

THE CHILD'S RIGHTS IN INTERNATIONAL CHARTERS COMMENT ON THE REPORT OF PROFESSOR OMBRETTA FUMAGALLI CARULLI

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The Academy owes Professor Fumagalli a deep gratitude for her report on the statements which can be found in international legal documents about the rights of children and minors. The tradition of such statements is a very young one, both in national and international law. The more valuable is the precise and comprehensive report, which Professor Fumagalli has presented. I should, however, not only like to thank Professor Fumagalli for having studied and presented the texts in such an instructive way. The sincerest thanks must be expressed to her for the helpful explanations, which make us better understand the relation between the texts and reality. Her critical remarks outline with admirable succinctness what can be said to evaluate the development.

What is left for a comment after so much agreement? Let me try to put complementary accents by an alternative approach of examination. Professor Fumagalli's report follows a line that is determined by the international institutions which have produced the texts, by the scope of their responsibilities and by the historical sequence of the texts. I will in contrast start with the difficulties which are caused if light is to be shed on the maze of correlations and contradictions in which the child is embedded as a social being, by drawing on elementary normative statements which correspond with the tradition of human rights.

These difficulties consist above all

1. of the extraordinary complexity of the real and normative contexts in which children live and grow up;
2. of the extreme uniqueness through which that complexity in ethnic or religious communities, in social classes, in local, regional or national units reduces itself to concrete real and normative conditions;

3. of the maximum diversity and instability of the individual situations and developments which occur in spite or on account of these ethnic, religious, social, local, regional or national specifications;
4. of the fractures, which may result at any time if the borders separating those communities, classes, regions etc. from each other, are crossed, a fact which, however, especially comes true if children, parents, families or comparable groups cross national borders together or separately. The growing transnationality of human life gives that aspect special topicality.

AD 1) FIRST THE COMPLEXITY OF THE REAL AND NORMATIVE CONTEXTS IN WHICH CHILDREN LIVE AND GROW UP SHALL BE DEALT WITH

– Let us start with the rights of the *child*. At the very beginning there is the simple right to be: the right to life. But there is also the difference between what that right means for the time before birth and what it means after birth. On the other hand, at the end of childhood there should be the young adult who is able to exercise all the rights men enjoy, in a self-determined way. From the very beginning, the right to life is accompanied by the right to equality: the right not to be disadvantaged, not to be discriminated. From birth on, a child may also enjoy property rights, which may be exercised by the parents or by guardians. Other rights, however, grow along with the young life. While the child becomes older they change. There is, on the one hand, the right to be fostered, to be looked after, to be cared for, to be provided with goods, but also to be protected from damage. From the very beginning, childhood also embraces the right to education. As time goes by, this right differentiates, and thus some branches – especially when schools are involved – go independent ways. On the other hand there are the freedoms. They start with the naïve freedoms to experience the environment and to play. But behind them grow those freedoms which also adults enjoy. For quite a while the freedoms and the right to education penetrate each other. But then this combination ceases. Freedoms and education go independent ways. Together with the growth of rights the child's duties start to grow as well. The child has to adjust itself to the process of its own development. It has to contribute to this process. It has to learn to be responsible. All this because otherwise, as a rule, the process of its development cannot take place or the success of the process will at least suffer. And finally because learning freedom without learning duties and responsibility is futile.

– *Parents* are regarded the natural party opposite. They are primarily responsible for the mentioned process regarding the being and the development of their child or their children. But that is as true as it is much too simple. That one man and one woman are the common parents to one or more children does not necessarily mean that both of them experience the relationship in the same way and that they are unanimous in implementing it. Before birth there is the strongest evidence for that. But after birth it is valid in the same way. In spite of their common relationship with one or more children each of the parents is an individual person, has individual rights and interests, has individual ideas of values, individual opinions and emotions, and each of them has an own rationality. The possibility of a patriarchal (or also a matriarchal) order of parenthood does not make things overcome. In contrary: it underlines that father and mother are different.

That parents live upon their own rights is also valid for the relationship between parents and children. Parents can only bear responsibility for their child's process of being and development if and to the extent to which they develop their personality. In the context of rights that means: because they are subjects of own rights and because they materialise those rights. In doing so they are *by no means only* parents. They live their lives. And their rights constitute their free play. Their being parents and their being themselves are complementary. But not only that. Their being parents and their being themselves also exist in a relationship of competition, of rivalry, and of conflict. That is all the more valid as parent's rights and parent's duties cannot be separated from one another.

– Parents and children are not isolated. Men live in societies and in states. Thus also childhood and adolescence as well as parenthood take place in the full context of society and state. And that should be that way. Childhood and adolescence does not mean to form the young person only according to the measure of the parents. The meaning of childhood and adolescence is to enable the human being together with others to lead an autonomous life in the context of society and state. But that again means to approach another field of manifold complexity.

Society and state complement the relationship between parents and children in *individual cases* if the relationship suffers from *concrete deficits*. Important examples are the assistance to overstrained parents, the protection of children against degradation or abuse, the committing of children to foster families or homes, the guardianship after parents having died.

Society and state complement the parent-child relationship, however, also in a *general* way: if there is a reason to *generally presume* that the com-

petence and/or the efficiency of the parents will not suffice to enable the young person to lead an autonomous life together with others in the context of society and state. The prime example is the school system. Other examples are institutions caring for children or adolescents and also youth organisations themselves. Various constellations between harmony and conflict can be observed. Offers of the mentioned type, as a rule, feature a certain value-orientation. These value-orientations may coincide with the parents' ones. They can correspond to the adolescents' ones, which is especially relevant to adolescents whose responsibility is approaching majority. The bodies running the institutions or services can try to avoid contact with the orientation of the parents or the adolescents, be neutral. But they may also combat the parent's or the adolescent's orientations, and suppress them. And not rarely it is the government who compels them to do so. In all those situations measures are necessary to distinguish the permissible from the inadmissible. Value-orientations generally have a background within fundamental rights. That deserves recognition and respect. But also an excessive affirmation may become a problem if it suffocates the understanding that others are different, hence pluralism.

Even much more diverse are the problems coming from the many *co-educators* that accompany and influence the development of children and adolescents beyond all the offers provided by special institutions. The multiplicity of those influences is immense. There are the mass media having a public mandate or working for commercial reasons. There are influences aiming at others and others to adopt a certain lifestyle, a certain behaviour, a certain opinion, certain convictions. Other influences simply act on the assumption that others are as they are and do what they do: that they present their commercial offers, practise the arts, practise their religion, spend their leisure time, buy, consume, enjoy themselves etc. There are influences exerted by children on children, by young people on young people, by masses on individuals, by individuals on individuals. That chaos of 'co-education' has its causes. It corresponds to the freedoms out of which society lives. And that children and young people experience those 'co-educators' belongs essentially to them getting used to society and state. But, no doubt, there are also influences they should be protected from. Where should the limits be drawn? Once more: nothing here is simple. The international documents on the child's rights have touched that question least of all.

Behind all that there is the pitiless rule that society and state decide on the political, economic and cultural standards within which children grow up and parents bring them up. The microcosm of the parent-child-

family is only able to get rid of those bonds within narrow limits. Also the relevance of political or legal concepts with respect to the status and relationship of children, parents or families depends on those conditions. All elementary statements written in national constitutions or international documents on the rights of children, parents or families therefore are to be understood with the reservation of that relativity. Rights that may be reasonable under certain conditions may be ridiculous under others. Sometimes these statements miss the bare essentials. And often enough they are to no avail.

At the beginning I mentioned some further parameters of the problems. To keep to the limits of a comment, I will refer to them by some catchwords.

AD 2) MY SECOND POINT WAS: THE EXTREME UNIQUENESS THROUGH WHICH THAT COMPLEXITY IN ETHNIC OR RELIGIOUS COMMUNITIES, IN SOCIAL CLASSES, IN LOCAL, REGIONAL OR NATIONAL UNITS REDUCES ITSELF TO CONCRETE REAL AND NORMATIVE CONDITIONS

For instance if the relationship between parents and children is overgrown by the structures and the norms of an enlarged family whose claim to power eclipses the immediate and primary relation the child has with its parents. Or if the comprehensive social ideology of an ethnic or religious majority suppresses the multiplicity of options to design the relation between parents and children, and locks the way into an open society for the children.

Perceived by their authors or not, elementary statements in the tradition of human rights, as a rule, presuppose matters of course, which they don't articulate. At least, less important presuppositions are renounced in favour of the articulation of more important ones. Thus these elementary statements are incomplete regulations. In the national context the risk of this technique is limited. If the course of history shows that an additional clarification of the content is necessary, this can be done by the amendment of the constitution, by the decisions of a court or by a practice based on consensus. Universal documents, however, run a much higher risk. Universal – legal, political or social – norms being able to complement the explicit statement, are frequently missing. Thus they are dependent on particular – legal, political or social – norms to be complemented. This way, however, the critical function often gets lost which the universal statement should have compared to the particular conditions.

AD 3) MY THIRD POINT WAS: THE MAXIMUM DIVERSITY AND INSTABILITY OF THE INDIVIDUAL SITUATIONS AND DEVELOPMENTS WHICH OCCUR IN SPITE OR ON ACCOUNT OF THE ETHNIC, RELIGIOUS, SOCIAL, LOCAL, REGIONAL OR NATIONAL SPECIFICATIONS

Examples are the frequency of developments and events making the connection between wedlock and family dissolve, and the social practise of patchwork-families in western countries.

Children's rights and parent's rights correspond to each other in a special way if two parents, who are married raise and educate their common children in a permanent community. This precondition was always put at risk: by the death of father or mother or both parents; or by the possibility, that a mother gives birth to a child whose father is not her husband. Meanwhile, however, the constellations as to how parent-child relations may be designed have multiplied, as well as the reasons for leaving the traditional patterns of life. One of the consequences is that the composition of parent-child communities as well as the design of parent-child relations outside of such a community become more and more 'hand-made' by the intervention of an authority. That way, also the measure of 'the child's best interest' has acquired more and more importance. In the context of the traditional family the presumption was that the use of the parent's right is in accordance with 'the child's best interest'. That was the rule. The explicit application of the measure of 'the child's best interest' was the exception. Today not rarely an open circle of persons (parents, fathers and mothers; husbands and spouses or other partners of father or mother; foster parents, relatives etc.) discusses the 'child's best interest', and a final decision lies with the authorities whereas the implementation [very often] lies with the persons who are not the parents. Whereas in many parts of the world – because of poverty, underdevelopment, exploitation, oppression, prejudices etc. – the 'child's best interest' is extremely neglected, in other parts many parents (in any case: too many) have lost the energy and the determination to do justice to the 'child's best interest' in spite of a relative prosperity. In a very peculiar way the apparently natural basic rule of the 'child's best interest' thus shows an extreme ambiguity.

AD 4) MY FOURTH AND LAST POINT REFERRED TO THE FRACTURES WHICH MAY RESULT IF CHILDREN, PARENTS, FAMILIES OR COMPARABLE GROUPS CROSS NATIONAL BORDERS TOGETHER OR SEPARATELY

The growing transnationality of human life gives that aspect special topicality. There are so many reasons for these fractures: the easiness of mobility, looking for a better life, looking for work, food, shelter, catastrophes, displacement, flight, and to barely escape with one's life. And children especially in this context experience the most varied fate. They are taken with by their parents, by relatives, by others. They are left behind, sent away. They are kidnapped, sold. Their parents killed, imprisoned, made slaves. But even if they change the country under peaceful conditions they suffer social fractures. Who ever ponders on children's rights should dedicate the highest attention to the threats to, and suffering of children. But the international documents which are the subject of the report as well as of this comment have only perceived that concern in a very selective way. Perhaps one should say: in a marginal way.

Final Remarks

At the end of my comment I feel confusion, embarrassment. What can the rights which Professor Fumagalli has presented in her report, really mean amidst these difficult, complex contexts, filled with contradictions? Is there not eventually the danger that the problems are seen in a simple way, much more simple than they are. On the other hand: can universal 'rights' in the tradition of human rights be renounced. Their power is indispensable to do what is possible and can be done for the children. The search for the best solutions must go on.