

The rights of children: a suggested approach for early childhood care and education in Australia

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Abstract

Statements on human rights need to be understood in terms of their source and mandate. Five different sources of such statements can be identified, each providing a different authorising capability to statements emanating from them. Statements on the rights of children arising from each of these sources provide possible guidelines for early childhood care and education in Australia. The Reggio Emilia approach to the rights of children, which arises from the source of common sense, is to be preferred to the United Nations Convention on the Rights of the Child, which is an international declaration.

introduction

In this paper I describe five sources of statements on human rights in order to show that there is a framework or structure within which statements on human rights need to be understood. The different sources identified each give a different kind of sanction to the statements which flow from them. Hence these statements need to be examined in the light of their source to determine their status and their mandate. By way of illustration, the paper provides five examples of statements on the rights of children, each of which comes from one of the sources identified.

I then describe a specific point of view on the rights of children which can be derived from the Reggio Emilia approach to early childhood care and education. I attribute the Reggio statement to one particular source - that of common sense - and I reject attempts to link it to another source - that of international declarations and conventions, in particular the United Nations Convention on the Rights of the Child.

I conclude the paper with a consideration of a suggested approach to the rights of children for early childhood care and education in Australia. I discuss three reasons for not using the Convention: controversy, ambiguity and lack of balance. I conclude by endorsing the Reggio approach, and its source of common sense, as a preferred approach for providing policy statements on the rights of children for early childhood care and education in Australia.

Sources of Human Rights

It is possible to identify at least five different sources of statements on human rights.

(a) International declarations and conventions

These are proclamations which emanate from committees of bodies such as the United Nations. They purport to enshrine universally applicable principles which engage international support, cooperation and compliance from member countries. Examples are the Universal Declaration of Human Rights (1948), the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979) and, to give a more recent example, the Universal Declaration on the Human Genome and Human Rights (1997). Declarations and conventions are different. A declaration is not legally binding on a member country. It is simply an expression of a point of view by the United Nations. A convention imposes international obligations which are legally binding. Signing by a member country indicates in principle agreement, without committing that country to any obligations. The further step of ratification means that the member country will ensure that its internal laws conform with whatever principles are contained in the convention (Phillips, 1999, p.7). Implementation of the principles of the convention must be demonstrated by supervised compliance reports on steps which have been taken to meet the requirements contained in the principles. It is interesting to note that in Australia no parliamentary debate is required before either signing or ratification of United Nations conventions occurs and there is no public discussion or procedure for public input into the process.

(b) National constitutions

Some national constitutions incorporate a Bill of Rights which states formally the most important personal freedoms which citizens of the country enjoy. These are rights which are endemic in the life of the nation. They evolve from the influence of philosophy and from long held community values which pervade the thinking of the people. An example is the American Bill of Rights, which was incorporated as Amendments to the Constitution of the United States. Cooray (1985, p.24) notes that this particular Bill of Rights

was drafted by representatives of all significant political groupings. The drafters and the judges who interpreted it valued common law rules of procedure and evidence, recognised common law restrictions on freedom, reflected the spirit of the common law and ensured that such rights were administered and protected by the common law courts.

(c) Legislation

In some countries a Bill of Rights may be legislated by Act of Parliament and thus become part of the law of the land. An example is the New Zealand Bill of Rights Act (1990) which was amended by the Human Rights Act (1993). In the case of New Zealand the country has no written Constitution. The New Zealand Bill of Rights Act is thus a statute which may be amended or repealed through the parliamentary process. It has no preferential status over any other New Zealand legislation. It is an Act (i) to affirm, protect and promote human rights and fundamental freedoms in New Zealand and (ii) to

affirm New Zealand's commitment to the International Covenant on Civil and Political Rights, which is a United Nations covenant. Certain inconsistencies with this covenant remain in the Act (Jefferies, 2000).

(d) Common Law

One of the oldest established sources of human rights is the common law rights which derive from the operation of long held national beliefs and institutions, interpreted and determined by judicial rulings, and sometimes enunciated in formal edicts. They evolve and are recognised in courts of law but are not enacted as formal legislation. They grow from disputes, which draw upon precedents and debate, to decide upon upholding or gradually changing publicly agreed moral standards. Common Law jurisdictions use the decisions of other common law systems to inform and support their judgements. In a lecture to the Heritage Foundation in 1996 Daniel Fung, the Solicitor General of Hong Kong, made the following comment about the working of the common law.

"They way the common law operates is illustrated in the immortal words of one legal commentator who observed that it "stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in turn left a foundation upon which his successors might work."

(Fung, 1996).

The High Court of Australia judgement on the Mabo case is a recent example of this source of human rights.

(e) Common sense

Common sense as a source of human rights is the most intangible source. It includes a range of constituent elements which may be widely accepted values, past traditions, factual evidence, current concerns, vested points of view and interests, financial considerations, new ideas, changing circumstances and ideals. The words 'common sense' carry with them overtones of approval, suggesting solid, workable and rational agreement over what is the best to be done in determining the rights of individuals and social groups. The source also suggests the use of collective wisdom, derived from experience and distilled through processes of public debate, using popular media as a vehicle. The message itself may thus be couched in populist terms and readily accessible to the general understanding. There is also a strong focus on community and a participant citizenry. Sometimes these statements progress to the point where they become enshrined in legislation. It is important to be aware with statements from this source that they may be disguised propaganda vehicles for vested points of view, rather than expressions of generally and widely accepted positions. Education policy statements are a good example of the use of this source of human rights, a particular recent one being the Scottish Council Foundation report, Children, families and learning: A new agenda for education (Scottish Council Foundation, 1999).

Statements on the rights of children: some examples and where they fit

The following examples given an idea of the range and detail of some of the statements on the rights of children which have emerged from the five sources identified above.

(a) From international declarations and conventions.

The United Nations General Assembly adopted the United Nations Convention on the Rights of the Child in 1989 and it has been signed by more countries than any other human rights treaty. It was signed by Australia in August, 1990 and ratified in December 1990. Australia submitted its first report on compliance in December, 1995 and an alternative report was submitted by Australian non government organisations in October, 1996. The Convention on the Rights of the Child contains fifty-four articles which aim

to protect children from economic exploitation and performance of hazardous work; sexual exploitation including the use of children for pornography or prostitution; and abduction, sale of and traffic. It covers all forms of physical or mental violence injury or abuse, neglect, maltreatment or exploitation, including sexual abuse, torture, capital punishment or life imprisonment without the possibility of release. It also recognises the cultural, economic and social rights of children including health, education, an adequate standard of living and the child's own culture, religion and language.

(Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Background to the Inquiry, United Nations Convention on the Rights of the Child, 1997, p.3)

(b) From national constitutions

Over forty national constitutions have been identified (Marriage and Family in National Constitutions online search) which incorporate Articles pertaining to marriage and the family, and by direct or derivative reference, to the rights of

children. Some examples of children's rights embodied in the constitutions of various countries are excerpted below.

Belarus Article 32

No child shall be subjected to cruel treatment or humiliation or used for work that may be harmful to its physical, mental or moral development. Children shall care for their parents or persons *in loco parentis* and render them assistance.

Congo Article 38

The State shall have the duty to assure the protection of the Rights of the mother and infant as stipulated in the International Declarations and Conventions.

Eritrea Article 22

(3) Parents have the right and duty to bring up their children with proper care and affection; and, in turn, children have the right and the duty to respect their parents and to sustain them in their old age.

Switzerland Article 54

Children born before marriage shall be legitimized by the subsequent marriage of their parents.

It is of interest to note two examples which mark the extremes of current incorporations of children's rights into constitutions.

The United States of America

The constitution of the United States makes no mention of the rights of children and there is both doctrinal and political resistance to attempts to secure a place for them: doctrinal, because of the common law structure of the constitution; and political, because children do not vote and the concept of children's rights is perceived by conservatives to threaten family values and by those on the left to threaten women's autonomy (Woodhouse, n.d.).

The Republic of South Africa Article 28

At the other end of the spectrum the 1996 constitution of the Republic of South Africa incorporates a Bill of Rights for children which is the most detailed and explicit formulation contained in any constitution so far. The relevant section reads as follows:

Children

28. (1) Every child has the right

(a) to a name and nationality from birth;

(b) to family or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practice;

(f) not to be required or permitted to perform work or provide services that –

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights which a child enjoys under sections 12 [Freedom and security of the person] and 35 [Arrested, detained and accused persons], the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years;
and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means person under the age of 18 years.

(c) From legislation

An example of legislation presently being enacted is the Children's Rights Commissioner Bill in England which is passing through the House of Commons. To be cited as the Children's Rights Commissioner Act 2000, it provides for the establishment of a children's rights commissioner who is charged with the following duties.

(a) to promote the rights and interests of children;

(b) to seek to ensure that the rights and interests of children are properly taken into account by Ministers of the Crown, government departments, local authorities, other public bodies

and voluntary and private organisations when decision on policies affecting children are taken:

(c) to promote compliance with the United Nations Convention on the rights of the Child as ratified by Her Majesty's Government and subject to such reservations as Her Majesty's Government made on ratification, unless subsequently withdrawn; and

(d) to seek to ensure that children have effective means of redress if their rights are disregarded by any body referred to in paragraph (b).

There are four guiding principles to which the Commissioner shall have regard.

(a) the principles laid down in the United Nations Convention on the Rights of the Child, and in such other international treaties, conventions or agreements which have been ratified or otherwise acceded to by Her Majesty's Government and which affect children;

(b) the need to maintain direct contact with children and children's organisations, to pay particular regard to the views of children and to promote respect for the views of children throughout society;

(d) the need to consult from time to time other persons seeking to promote the rights and interests of children.

(Children's Rights Commissioner Act 2000, Section 2).

(d) From common law

Many of the prominent common law jurisdictions have been concerned with judgements pertaining to the rights of children. Of some international interest, and important for Australia, was the judgement of the High Court in this country on the Teoh case (Minister for Immigration and Ethnic Affairs v Teoh, 1995). Ah Hin Teoh, a Malaysian, had resided in Australia on a temporary entry permit. His wife was an Australian citizen and the three children from their marriage had been born in Australia. Teoh was convicted of importing and possessing heroin before approval for permanent residence was given and the Minister for Immigration ordered that he be deported. Because his wife was a heroin addict and because there were six young children altogether in the family Teoh appealed, on the grounds that they depended on his emotional and financial support. The United Nations Convention on the Rights of the Child was invoked because in Australia such conventions can be used to influence the development of common law.

The results were twofold: first, Teoh was permitted to remain in Australia, despite his criminal record, because it was judged to be in the best interests of the children; second, the two High Court judges found that because a

convention had not become part of Australia's law, even though it had been ratified, it did not mean that its ratification had no significance for Australian law (Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, 17th Report, United Nations Convention on the Rights of the Child, 1998, p.4). Partly as a result of that judgement the Joint Standing Committee on Treaties conducted a long and detailed inquiry into the implementation of the United Nations Convention on the Rights of the Child in order to consider aspects of community concern relating to it.

(e) From common sense

Examples of statements on the rights of children which might fit the source identified as common sense range from the real estate "open house" advice to viewing parents that "children are welcome if held by the hand" to statements reflecting attitudes or policy. An expression of attitude, which appeared in a letter to the editor of a state daily newspaper, incorporated an implied set of rights for children. According to the writer, the principal of a primary school, these were that children should be in bed at a reasonable hour, that decent meals should be provided for them every day, that both boys and girls require love and understanding, that a child should be adequately clothed, that certain values are required to be taught and that parents should teach children adequate values for them to be responsible and well-rounded adults. ("The West Australian", 22 September, 2000). An expression of policy was evident in a recent display poster generated by an Australian state government department of family and children's services, which suggested that children should be "seen and heard and loved and cherished and nurtured and hugged and enjoyed and admired and protected and encouraged and supported and praised and respected and appreciated and valued and helped and complimented and NOT HURT" - again an oblique statement of the thinking informing their policy on the rights of children. These statements, unlike the previous examples, have no legal status. They purport to express generally accepted points of view, although the notion of what counts as "generally acceptable" is very much open to debate.

Reggio Emilia: the Reggio approach to early childhood and education and the rights of children

Of current international interest is the approach to early childhood and education in the municipality of Reggio Emilia in Italy. Its centres were selected as among the ten best schools in the world by Newsweek magazine in 1991 and its twenty-one pre-schools and thirteen infant-toddler centres attract educators from all over the world. To give an idea of the extent of its influence, between January 1981 and January 1999 there were approximately six hundred delegations to Reggio Emilia with a total of about ten thousand visitors (Morrow, 1999, p.23). As in other countries there has been much interest shown in Australia in recent years in the Reggio approach to early childhood care and education. By way of example, one may note one of the most well-known of the independent schools in Western Australia advertising recently for an early childhood coordinator to assist with the development of a new K-2 Early Learning Centre and calling specifically for "an energetic, innovative and enthusiastic early childhood specialist, familiar with the Reggio Emilia philosophy" ("The West Australian", 11 September, 1999).

The essence of the Reggio Emilia culture of childhood revolves around two concepts: the rights and the potential of children. Reflecting on the history, ideas and basic philosophy of

the Reggio approach in an interview with Lella Gandini, Loris Malaguzzi, the founder of the programme in Reggio Emilia, made the comment that the parents of the children of the first school in 1946 wanted a different school, one in which the children would be educated differently. Malaguzzi drew attention in particular to the desire to see the potential of the children taken seriously. He noted

The equation was simple: If the children had legitimate rights, then they also should have opportunities to develop their intelligence and to be made ready for the success that would not, and should not, escape them. These were the parents' thoughts, expressing a universal aspiration, a declaration against the betrayal of children's potential, and a warning that children first of all had to be taken seriously and believed in.

(Edwards, Gandini & Forman, 1993, p.51).

Malaguzzi did not amplify in the interview what the "legitimate rights" of children might be, but the implication is that education of a particular kind is one such right. How this emerged in practice is perhaps revealed in a poster, compiled by some of the children, placed in the Diana School in Reggio Emilia in 1990. It declared

Children have the right to have friends, otherwise they do not grow up too well.

Children have the right to live in peace.

To live in peace means to be well, to live together, to live with things that interest us, to have friends, to think about flying, to dream.

If a child does not know, she has the right to make mistakes. It works because after she sees the problem and the mistakes she made, then she knows.

(Edwards, Gandini & Forman, 1993, p.135).

Such statements suggest a particular image of childhood which lies at the heart of the Reggio approach. It is summed up in Malaguzzi's own words which visualise the child as "rich in potential, strong, powerful, competent, and, most of all, connected to adults and other children" (Malaguzzi, 1993, p.10). The connection between the rights of children and the image of the competent child has led one American early childhood educator to make the following claim:

At the core of the Reggio Emilia philosophy is the image of children as competent. Reggio educators believe that the quality of their schools results in large part from this image of a competent child who has rights, especially the right to outstanding care and education, rather than only needs.

(Bredekamp, 1993, p.13).

Few educators would not wish to support a focus in early childhood care and education on the rights of children to learn to communicate, to be understood and to uphold a point of

view. The Reggio view of the competent child is unexceptionable, particularly because it is allied with the notion of partnership with parents and the community. As one writer has noted

The society and culture of Reggio Emilia is strongly imprinted by social solidarity. The local population has roots of stability and continuity. Despite the rapid changes taking place, the family is still a strong social nucleus, with an important support network provided by the extended family. All this creates a context that sustains and integrates participation in the experience of the infant-toddler centers and preschools.

(Morrow, 1999, p.19).

In considering the Reggio statements on the rights of children in relation to the statements outlined in the previous section of this paper, it is most appropriate to categorise them as statements from the source identified as common sense, for several reasons. They clearly derive from accepted community values and traditions as well as from current vested points of view. They acknowledge no international convention or national constitutional base, nor are they legislated or derived from common law. They do however, possess a strong focus on community and a participant citizenry.

To claim that the Reggio approach relies on the source of common sense for its statements on the rights of children is significant. Others (see, for example, Nyland, 1997) claim that the United Nations Convention on the Rights of the Child should be seen as providing a rights perspective to the Reggio approach. The corollary to this kind of claim is that the Convention should be seen as providing a benchmark in Australia for early childhood care and education professionals to reflect on practice. In considering the claim and its corollary I am suggesting that the Reggio approach does not draw on the Convention but, rather, on the manifestations of common sense for the reasons outlined above. This said, the question of the corollary remains. Should the Convention be seen as a source from which to derive rights of children pertaining to early childhood care and education in Australia?

A suggested approach for early childhood care and education in Australia to the concept of the rights of children

My response to this question is that the United Nations Convention on the Rights of the Child is not an acceptable statement of the rights of children for Australian educators. This response can be substantiated by addressing the following three issues.

(a) Controversy

The Convention is controversial. On the one hand, when Australia ratified it in December 1990 there had been 70 petitions tabled in the Senate and 172 petitions tabled in the House of Representatives, with many thousands of signatures, urging either delay, or less than full endorsement of the Articles it contained. On the other hand, there have subsequently been calls from other quarters objecting to Australia's lack of application of many aspects of the Convention. One important reason for the controversy surrounding the Convention in Australia is the perception by many that it is anti-family. A second is the perception that it undermines parental rights and that it is anti-parent. These perceptions have given rise to specific criticisms which relate to the concept of the autonomous child. This concept has its origins in the claim that there are two aspects to the rights of children: rights to protection from hunger, neglect, abuse and so on; and rights related to an individual

personality. Individual personality rights involve "choice" rights such as style of education, religious preference, how to vote, who to marry (17th Report, p.469, paras. 27-30). The concept of the autonomous child suggests that children are individual entities possessing "choice" rights. The child is not seen as primarily part of a family unit in which parents exercise choice on its behalf, consistent with the child's developing capacity to choose for itself. The concept of autonomous child rights is highly problematic and its controversial nature is a first reason for rejecting the Convention as a source for framing the rights of children in early childhood care and education in Australia.

(b) Ambiguity

The Convention is ambiguous. Its ambiguity is necessary because it is a document which covers a range of developmental situations affecting children aged from birth to the late stages of adolescence. Therefore it has to cover a wide spread of evolving capacities on the part of children and hence is broad and general in its stipulations. It is thus at times open to differing interpretations. But his very ambiguity limits its usefulness in considering children who are at a developmental stage where they have very restricted decision making capacities. An example relates to Article Three which states (in part)

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

(United Nations Convention on the Rights of the Child, 1990)

This Article can be interpreted (see Nyland, 1999, p.11) to justify separating children from their parents, as was done with Aboriginal Torres Strait Islander families in Australia. This is because the concept of best interests is left quite undefined by the Convention. This vagueness leads to ambiguity. Is it in children's best interests to be separated from their parents in certain circumstances or is it not? Current response from the Aboriginal and Torres Strait Islander communities suggest that it is not, implying that the family unit is the best environment for the raising of children (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, April, 1997). Yet the Convention does not systematically support the family unit as being in the best interests of children. Rather, it seeks to set in place the concept of parents and children as having the same relationship to the State and hence opens the way for state intervention in the family unit on "best interests" grounds.

Hafen and Hafen (1996) note that the language of best interest in the Convention is ambiguous from the point of view of legal interpretation. They record that in America the claim has been made that state intervention would occur only when custody issues arise or neglect had been established. They contrast this view with legal opinion in Australia, where two Australian lawyers consider that

under the CRC, parental childrearing rights are "*subject to external scrutiny*" and may be overridden when "*the parents are not acting in the best interests of the child*", or where the

parents are *unreasonably* attempting to impose their views upon mature minors who have the capacity to make their own decisions." This interpretation is consistent with the CRC's apparent intent to place children and parents on the same plane as co-autonomous persons in their relationship with the state. To the extent that the CRC encourages such interpretations, its ambiguity, or its conscious design, risks creating a new and lower threshold for state intervention in intact families.

(Hafen & Hafen, 1996, p.464)

In view of the vagueness of the use of "best interest" and the subsequent ethical and legal ambiguity arising from it Australia would do better to look for support for policies concerning the child's point of view from sources where the term is more clearly defined and the implications more clearly spelled out than they are in the Convention. Its ambiguity is a second reason for rejecting the Convention as a source for framing the rights of children in early childhood care and education in Australia.

(c) Lack of balance in the convention

The Convention is unbalanced. As we have seen, its focus is on the concept of autonomous child rights. But children, even babies in day care settings, as a general rule have a parent or parents who are needed for their upbringing. It is the very nature of childhood to be in need of such support. As one group of commentators on the Convention has noted

No matter how well intentioned, governments and their public servants cannot bring up children. Only the parents can do that. There is no evidence to suggest that someone has discovered that children can care for themselves and do not need guidance. Children are inherently dependent.

(Abetz, McGauran & O'Chee, 1998, p.472)

Yet there is no focus in the Convention on the rights and responsibilities which parents must exercise in matter relating to children's development. Article Five draws attention to the "responsibilities, rights and duties of parents...to provide...appropriate direction and guidance in the *exercise by the child* (my italics) of the rights recognised in the present Convention. Article Fourteen requires States Parties to "respect the rights and duties of the parents...to provide direction to the child in the *exercise of his or her right* (my italics) in a manner consistent with the evolving capacities of the child". However, what seems on a surface reading to be references to parent rights and the responsibilities are, in fact, directing parents to support the autonomous child's exercise of rights conferred by the Convention. The only rights and responsibilities attributed to parents are in respect of upholding the child's rights to independence. Nowhere in the Convention are the rights and responsibilities of parents regarding the educational, physical, social and moral development of their children recognised (Abetz, McGauran & O'Chee, 1998, p.474, quoting Senator Robert Hill).

Nyland (1999, p.10) makes the point that "a partnership with parents is a necessity for a good quality early childhood program". This cause would be better served if supported with a policy document that, unlike the Convention, gave due consideration to a balance between parent and child rights. Its lack of balance is a third reason for rejecting the Convention as a source for framing the rights of children in early childhood care and education in Australia.

So what approach to the concept of the rights of children should be advocated as a beneficial one for early childhood care and education in Australia? My response is an endorsement of the Reggio approach with its recourse to common sense as a primary source. It is encouraging to note the increasing number of early childhood professionals who are participating in delegations visiting Reggio where the exchange with Australia has intensified over the last few years (Morrow, 1999, p.23). The Hundred Languages of Children exhibit of the municipal infant-toddler centres and preschools of Reggio Emilia has also been seen in Melbourne. One cannot, nor would one wish, to re-create Reggio Emilia in this country. But as Howard Gardner notes

...each...educational environment(s) has to struggle with and find its own comfortable point of repose between the desires of the individual and the needs for the group; the training of skills and cultivation of creativity; the respect for the family and the involvement in a wider community; attention to cognitive growth and concern with matters of temperament, feelings, and spirit.

(Edwards, Gandini & Forman, 1993, pp.xxii-xiii)

The wisdom of common sense pervades the successful Reggio approach to the rights of children. Common sense, I suggest, is also the source which should inform the approach for early childhood care and education in Australia to the concept of the rights of children.

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