

A CRITERION FOR THE IMPOSITION OF HELP: A DEFINITION AND JUSTIFICATION

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On the 6th of August, 1992, Holland was shocked by the news that a 10-year-old boy was battered to death by his step-father even though the Council for Childprotection kept an eye on the family. Not only in Holland, but in all western countries, though they may have quite elaborate an law on families, examples of these kinds of mistakes can be given. Sometimes there is great commotion because the state removed a child from the family unnecessarily; at other times the uproar is caused by the death of a child that could have been prevented by state intervention.

Several factors influence these mistakes, among which is quality of the criterion for intervention described in the law. In Holland the measure a judge can take to impose help on families is placement under supervision: If a child is exposed to moral decay or bodily destruction, the judge can place the child under supervision (St. 254.1). The measure restrains parental authority by the assignment of a guardian to the family whose advice and restrictions are binding. The major problem with the ground of this measure is that it is defined too vaguely. Doek, a Dutch professor of family law states that it is like a magical spell with which all family interventions can be justified.¹

Out of dissatisfaction, jurists and social scientists have proposed alternative criteria. This paper presents first, the analysis of these proposals and second, a new criterion for one of the aims of judicial intervention in families, namely, the imposition of help.

AN OUTLINE OF PROPOSED CRITERIA BY DIFFERENT RESEARCHERS

Starting our research, the writers most obvious to study were special pedagogues and jurists.²

Special Pedagogues

The most important, and quite astonishing, conclusion of the review of special pedagogical literature was that no Dutch special pedagogue explicates when help should be imposed on families. We could not believe that this lack of attention to the subject was due to a lack of ideas. To check this belief, we carried out a Delphi-study.

The most significant results of the study (N=15) are the following: The experts consider the child the most important subject of the criterion. The parents are mentioned as well, but only in relation to (the damage they cause to) the child. The child's development is thought to be the most important aspect of the child. Other aspects, like behaviour, rights or well-being are mentioned, but by fewer experts. The criterion most chosen by special pedagogues is that if the development of the child is inhibited because of impotence or unwillingness of the parents, help should be imposed.

Though this criterion is defined in the terms in which we believe a criterion for the imposition of help should be defined, it is not precise and elaborate enough. We do not know which kind of development is meant or at which level the development is situated. This is, however, necessary, for there is rather a difference between a criterion in terms of development towards a minimum or a maximum goal. If for instance we do not explicate this for the moral development of the child and the latter is interpreted as development into a post-conventional thinking person, we would be forced

to intervene in almost all families. This is an absurd consequence. This argument is applicable to all aspects of the child's development, so we have to be quite precise in the definition of the criterion, making sure it will be used in the intended situations only.

Jurists

All the jurists in the western world base their proposal for intervention in families on "the best interest of the child" principle. This principle has become the most important criterion for state intervention during this century. It is, however, a rather vague criterion, open to many interpretations. Some proposed criteria are as vague as the "best interest" principle itself. For instance, when the criterion is described in terms of spheres of interest such as if the child's moral or mental interests are harmed, or if she is physically hurt, intervention is necessary.³ Sometimes it is explicated in terms no less vague than interest, like happiness or well-being.⁴

What is quite interesting, considering the results of the Delphi-study, is that most of the more precise descriptions are stated in terms of the child's development. Katz, for instance, says the child's interest "encompasses a constellation of social values essential to a child's development into a physically and emotionally healthy and responsible adult."⁵ And a Dutch committee defines it in terms of the harmonious development of the child's personality.

We think the same can be said for these proposals as for those of the special pedagogues: though they are defined in the right terms, they are not specific and elaborate enough.

When jurists want to define a criterion in more precise terms, most of them feel forced to define the criterion in terms of identifiable harms. Consequently, the criterion is not exhaustive enough. Morris et al., for instance, want to restrict intervention to situations in which (a) the child is physically harmed or neglected; (b) the child is sexually abused by his parents; or (c) the child is abandoned by his parents.⁶ With this choice, they exclude emotional abuse and prevention.

The Children's Rights Discussion

The research continued from a different angle, namely, from the children's rights discussion. There were hints from jurists as well as pedagogues in this direction, so we wanted to explore whether there were proposals for an intervention-criterion or proposed rights that could be used for the criterion. Moreover, we began to perceive the importance of a definition in terms of children's rights. There are several reasons for this idea: first, the interests of the child are better protected when stated in terms of rights. Since a right gives someone a claim to someone else or on something else, one is not dependent on the charity (or even duties) of others. Secondly, defining the criterion in terms of the rights of the child instead of parental duties forces one to define it from the child's perspective, guaranteeing it will be in the child's interest. For instance, there is nothing wrong or strange in stating that I have the duty to punish you severely when you have done something we consider punishable. It is, however, odd to state that I have the right to be punished severely. Thus, by stating the interests of the child in terms of her rights instead of parental duties, we can be more certain that we are really dealing with the child's interest, not that of someone or something else.⁷

Different rights are assigned to children. The latest official and legal recognition of their rights is, of course, the Convention on the Rights of the Child (1989). The rights that are mainly relevant to intervention in families are the rights of children against their parents. Rights that have been suggested include the right to nourishment, the right to care, family-love, attachment-figures, the right to intellectual and emotional stimulation and the right to education, the right to autonomy, and the right not to be abused or neglected.⁸ The violation of all these rights, in principle, can lead to intervention in the family, but not to the imposition of pedagogical help. For instance, if a parent refuses medical assistance for his child, thereby risking the life of his child, intervention can be

justified on grounds of the child's right to life. But in this case medical assistance, not pedagogical help, is primarily required.

The exploration in the field of children's rights has yielded new views. From the perspective of defining a pedagogical criterion for the imposition of pedagogical help, the most interesting rights are the child's so called developmental rights (the rights to education and stimulation) and her autonomy rights. But, again, proposals like the right to education or to development are not precise enough.

The analysis of the literature leads to the conclusion that an alternative intervention criterion that is more precise and specific is indeed desirable.

A PEDAGOGICAL PROPOSAL

Before we can give our proposal, six conditions for the criterion for imposing help on families must be described. Two conditions were found to be of influence on the definition of intervention criteria by jurists. The first concerns parental autonomy. We think that parents qua caretakers should be considered autonomous and not as delegates of the state to educate their children in the state's place. This implies that liberty-rights are given to parents to raise their children in the way they think right. In defining the criterion, this right of the parents should be taken into account. The second condition deals with the terms in which the criterion is defined. We believe that it should be defined in terms of harm to the child and in terms of parental conduct. On the one hand, it is obviously necessary that only if the child has been harmed or there is a serious threat that it will be harmed should the parents liberty-rights be abridged, since we have to insure that state intervention is not without need (in which case it will be against the child's interest). On the other hand, the harm to the child must be ascribable to the conduct of his parents, whether this is reproachable or not, since intervention has an impact on the bonds between parents and children.

We have to define a minimum standard of pedagogical skills the parents must meet. The imposition of help should not become an instrument of social change. It "represent[s] *one particular form* of state intervention in family life: the forcible acquisition of responsibility for a child by the state because the standard of care being offered falls substantially short of what his or her parents should be offering."²

A third condition is that we should define the criterion "semi-strictly." What we mean by this is that, on the one hand, we should not define it too vaguely or too generally. Melton and Thompson state:

Concerns about vagueness are especially warranted in the family law context...because there is rarely social consensus about what constitutes "inadequate" or "unfit" parental behaviour. In the absence of clear criteria, judges are unable to rely on precedent for their decisions. Instead, they must make a subjective judgment, usually with little basis other than their own hunches and values about the factors important to the healthy socialization of children. With no clear legal rule and no clear social and moral norm, there is substantial risk that, contrary to the most basic principles of distributive justice, similar cases will be treated differently under law.¹⁰

On the other hand, we think it is (still) impossible to present a list of specific violations of the child's right that is exhaustive. Therefore, we have to take a middle course: the criterion itself can be defined in a rather vague way, but with this, instructions for the operationalisation of the criterion must be provided.

The fourth, twofold, condition is that the criterion should be defined in pedagogical terms and by experts in the pedagogical domain, since it is to be used to impose pedagogical help. Though it is of course a judicial criterion, since it is a text of the law, we think these texts, when they concern a specific domain, should be defined in the terms of this domain by experts in this domain. In saying this, it is not suggested that lawyers should get out of business. They have the responsibility to check whether the criteria proposed by the experts can have a function in the definition of a law.

The fifth condition is that the criterion should be defined in terms that are not (too) tradition-bound. Naturally, this is not desirable since we should not favour a certain religious or political tradition in the criterion, nor should we use intervention to impose a certain tradition on families. This condition is warranted when the criterion is defined in minimal terms. By defining it in minimal terms, we also prevent the state from intervening too early and too often (which would be against the interest of the child and the parents).

The last condition is that it should be defined in terms of a right of the child for the reasons stated earlier. The criterion we want to define is composed of two central educational concepts, namely, the child's becoming a person and the education given by the parents (qua caretakers). In keeping with the condition that the criterion should be defined semi-strictly, these concepts must be explicated, because the concepts 'becoming a person' and 'education' are too vague. In the explication of these concepts, the sketched conditions must be taken into account.

We define a person as a human being who is able to act adequately. Action has to be at least minimally rational, minimally moral and minimally authentic in order to call it adequate.

Minimal rationality can be defined as the cognitive skills by which the person is able to act in daily life. There are four conditions necessary:¹¹ a. she must be able to interpret reality realistically. This means that she has an eye for the characteristics of the situation and is not driven towards one goal by fears or delusions; b. she must be able to weigh the pro's and con's of the alternatives on the basis of her interpretation of reality; c. she must be able to make a decision among the alternatives based on her thoughts and her interpretation of reality; d. she must be able to act consistently with her decisions.

We can say that a person is *minimally moral* if he follows minimal moral rules and if he either feels obliged to do this or he follows these rules out of sympathy for others. Minimal or basic moral rules are rules that are of such importance to every member of society that they can be considered as definitions of society. Examples of these rules are those concerning care of the young, rules of honesty and those that forbid cruelty and aggression.¹² Given social life, these rules must be followed.

It is possible to discern several aspects of *minimal authenticity*.¹³ First, it is a necessary condition that a person knows herself, that she is aware of herself. Her self-knowledge can be at a low explicit level, it can be vague and incomplete. Minimal authenticity is compatible with relatively unthinking compliance with motives, interests, etc. which have been socially transmitted.¹⁴ Also, the minimal person's self-awareness can be of a fairly low level. Second, and what is indeed the crux of authenticity, a person's action is authentic if it corresponds with the constituting self. This means that the person must be true to herself in what she does or says. This implies as a third aspect that an authentic person stands for her ideas and actions, that she can put her signature to them. Being able to act authentically, even in a minimal way, implies that the person has acquired a certain level of self-respect and self-esteem.

Summarizing, the criterion we propose is: Help should be imposed if the child's right to develop into a minimally rational, minimally moral or minimally authentic person is violated by her parents. It is important to underline the link between parental education and the consequences for the child's becoming a minimal person. It must be possible to attribute the inabilities in rational, moral and authentic functioning to the education received. It is not necessary, though, that we be able to connect distinctive destructive educational actions with the consequences for each of the domains distinguished.

Does this criterion meet the conditions we have stated at the beginning of this chapter? We think we have defined a criterion in which a minimal educational standard is described, which is not tradition-bound, and which is defined semi-strictly. The most interesting point in this respect is whether we

can claim that the child is being harmed, or put differently, whether the characteristics of adequate action represent the interests of the child.

To become a minimally rational person is of fundamental importance to the child. Minimal rationality is a necessary condition to realize our life-plans, to be able to live an independent life in our society. That is, it is a necessary condition in order to become aware of one's desires and aversions and to be able to realize them. Given these facts, it is rather obvious that becoming a minimally rational person is a fundamental or valid interest of the child.

The importance of minimal morality is normally thought to be attached to the interests of (the members of) society, not to those of the child. We claim, however, that it is in the child's interest to become a minimally moral person, because of a person's fundamental interest in being related to other persons. Not only will the promotion of the well-being of others have positive consequences for her own well-being, but her well-being will be damaged exceedingly if she were to be expelled from her community. Therefore, in becoming a minimally moral person, the child will be better off than in being non-moral or immoral. Having basic moral principles that will guide her, she will have less or no difficulty in acting as a minimally moral person who will be respected by others and will act in favour of herself.¹⁵

Being (minimally) authentic is also in the child's interest. It is in a (potential) person's interest that she have self-respect and self-esteem and be able to act according to her constitutional self. According to Rawls, self-respect is a primary good, because without that nothing may seem worth doing. "All desire and activity becomes empty and vain, and we sink into apathy and cynicism."¹⁶ This gives us an extra reason to claim that children have a right to become self-respecting persons, for which they have to become authentic.

JUSTIFICATION OF THE PROPOSAL

The justification of the proposed criterion focuses on the weighing of the rights or interests of the parties concerned. The easiest and least complex way would be to think of it as a conflict between a right of the parent and a right of the child, accepting the often-heard claim that the right of the parent to take care of the child is dependent on the developmental right of the child.¹⁷ In this case the parents' right is interpreted as an enabling right: they have the right only by virtue of the fact that they have the duty to take care of the child. The child's welfare is paramount, so if the parents violate the right of the child, they lose their right. Although we think this is a sound argument, it is too simple to consider it as the complete answer. It is just one aspect of the argument. It would be more correct to argue that the parents' right is not only dependent on the right of the child, but that it is primarily based on their valid interest in taking care of the child they have procreated.¹⁸ This valid interest leads to a freedom from intervention to exercise their right, making it necessary to question whether the right of the child per definition overrides the right of the parent.

There are several ways to defend the overridingness of the child's right. We will use two methods, namely, Rawls' original position¹⁹ and Hare's method of weighing the interests or preferences of all concerned.²⁰ In weighing the interests of the parents and children, the scale tips in favour of the child. The intrusiveness of intervention in the family is less damaging to the parents compared to the negative influence of mis-education in the child's becoming a person. Besides, the positive effects of help on the child override the negative effects of intervention on the parents. Not only the parents' and child's interests but the interests of society are to be considered in the process of weighing. This may seem a perilous statement. But this is not necessarily so, because it is fully dependent on the way in which this interest is interpreted. If society's interest is defined in terms of negative basic moral rules — for instance, the rules not to kill, not to harm other people, nor to interfere with their freedom unless justified — then we are less reluctant to justify intervention in the family when parents educate their children to break these rules.

Using Rawls' method of the original position and the veil of ignorance, it is possible to defend a claim that the criterion people in the original position would choose is similar to the one we have proposed. Imagining oneself in the situation of the parents and the child (since one cannot be sure which position one will have), and following the maximin rule, one will choose among possible criteria like an optimal education for the child or complete autonomy of the parents, a criterion that assures a minimal, though sufficient level of education and care.

We have stated that the child has the right to become a person. The only justification we have given so far is that the described characteristics are interests of the child. Though this is a necessary condition for 'rights',²¹ it is not the only one. The other necessary conditions are: a) the interest involved is a valid claim, which implies that it must be something reasonable that is defensible as a just claim in relation to claims by others, or something that is perceived as a fundamental claim; b) it must be something claimable, that is, it must be something that can be influenced by the right-holder or by the duty-bearer. If something is given by nature or given by chance and cannot be influenced, one cannot have a right to that.

We do think that it is defensible to state that the child has a *right* to become a person. Becoming a person is not just a matter of natural growth, but requires human effort. Of course, some aspects are more or less given by nature, for instance the child's temper and his physical health, but even these are in a way open to parental influence. The development of the described characteristics especially is heavily influenced by (parental) education. In arguing that the child's interest overrides that of the parents, we have at the same time justified the claim that this interest is fundamental and that the claim is valid.

¹ J.E. Doek, "Ondertoezichtstelling en het belang van het kind: een toverformule in het kwadraat?" in *Met het oog op het belang van het kind*, ed. A. van der Linden en P. Vlaardingerbroek (Deventer: Kluwer, 1988), 97-107.

² In Holland the professionals who work academically and practically on educational problems in the family as well as at school are called special pedagogues.

³ Wiardacommissie, *Jeugdbeschermingsrecht* (Den Haag, 1971).

⁴ M. Rood-de Boer, *Evolutie van een rechtsbegrip, "Het belang van het kind"* (Arnhem: Gouda Quint, 1984), 24.

⁵ S.N. Katz, *When Parents Fail* (Boston: Beacon Press, 1971), 145.

⁶ A. Morris, G. Giller, E. Schwed and H. Geach, *Justice for Children* (London, 1980), 132.

⁷ See, for example N. McCormick, "Children's Rights: A Test-Case for Theories of Rights," in *Legal Right and Social Democracy*, ed. N. McCormick (Oxford: Clarendon Press, 1982), 154-66.

⁸ See, for example: H. Rodham, "Children under the Law," *Harvard Educational Review* 43 (1973): 487-514. Also, C.A. Wringe, *Children's Rights. A Philosophical Study* (London: Routledge and Kegan Paul, 1981). Also, J.M. Eekelaar, "The Emergence of Children's Rights," *Oxford Journal of Legal Studies* 6 (1986): 161-82.

⁹ J. Eekelaar and R. Dingwall, *Child Care Law. A Practical Guide to the Children Act 1989* (London: Routledge, 1990), 103.

¹⁰ G.B. Melton and R.A. Thompson, "Legislative approaches to Psychological Maltreatment: A Social Policy Analysis," in *Psychological Maltreatment of Children and Youth*, ed. M.R. Brassard, R. Germain and S.N. Hart (New York: Pergamon, 1987), 205.

¹¹ See, for example, C. Cherniak, *Minimal Rationality* (Cambridge: The MIT Press, 1986), 3-27. Also, R. S. Peters, "Freedom and the Development of the Free Man," in *Educational Judgements*, ed. J.F. Doyle (London: Routledge and Kegan Paul, 1973), 119-41.

¹² R.S. Peters, *Moral Development and Moral Education* (London: Allen & Unwin, 1981), 65.

¹³ See, for example M. Bonnett, "Authenticity and Education," *Journal of Philosophy of Education* 12 (1978): 51-61. Also, O.F. Bollnow, *Wesen und Wandel der Tugenden* (Frankfurt: Ullstein Materialien, 1981), 135-54. Also, D.E. Cooper, *Authenticity and Learning* (London: Routledge and Kegan Paul, 1983).

¹⁴ M. Bonnett, "Authenticity and Education," 57.

¹⁵ See for example, P. Foot, "Moral Beliefs," *Theories of Ethics*, ed. P. Foot (Oxford: Oxford University Press, 1979). Also, R.M. Hare, *Moral Thinking* (Oxford: Clarendon Press, 1981), 190-99.

¹⁶ *Theory of Justice* (Oxford: Oxford University Press, 1989), 440.

¹⁷ See, for example, P. Hobson, "Some Reflections on Parents' Rights in the Upbringing of Their Children," *Journal of Philosophy of Education* 18 (1984): 63-74. Also, E. Page, "Parental Rights," *Journal of Applied Philosophy* 2 (1984): 187-203.

¹⁸ D. Bridges, "Non-paternalistic arguments in support of parents' rights," *Journal of Philosophy of Education* 18 (1984): 55-61.

¹⁹ *Theory of Justice*, 118-95.

²⁰ *Moral Thinking*, 87-147.

²¹ See for example, N. McCormick, "Children's Rights." Also, J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1989), 166.

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