or treatment without her permission. When she failed to receive an

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<sup>95</sup> See ch 8 par 6 below.

<sup>96</sup> See ch 8 par 6.1 below.

<sup>97</sup> Freeman 1980 *CLP* 17; Freeman 1992 *IJLF* 59.

<sup>98</sup> [1985] 3 All ER 402. See, in general, Bainham *Children* 270 *et seq*; Eekelaar 1986 *LQR* 4 *et seq*; Eekelaar 1986 *NLJ* 184 *et seq*; Eekelaar 1986 *Oxford JLS* 177 *et seq*; Human 2000 *Stell LR* 71 *et seq*; Robinson 1993 *TRW* 52 *te seq*.



acceptable response, she applied for a declaration that the advice in the circular was unlawful because it interfered unjustifiably with her parental authority. She argued that a parent had the fundamental right to carry the responsibility of a child's educational, social, moral and medical care.

In what was to become the most significant twentieth-century decision on the legal relationship between parents and children, Victoria Gillick lost in the court of first instance (the Queen's Bench Division),<sup>99</sup> won unanimously in the Court of Appeal,<sup>100</sup> and eventually lost by means of a 3-2 majority in the House of Lords.<sup>101</sup>

In the majority decision in the House of Lords, Lord Scarman held that children under 16 years did not lack capacity to make their own decisions (ie the required understanding and intelligence to enable him or her to understand what is involved in giving consent that is valid in law) by virtue of age alone, but acquired it, when "he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision".<sup>102</sup> The test formulated by Lord Scarman involves an individualistic assessment of a particular child's level of maturity and intellectual ability. Lord Scarman envisaged that a high level of understanding would be required, extending beyond the purely medical issues.<sup>103</sup>

The majority in the House of Lords was quite clear that parental authority was not absolute. Lord Scarman held that parental rights in general (including the right to decide on medical

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<sup>99</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1984] 1 All ER 365.

<sup>100</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1985] 1 All ER 533.

<sup>101</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1985] 3 All ER 402. See further Bainham *Children* 270; Eekelaar 1986 *LQR* 4.

<sup>102</sup> At 422a.

<sup>103</sup> At 424b-d.

treatment on behalf of the child) are derived from parental duty and exist only so long as they are needed for the protection of the child.<sup>104</sup> According to Lord Scarman parental rights over the child terminate when the child acquires the capacity to make his or her own decisions (ie the required understanding and intelligence to enable him or her to understand what is involved in giving consent that is valid in law).<sup>105</sup> Lord Fraser emphasised that such rights exist for the benefit of the child and not for the benefit of the parent.<sup>106</sup>

## 6 WHAT RIGHTS DO CHILDREN HAVE?

### 6.1 Introduction

Even if one accepts that children have rights, there are no clear methods of establishing which rights children may legitimately claim. The reason for this is the complexity of the concept “children’s rights”. The absence of a coherent theory is not surprising considering that the demand for children’s rights calls into question certain basic beliefs of our society. Philosophical, moral, legal and social considerations are involved.<sup>107</sup>

The complexity of the concept “children’s rights” is also reflected in the wide range of claims made for the recognition of a variety of children’s “rights”. For example, children’s rights advocate John Holt advocates that children of any age should be given the right to vote, to work for money, to choose what type of education they want, and to be free from corporal punishment.<sup>108</sup> Psychologist Richard Farson goes even further when he argues that children’s rights can only be realised when all children have total freedom to decide

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<sup>104</sup> At 421e.

<sup>105</sup> At 423j.

<sup>106</sup> At 410d.

<sup>107</sup> Bainham *Children* 81-82; Fortin *Children’s rights* 3-4; Wald 1979 *UCDLR* 259.

<sup>108</sup> cited by Wald 1979 *UCDLR* 257.

for themselves what is best for them, including the right to sexual freedom, financial independence, and the right to choose where they shall live.<sup>109</sup> While most theorists do not go this far, respected experts from many disciplines argue for the adoption of a “Bill of Rights” for children.<sup>110</sup> The type of rights suggested range from broad claims such as the right to receive parental love and affection, and to be born a wanted child, to more specific rights, such as the right of children to seek and obtain medical care, treatment and counselling, and to earn and keep their own earnings.<sup>111</sup>

However, in spite of the indeterminacy of the concept “children’s rights”, the following recurring theme is found when studying attempts to define children’s rights: Traditionally, a distinction is made between two approaches to the protection of the rights of children, namely the so-called “self-determination/autonomy approach” on the one hand, and the so-called “nurturance approach” on the other hand. The nurturance approach advocates “giving children what’s good for them”, and the self-determination approach advocates “giving children the right to decide what’s good for themselves”.<sup>112</sup> Farson distinguishes between “protecting children and protecting children’s rights” (“protecting children” refers to the “nurturance approach”, whereas “protecting children’s rights” refers to the “autonomy approach”).<sup>113</sup>

Various terms are used to indicate the abovementioned distinction. Coons and Mnookin use the terms “child liberators” and “child savers”.<sup>114</sup> The terms “kiddie libbers” and “kiddie savers” are also frequently encountered,<sup>115</sup> as are the terms “protectionist” and

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<sup>109</sup> cited by Wald 1979 *UCDLR* 257.

<sup>110</sup> see eg Foster & Freed 1972 *FLQ* 343.

<sup>111</sup> Foster & Freed 1972 *FLQ* 347. Also see Wald 1979 *UCDLR* 257.

<sup>112</sup> Freeman 1980 *CLP* 15, 17.

<sup>113</sup> Farson *Birthrights* (1978) 165, as cited by Freeman 1980 *CLP* 17.

<sup>114</sup> Coons & Mnookin in Baxter & Eberts (eds) *Child and courts* 391-392.

<sup>115</sup> Haupt & Robinson 2001 *THRHR* 23 *et seq.*

“liberationist” schools.<sup>116</sup>

The distinction between the “self-determination/autonomy” and “nurturance” approaches to the protection of children’s rights can already be observed in the earlier discussion of the philosophical underpinnings of children’s rights theory.<sup>117</sup> The “will theory of rights” can in my opinion be seen as the basis of the “self-determination/autonomy approach”, whereas the “interest theory of rights” can be regarded as the origin of the “nurturance approach”.

Wald correctly indicates that it is important to separate the various types of claims being made on behalf of children. He puts it as follows:<sup>118</sup>

“By lumping a wide range of claims under the heading “children’s rights,” proponents of expanded rights broaden their appeal while masking significant differences in the desirability or undesirability of granting specific rights to children.”

Keeping in mind the aforementioned warning by Wald, the rest of this paragraph is devoted to a study of attempts by Freeman, Eekelaar, Wald, and Hafen to provide practical frameworks to promote and enable the recognition of children’s rights by classifying them into certain categories.

## 6.2 Freeman’s framework of children’s’ rights

### 6.2.1 Introduction

Freeman proposes four categories of rights for children, namely rights to welfare, rights to

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<sup>116</sup> Bainham *Children* 88.

<sup>117</sup> See ch 8 par 2 above.

<sup>118</sup> Wald 1979 *UCDLR* 259.

protection, rights to be treated as adults and rights against parents. The above-mentioned distinction<sup>119</sup> between the “nurturance” and “self-determination” approaches can also be found in Freeman’s proposed framework. Rights to welfare and protection can be classified under the “nurturance approach”, whereas the right to be treated as an adult and rights against parents can be classified under the “self-determination approach”. This conclusion is strengthened by the fact that Freeman regards children, broadly speaking, to have the following two types of right: the right to equal opportunity and the right to liberal paternalism.<sup>120</sup> Freeman’s contribution to the children’s rights debate demonstrates the extremely diverse nature of the rights which children may claim.<sup>121</sup>

#### 6.2.1.1 Rights to welfare

Freeman’s first category originated in the general notion of human rights. He drew freely from the United Nations Convention on the Rights of the Child 1989.<sup>122</sup> Freeman considers this document politically important because, by expressing children’s rights as human rights, the United Nations was not saying that children ought to have these rights but, since children are human beings, that they already have them.<sup>123</sup>

The rights are wide-ranging and include:

- entitlement to a name and nationality
- freedom from discrimination based on, for example race, colour or religion
- social security extending to adequate nutrition, housing, recreation and medical care

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<sup>119</sup> See ch 8 par 6.1 above.

<sup>120</sup> cited by Jones & Marks 1994 *IJCR* 275.

<sup>121</sup> Bainham *Children* 87.

<sup>122</sup> See ch 9 below.

<sup>123</sup> Bainham *Children* 88.

- entitlement to free education and equal opportunities
- protection from all forms of cruelty, neglect and exploitation
- special treatment for the handicapped.

These rights are “manifestos” of the fundamental rights that children ought to have against everyone. The rights are vaguely formulated, perhaps deliberately so, in order to reflect the cultural and economic differences that exist between societies. The rights are essentially protectionist rather than liberationist in nature, and their realisation is dependent on political decision-making and relevant legislation.<sup>124</sup>

#### 6.2.1.2 Rights to protection

Freeman's second category is more overtly concerned with protection from negative behaviour and activities, such as inadequate care, abuse or neglect by parents, exploitation by employers or environmental dangers. Whereas welfare rights are based on the assumption that society owes children the best it has to offer, protective rights aim to ensure that minimally acceptable standards of treatment are observed.

Freeman's first two categories of rights have a common paternalistic approach. They are rights which the adult world would deem to be appropriate for children even if children would not claim them for themselves. The rights contrast sharply with Freeman's third and fourth categories, which belong more to the liberationist school.

#### 6.2.1.3 The right to be treated like adults

This category is based on social justice and egalitarianism. According to Freeman, the rights and liberties afforded to adults should also be extended to children as fellow human beings, unless there is a good reason for differentiating between adults and children in this

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<sup>124</sup> Bainham *Children* 88; Human in Davel (ed) *et al Introduction* 156.

regard.<sup>125</sup>

Freeman regards the claim that children should be treated as adults with scepticism. In his view, respect for children as persons requires society to provide “a childhood for every child” and not an adulthood for every child.<sup>126</sup> However, Freeman questions the double standard involved in the differential treatment of adults and children.<sup>127</sup> Freeman points out that the basis for this double standard is the supposed incapacity or lack of maturity which would prevent children from making sound decisions on their own behalf. Freeman nonetheless rejects the removal of all age-related disabilities, since doing so would ignore evidence about the cognitive abilities of children provided by developmental psychology.<sup>128</sup> In Freeman's words:<sup>129</sup>

“The liberation of children ... does not make sense: it collides with biological and economic reality.”

However, Freeman argues that children's rights at least require that age-related restrictions be kept under review, based on the research of developmental psychologists.<sup>130</sup> His own preference is for legal capacity to be determined on a case-by-case basis, by assessing the actual capacity for particular activities of individual children. This, he argued, can be achieved by employing an objective test of rationality determined in accordance with a neutral theory of what is “good” for children.<sup>131</sup>

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<sup>125</sup> Bainham *Children* 88-89.

<sup>126</sup> as cited by Bainham *Children* 89.

<sup>127</sup> Also see ch 8 par 3 above.

<sup>128</sup> Bainham *Children* 89; Freeman 1980 *CLP* 16-17, 19, 23; Human in Davel (ed) *et al Introduction* 157.

<sup>129</sup> Freeman 1980 *CLP* 23. Also see ch 8 par 5 above.

<sup>130</sup> See ch 8 par 5 above.

<sup>131</sup> Bainham *Children* 89; Freeman 1980 *CLP* 17, 19.

A significant aspect of Freeman's proposed framework is the fact that he regards the dichotomy between "nurturance" and "self-determination" as false. I agree whole-heartedly with the following statement of Freeman:<sup>132</sup>

"It is not a question of whether child-savers or liberationists are right, for they are both correct in pointing out part of what needs recognising, and both wrong in failing to see the claims of the other side. To take children's rights seriously requires us to take seriously nurturance *and* self-determination, demands of us that we adopt policies, practices and laws which both protect children and their rights. Hence the *via media* I propose."

In the case of children, it is especially their capacity for *future autonomy* which should be safeguarded, according to Freeman. Therefore, a limited amount of intervention could be justified to protect children against their own irrational actions. Freeman formulates the following test to determine whether intervention is justified or not:<sup>133</sup>

"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 and be capable of deciding our own system of ends as free and rational beings."

It is clear that Freeman is in favour of a measure of paternalism towards children. One must not only recognise the autonomy of the child, but also the dangers of complete liberation. In this way children can be protected against their irrational actions, but at the same time the goal of rational independence of the child can be achieved.

#### 6.2.1.4 Rights against parents

This category is also concerned primarily with self-determination. However, whereas the

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<sup>132</sup> Freeman in Freeman & Veerman *Ideologies* 39. Also see Freeman 1992 *IJLF* 66-67, 69; Haupt & Robinson 2001 *THRHR* 28; Jones & Marks 1994 *IJCR* 276-277.

<sup>133</sup> as cited by Human in Davel (ed) *et al Introduction* 158. Also see Jones & Marks 1994 *IJCR* 275-276.



third category is concerned with the justification of civil liberties and the child's position under the general law, the fourth category is concerned with the claim for independence from parental control before the age of majority. Claims in this category range from the trivial (eg length of hair and bedtimes), to serious matters (eg consent to abortion or provision of contraceptives).<sup>134</sup>

Freeman notes two variants of this claim:<sup>135</sup>

- The first is the claim that the child should be able to act entirely independently from its parents, especially in the case of adolescents where decisions on abortion and contraception, medical care and the use of alcohol or drugs are at stake. Whether rights to independent decision-making on these matters should be legally recognised ultimately depends upon the question whether adolescents have the necessary skills and understanding to make such decisions.
- The second is the claim that the child should be able to act independently but with the sanction of an outside agency, usually a court. Freeman's position on parent-child conflicts is to view the parental role as a representative one. Where parents agree with their children's views there is no problem, and the parents represent their child's interests. Where there is conflict, Freeman would uphold parental decisions insofar as they are consistent with an objective evaluation of what Rawls called "primary social goods". These include liberty, health and opportunity, in short, the things which any rational person would want to pursue. Where parents purport to take decisions contrary to this objective, Freeman holds that parental representation ceases at that point, and that the intervention of an outside agency is justified, preferably a court.

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<sup>134</sup> Bainham *Children* 89.

<sup>135</sup> Bainham *Children* 89; Human in Davel (ed) *et al Introduction* 157.

### 6.3 Eekelaar's framework of children's rights

#### 6.3.1 Introduction

As was pointed out above,<sup>136</sup> the key precondition for rights according to Eekelaar is social perception that an individual or class of individuals has certain interests. The interests in question must also be capable of isolation from the interests of others. However, Eekelaar points out that children often lack the information or ability to decide what is in their best interest. Therefore Eekelaar's theory of rights involves "some kind of imaginative leap" in terms of which it is guessed "what a child might retrospectively have wanted once it reaches a position of maturity".<sup>137</sup>

Eekelaar identifies three separate kinds of interests which might form the foundation of these retrospective claims, namely basic interests, developmental interests, and autonomy interests.<sup>138</sup> Basic interests and developmental interests can be classified under the "nurturance approach", whereas autonomy interests belong under the "self-determination approach".<sup>139</sup>

#### 6.3.2 Basic interests

These interests relate to what might be described as the essentials of healthy living, including physical, emotional and intellectual care. According to Eekelaar, the duty to secure these interests is initially placed on the child's parents, but the state may intervene

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<sup>136</sup> See ch 8 par 2.3.5 above.

<sup>137</sup> Bainham *Children* 85; Eekelaar 1986 *Oxford JLS* 170; Human in Davel (ed) *et al Introduction* 159.

<sup>138</sup> Bainham *Children* 85; Human in Davel (ed) *et al Introduction* 159.

<sup>139</sup> See ch 8 par 6.1 above.

by means of care proceedings where the parents fail to fulfil their duty. The reason why Eekelaar calls these interests “basic”, is the fact that they require compliance with minimally acceptable standards of upbringing. Parents have the duty “to refrain from the actual prevention or neglect of proper development or natural health rather than the maximum promotion of these qualities. In this respect basic interests differ from developmental interests.”<sup>140</sup>

### 6.3.3 *Developmental interests*

Developmental interests entail that, subject to the socio-economic constraints in a particular society, “all children should have an equal opportunity to maximise the resources available to them during their childhood (including their own inherent abilities) so as to minimise the degree to which they enter adult life affected by avoidable prejudices incurred during childhood”.<sup>141</sup>

Developmental interests are wider than basic interests, and may be asserted not just against parents but against the wider community. Eekelaar doubts whether developmental interests could legitimately be classified as legal rights, since, apart from the right to education, the law imposes no duty on parents to fulfil children's developmental interests. Developmental interests depend, rather, on “the natural workings of the economies of families which are themselves dependent on the wider social and economic mechanisms of the community”.<sup>142</sup>

### 6.3.4 *Autonomy interests*

The autonomy interests which children may retrospectively claim, refer to the freedom to

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<sup>140</sup> Bainham *Children* 85-86; Eekelaar 1986 *Oxford JLS* 171-172.

<sup>141</sup> Eekelaar 1984 *HRA* 81-82; Eekelaar 1986 *Oxford JLS* 170.

<sup>142</sup> Bainham *Children* 86; Eekelaar 1986 *Oxford JLS* 172-173.

choose their own lifestyle, and to enter social relations according to their own inclinations, “uncontrolled by the authority of the adult world, whether parents or institutions”.<sup>143</sup> This classic liberationist claim can, according to Eekelaar, be interpreted as a version of the developmental interests.<sup>144</sup> Eekelaar does not explain this last statement, but Bainham argues that what Eekelaar probably means is that healthy development implies a measure of self-determination or autonomy.<sup>145</sup>

Due to the possible conflict between a child's autonomy interests and his or her developmental interests, Eekelaar argues that a separate category of rights should be adopted.<sup>146</sup> It is, for example, likely that the removal of age restrictions on drinking or driving would further the autonomy interests of children, but it would also result in more deaths or injury among children from road accidents, thereby infringing their developmental and basic interests.<sup>147</sup>

Eekelaar regards autonomy interests as subordinate to basic and developmental interests. However, Eekelaar has subsequently attempted to build on his earlier theory by suggesting a way in which furthering the best interests of children may be reconciled with treating them as possessors of rights. This theory is based on the concept of “dynamic self-determination” and relies on the argument that the best interest principle should be properly understood to accommodate an opportunity for the child to determine what those best interests are.<sup>148</sup> Eekelaar proposes, subject to the following two limitations, that a child's decision should determine the outcome of the issue in question:<sup>149</sup>

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<sup>143</sup> Eekelaar 1986 *Oxford JLS* 171.

<sup>144</sup> Eekelaar 1986 *Oxford JLS* 171.

<sup>145</sup> Bainham *Children* 86.

<sup>146</sup> Eekelaar 1986 *Oxford JLS* 171.

<sup>147</sup> Bainham *Children* 86.

<sup>148</sup> Eekelaar in Alston (ed) *Best interests* 42.

<sup>149</sup> Eekelaar in Alston (ed) *Best interests* 42.

- children may not make decisions which are incompatible with the general law and the interests of others
- children may not make decisions which are contrary to their "... self interest, ... narrowly defined in terms of physical or mental well-being and integrity".

## 6.4 Wald's framework of children's rights

### 6.4.1 Introduction

Although Wald does not attempt to indicate what specific rights, if any, children should be given, he indicates that there are four different types of claims under the general rubric of children's rights. The reason for categorising children's rights like this can be found in Wald's warning against "lumping a wide range of claims under the heading 'children's rights'". First of all, by doing this, proponents of expanded rights "broaden their appeal while masking significant differences in the desirability or undesirability of granting specific rights to children". Secondly, the means of achieving and enforcing various rights depends on the type of right concerned.<sup>150</sup>

The claims identified by Wald can be categorised under the two approaches to the protection of the rights of children (the "nurturance" and "self-determination" approaches).<sup>151</sup> Wald refers to the claims usually made under the "nurturance approach" as "protections due [to], rather than rights of, children". He lists two categories of "protections", namely rights against the world and protection against inadequate care.<sup>152</sup> As far as the "self-determination approach" is concerned, Wald indicates that since 1967 the children's rights movement has focussed on two other categories of rights. These categories raise fundamental issues regarding the role children play in our society. Wald

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<sup>150</sup> Wald 1979 *UCDLR* 259. Also see ch 8 par 6.1 above.

<sup>151</sup> See ch 8 par 6.1 above.

<sup>152</sup> Wald 1979 *UCDLR* 261, 263.

identifies two categories of rights that can be classified under this approach, namely adult legal status and rights *versus* parents.<sup>153</sup>

#### 6.4.2 *Rights against the world*

This category has to do with claims for equal access to adequate nutrition, housing, medical care and schooling. Wald indicates that these rights are not meant to alter the status of children (by giving them more autonomy or self-determination). On the contrary, they recognise that children cannot provide for themselves and need the care and guidance of adults. The claims listed here are not traditionally recognised as "legal rights" (entitlements enforceable by court order). Since these claims are basically moral and social goals, they should be directed at legislators, not courts (like second and third generation fundamental rights).<sup>154</sup>

#### 6.4.3 *Protection against inadequate care*

The second category of "protections" identified by Wald, is protection against inadequate care. Wald has in mind that the state should actively protect children from harm by adults, especially their parents. Many argue for increased state monitoring of parental care.<sup>155</sup>

These rights are similar to the rights mentioned above. They are based on the assumption that children are unable to care for themselves, and that they need adult protection and guidance. Like the category mentioned above, this category of rights does not change the status of children. However, contrary to the previous category of rights, these claims can more easily be enforced by the courts and the legislature, since they are more specific and

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<sup>153</sup> Wald 1979 *UCDLR* 265.

<sup>154</sup> Wald 1979 *UCDLR* 260-261.

<sup>155</sup> Wald 1979 *UCDLR* 261-262. Also see ch 8 par 4 above.

focus on the question of whether the parents are harming the child.<sup>156</sup>

Wald correctly points out that, in this regard, debate should centre on the appropriate role of parents and the state in child rearing. This issue divides children's rights advocates. Some argue that less, rather than more, interference is necessary to best protect children.<sup>157</sup>

#### 6.4.4 *Adult legal status*

Historically, age has been accepted as the only basis for withholding certain privileges (eg the right to vote, marry, drive and work) from children. This distinction between adults and children is based on the assumption that children are incapable of acting in an "adult" manner. Wald indicates that if it is found that the assumptions of incapacity are invalid, or that the social structure and the rate of development of adolescents have changed, these constraints should be eliminated. A step in that direction, is the lowering of the age of majority from 21 to 18 in most states in the USA.<sup>158</sup>

Wald shows that, from a constitutional perspective, the basic question is whether discrimination based on age is rationally related to the following: (If these questions are answered in the affirmative, the discrimination is permissible.)<sup>159</sup>

- the fact that persons under a certain age have capacities that are different from those of persons above that age
- the special needs of children.

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<sup>156</sup> Wald 1979 *UCDLR* 262-264.

<sup>157</sup> Wald 1979 *UCDLR* 264. See ch 8 par 4 above.

<sup>158</sup> Wald 1979 *UCDLR* 265-267.

<sup>159</sup> Wald 1979 *UCDLR* 267.

In determining the rationality of a given restriction, it must be kept in mind that, since people mature at different times, any given age will be arbitrary to some degree. The practical difficulties of making decisions on a case-by-case basis may justify the selection of some age as a cut-off point for granting specific rights. However, the courts should determine the following:<sup>160</sup>

- whether the age restriction is necessary in order to achieve a legitimate state interest
- whether the specific classification is reasonable in the light of existing data of the capacities of children at different ages.

Since most restrictions were enacted years ago, the courts should determine whether the reasons for the restrictions remain valid. Wald points out that courts have already struck down many restrictions, for example provisions regulating school hair and dress codes. Other decisions provide children with the right to counsel when the state is seeking to deprive them of liberty, and the right of access to contraceptive devices and to abortions.<sup>161</sup> The rationality of the present age limits on the exercise of other rights (what are known in South African law as “competences”<sup>162</sup>), such as the right to contract, marry, or vote, may also not withstand judicial scrutiny, according to Wald.<sup>163</sup>

Legislative re-evaluation of existing restrictions is also needed. However, Wald correctly emphasises that the re-examining of existing constraints will never totally eliminate the incapacities of childhood. Children do not have the same mental abilities, judgment or work capacity as adults. This does not mean, however, that existing age limits are sensible. While the reasons for disenfranchising a one-year-old are clear, the justification

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<sup>160</sup> Wald 1979 *UCDLR* 267-268.

<sup>161</sup> Wald 1979 *UCDLR* 268, and the cases cited in 255 fn 1.

<sup>162</sup> See ch 3 par 1 above.

<sup>163</sup> Wald 1979 *UCDLR* 268.



is less obvious with regard to sixteen-year-olds. For some rights it may be sensible to give control to parents rather than the state (eg when the right of children to marry is concerned).<sup>164</sup>

#### 6.4.5 *Rights versus parents*

##### 6.4.5.1 General

Wald shows that this category of rights has to do with the right of children, prior to reaching the age of majority, to act independently of their parents. It touches on issues such as consent to medical care, consent to abortion, decisions on the school the child should attend, and where the child will live. Historically, all such decisions were made by the parents. Recently, the extent of parental control has been altered by courts and legislatures in the USA, especially as far as consent to medical care is concerned.<sup>165</sup>

Wald shows that the expansion of these types of rights can take various different forms:<sup>166</sup>

- The right to act independently in a particular respect can be given to the child alone. In some states in the USA, for example, the child has been given the right to have an abortion without parental consent or knowledge.
- The child may be required to seek approval for his or her action, or challenge the parental decision, in a court or other agency. For example, in some states the child may petition a court to order the abortion in cases of parent-child dispute.

##### 6.4.5.2 When should the decision-making authority be removed from the parent?

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<sup>164</sup> Wald 1979 *UCDLR* 268-269.

<sup>165</sup> Wald 1979 *UCDLR* 270-271.

<sup>166</sup> Wald 1979 *UCDLR* 271.

Wald discusses the possibility that the decision-making authority be removed from the parent, and awarded to an independent person (the child himself or herself, a court or some other institution). He lists five factors to be taken into account when deciding whether the decision-making authority should be removed from the parent:<sup>167</sup>

- whether the child can make such decisions adequately
- if not, whether other decision-makers are likely to arrive at better decisions than the parent
- whether the state can really remove decision-making powers from the parents
- the costs (figuratively speaking) of removing decision-making powers from the parents in terms of family autonomy and family privacy
- the costs (figuratively speaking) of not giving the power to make the decision to the child.

#### 6.4.5.3 Why should children be awarded these rights?

Wald also discusses the reasons why it is argued that children should have these rights (ie rights versus parents):<sup>168</sup>

- First, such rights are most likely to be exercised by older children, who have the greatest claim to individual autonomy.
- Secondly, failure to give children certain rights may be harmful to them. Wald mentions the example of parents who refuse to allow their daughter to have an abortion even though she may be psychologically damaged by having the child.

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<sup>167</sup> Wald 1979 *UCDLR* 271.

<sup>168</sup> Wald 1979 *UCDLR* 273.

- Thirdly, requiring parental involvement in some of these decisions may lead some children to forego actions that may benefit them. Wald gives the example of children who are sexually active and who may refuse to seek out contraceptive information if their parents must learn of their actions.

#### 6.4.5.4 When are children capable of making decisions for themselves?

Wald points out that before giving children a specific right, one must determine whether children have the capacity to make the decision for themselves. For example, is a child of a given age capable of deciding whether to have an operation, to go to one school rather than another, or to use contraceptives? To analyse this question it must first be determined what types of skills a person needs to make a given decision, and to what degree children possess the required abilities.<sup>169</sup>

Wald refers to research that has been done regarding the intellectual, social and moral development of children. This research indicates that younger children (generally those under 10 to 12 years old) lack the cognitive abilities and judgmental skills necessary to make decisions about events which could severely affect their lives. These limitations are developmental, not just the result of limited experience or social expertise. The research regarding older children is more limited. Moral and cognitive development seem to reach adult levels at between 12 and 14. Although there is little evidence regarding adolescents' decision-making capacity with regard to issues such as abortion, use of medical care, or choice of education, it appears that the ability to reason and therefore to make a rational decision, improves throughout adolescence.<sup>170</sup>

#### 6.4.5.5 The risk of the disruption of the family system

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<sup>169</sup> Wald 1979 *UCDLR* 273-274.

<sup>170</sup> Wald 1979 *UCDLR* 274.

Wald points out that even if adolescents could make some (or all) decisions without harming themselves significantly, the risk of the disruption of the family system may dictate against giving autonomy to children. The potential destruction of family autonomy is a major concern of those opposed to more children's rights in the family context.<sup>171</sup> Wald makes the following statements on the potential destruction of family autonomy:<sup>172</sup>

- First, Wald points out that opponents of children's rights fail to explain how giving children some autonomy to make decisions threatens the family system. On the contrary, intervention by the courts may threaten the family system. If children are given the authority to decide on abortion, medical care, schooling or religion, no outside intervention is necessary and family privacy remains.
- Secondly, although conceding that giving children decision-making power could generate family conflict, Wald points out that parental decision-making could have the same effect if children are resentful of it.
- Thirdly, Wald points out that the most legitimate concern is that if parents lose ultimate authority they will be less willing to assume responsibility for their children. It must be recognised, however, that the legal system and the granting or withholding of legal rights may have little to do with how parents view their role.
- Finally, it must be decided whether in some situations the costs (figuratively speaking) of not giving the child autonomy exceed the costs in terms of weakening families. For example, forcing a girl to have (or not have) an abortion or discouraging children from getting drug counselling or birth control by requiring parental consent before the child can obtain such services, may be very harmful to some children.

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<sup>171</sup> See ch 8 par 3 & 4 above.

<sup>172</sup> Wald 1979 *UCDLR* 275-278.

#### 6.4.5.6 Giving the decision-making authority to courts or other agencies

Wald points out that giving autonomy to the child is not the only option. In some cases of parent-child conflict a court or other agency may have to resolve the dispute. Wald gives the following reasons for not allowing court intervention in such cases:<sup>173</sup>

- First, disputes between parents and children cannot be settled with reference to any existing black-letter law. Instead, they involve making value judgments about appropriate family relationships. Such decisions will inevitably be based on the personal values of the decision-maker, not on legal grounds. Judges often make decisions based on their own moral or social values or lifestyle preferences.
- Secondly, courts and other professionals often "just drop in and then drop out of the child's life", while the child's problems may be ongoing. A girl who has an abortion, for example, may need counselling after the abortion. No professional can ensure that the child will continue to consult him or her. However, if the child continues to function as part of the family, it will be the parents who have the responsibility of providing help, guidance and support.
- Finally, the broader implications for family autonomy mentioned above are also relevant here.

### 6.5 Hafen's framework for children's rights

#### 6.5.1 Introduction

Hafen is an outspoken critic of rights for children. Arguing that children need a protective environment in which to develop their capacities, Hafen contends that according children

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<sup>173</sup> Wald 1979 *UCDLR* 278-280.

rights prematurely will damage individual liberty because children are incapable of making meaningful and rational choices.<sup>174</sup>

Hafen's approach to children's rights must be seen against the background of the following two themes:<sup>175</sup>

- in the first place, the tradition of the individual, which is at the heart of American culture
- secondly, family tradition, which is regarded by Hafen as an essential precondition for the individual tradition.

To Hafen, the maintenance of the family tradition is a prerequisite for the existence of a rational and productive individual tradition.<sup>176</sup> Children are excluded from the individual tradition mainly because of their lack of capacity for rational decision-making, an important requirement for individual freedom. However, children are part of the family tradition, where it is the duty of parents to develop the minimal capacities of their children with the intention of preparing them for the individual tradition.<sup>177</sup>

It is within this framework that Hafen divides children's rights into two groups, namely rights of protection and rights of choice.<sup>178</sup>

### 6.5.2 *Rights of protection*

Rights of protection include the right not to be imprisoned without due process, rights to

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<sup>174</sup> Federle 1993 *Depaul LR* 1012; Hafen 1976 *BYULR* 657-658.

<sup>175</sup> Hafen 1976 *BYULR* 610-619.

<sup>176</sup> Hafen 1976 *BYULR* 657.

<sup>177</sup> Hafen 1976 *BYULR* 630, 657-658.

<sup>178</sup> Hafen 1976 *BYULR* 644; Human in Davel (ed) *et al Introduction* 163.

property and the right to physical protection. These rights are aimed at protecting children not only against their parents and other adults, but also against the long-term implications of their own decisions, made at a time when they lack sufficient capacity and experience to be held as responsible as an adult would be for the same decision.<sup>179</sup>

### 6.5.3 *Rights of choice*

Rights of choice include the right to make affirmative choices of binding consequence, such as voting, marrying, exercising religious preferences, and choosing whether to seek education.<sup>180</sup> These rights are based on the assumption that the capacity for making rational decisions exists.<sup>181</sup>

Hafen is of the view that it is of the utmost importance that the distinction between rights of protection and rights of choice is preserved. To assume that rational capacity exists, when in fact it does not, may lead to an abandoning of the protections, processes and opportunities that can develop these very capacities. To restrict the child's right of choice is in fact an important form of protection rights.<sup>182</sup> Hafen further argues that parents have a critical role to play in guiding the development of their children's rational capacities towards maturity.<sup>183</sup>

## 7 THE PROTECTION OF CHILDREN'S RIGHTS: SOME PERSPECTIVES

### 7.1 Introduction

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<sup>179</sup> Hafen 1976 *BYULR* 644, 646.

<sup>180</sup> Hafen 1976 *BYULR* 644.

<sup>181</sup> Hafen 1976 *BYULR* 647-648.

<sup>182</sup> Hafen 1976 *BYULR* 650.

<sup>183</sup> Hafen 1976 *BYULR* 651-658.

In my view, the following two important points should be the point of departure in any attempt to develop a model for the protection of children's rights:

- First, it should be remembered that childhood is a unique concept. It is a "process" rather than a "state". Childhood is a process of continuous change, which takes place as the child develops from newborn to adolescent. This maturation results in the gradual development of the child's capacity for rational thought and action. As the child develops and matures, so do the dynamics of the concept parental authority change. Initially the parent exercises total control, but later parental authority amounts to little more than advice.
- Secondly, children are usually (and ideally) part of families. This interaction in family life complicates legal relationships and necessitates constant balancing of the interests of the different family members.

## **7.2 An acceptable model for the protection of children's rights?**

The abovementioned two points<sup>184</sup> are precisely the reasons why an unqualified individualistic model for the protection of children's rights cannot be accepted. Children have interests to protect long before they have wills to assert. The reason why the law regards young children as incapable of rational thought, is the protection of the child. The law wants to protect children against any negative consequences that may flow from their own immaturity and lack of judgment.

Closely related to the aforementioned point, is Freeman's theory that children's capacity

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<sup>184</sup> See ch 8 par 7.1 above.



for *future autonomy* should be safeguarded. In order to enable children to develop into rational, autonomous adults who are capable of making their own decisions, children should initially be protected against their own irrational actions.<sup>185</sup> In my view, this is the most convincing reason why a certain degree of paternalism towards children is necessary and justified.

However, in spite of what was said above, one cannot ignore the overwhelming research that has been done by developmental psychologists regarding the intellectual, social and moral development of children. These findings indicate that a child reaches adult decision-making capacities around mid-adolescence.<sup>186</sup> This evidence calls for the re-evaluation of the age-old restrictions on children's capacities. Freeman prefers that legal capacity be determined on a case-by-case basis, by assessing the actual capacity for particular activities of individual children.<sup>187</sup> However, I support Wald's view that the notion of legal certainty, and the practical difficulties of making decisions on a case-by-case basis may justify the selection of some age as a cut-off point for granting specific rights.<sup>188</sup> In determining the rationality of a given restriction, it must be kept in mind that, since people mature at different times, any given age will be arbitrary to some degree.

This raises the question as to what precisely the acceptable limits of paternalism are. Eekelaar's innovative proposed theory of "dynamic self-determination" relies on the argument that the best interest principle should be properly understood to accommodate an opportunity for the child to determine what those best interests are. According to Eekelaar, the child's decision should determine the outcome of the issue in question, provided that the outcome is not incompatible with general law and the interests of others, or contrary to the child's physical or mental well-being.

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<sup>185</sup> See ch 8 par 6.2.1.3 above.

<sup>186</sup> See ch 8 par 5, 6.2.1.3 & 6.4.5.4 above in this regard.

<sup>187</sup> See ch 8 par 6.2.1.3 above.

<sup>188</sup> See ch 8 par 6.4.4 above.

As creative as Eekelaar's proposal may be, it is in my view nothing more than the best interests standard. What Eekelaar is saying, is that the child can decide what is in his or her best interests, as long as the outcome will be in the child's best interests. In view of the fact that it is usually an adult (ie a judge) that determines what is in the child's best interests, it is clear that Eekelaar's theory of "dynamic *self-determination*" (my emphasis) is a fallacy.

The so-called "*Gillick*-competency test" is in my view the most appropriate answer to the question as to what precisely the acceptable limits of self-determination are. According to Lord Scarman,<sup>189</sup> a child acquires capacity to make his or her own decisions when he or she reaches a sufficient understanding and intelligence to be capable of making up his or her own mind on the matter requiring decision. The test formulated by Lord Scarman involves an individualistic assessment of a particular child's level of maturity and intellectual ability. However, in my view, an important rider should be added to this test, namely that children may not be allowed to make decisions that are clearly contrary to their best interests.

An important inference that can in my view be drawn from the abovementioned discussion, is the fact that the "nurturance" and "self-determination" approaches to the protection of children's rights are not mutually exclusive. It is therefore not necessary to decide whether the "child savers" or the "child liberators" are right. Both approaches should be followed, depending on the stage of development of the child. If the child is still an irrational being, the "nurturance" approach should be more important, whereas the "self-determination" approach should become more important when the child approaches mid-adolescence. For this reason, I support Freeman's call for a *via media* or dual approach. As Freeman correctly indicates:<sup>190</sup>

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<sup>189</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1985] 3 All ER 402. See ch 8 par 5 above.

<sup>190</sup> Freeman in Freeman & Veerman *Ideologies* 39.

"To take children's rights seriously requires us to take seriously nurturance *and* self-determination, demands of us that we adopt policies, practices and laws which both protect children and their rights."

### 7.3 What is the role of the state in family life?

The importance for children of growing up in a stable family environment where they can form lasting psychological bonds with family members can hardly be over-emphasised. Earlier<sup>191</sup> it was pointed out that, in order to enable children to develop into rational, autonomous adults who are capable of making their own decisions, children should initially be protected against their own irrational actions. It should in my view be emphasised that it is parents and other family members, in the first instance, who have the duty to assist a child to develop into a rational adult. This is another reason why it is so important for children to grow up in stable family environments. From the above it is clear that a policy of maximum coercive intervention by the state cannot be accepted.

However, this does not mean that families should be above all public scrutiny. The policy of minimum state intervention<sup>192</sup> can therefore, in my view, not be accepted in an unqualified form, for the following reasons:

- It falsely supposes that adults (particularly parents) always have their children's best interests at heart. If this was indeed the case, child abuse and neglect would not have been such a universal problem.
- The view that regards childhood as a golden age, as "the best years of your life", synonymous with innocence, freedom, joy and play, is far removed from the modern-day realities of poverty, disease, exploitation and abuse.
- The policy of minimum state intervention perpetuates the view that women, children and slaves belong to the *oikos* (private life), and have no place in

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<sup>191</sup> See ch 8 par 7.2 above.

<sup>192</sup> followed *inter alia* by Goldstein *et al* *Before best interests*. See ch 8 par 2.3.5, 3 & 4 above.

the *polis* (private life).<sup>193</sup> It reinforces existing inequalities, abuse and neglect.

In my view, the correct policy lies somewhere between the extremes of maximum coercive intervention and minimum intervention. To determine exactly what the limits of state intervention should be, is no doubt difficult to do. The appropriate policy lies in the correct application of the best interest of the child standard, although it should be conceded that this standard is vague and indeterminate. Montgomery puts it as follows:<sup>194</sup>

“Clearly there must be a safety net, and no non-interventionist stance can be absolute. Children must be protected against parents who fail to consider their interests but the definition of their interests is not to be given by the state in all cases. In a liberal democracy, the thresholds which justify state intervention should be defined by those interests which the children of that society have in common, not by a relatively narrow paradigm of the family created by part of that society only.”

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<sup>193</sup> See ch 8 par 4.1 above.

<sup>194</sup> Montgomery 1988 *MLR* 328.