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Child Rights: The Movement, International Law, and Opposition

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FROM THE EDITORIAL INTRODUCTION BY CLARK BUTLER, PAGES 1-3

The essays in this volume largely express ways in which the United Nations Convention on the Rights of the Child (CRC) has been interpreted and used by those who are active in disciplines other than international human rights law. A large body of literature shows that there is considerable precedent for non-legal, pedagogical, political, psychological, anthropological, and ethical reflection on the use of human rights law. Much of the moral conscience of humanity has been stored away in such law, and remains in that law ready to be retrieved by being interpreted as a statement of moral law. Historically, the concept of human rights arose as an ethical concept which preceded and inspired international human rights law. The ethical concept then led to a social, political, and pedagogical human rights movement, which only then led to the body of international human rights law as we know it. But the ethics and the movement never entirely dissolved into the law. Ethical human rights norms remain as the norms by which human rights law is justified, created, extended, qualified, or repealed. The movement remains the larger context of the law. It uses the law as a tool, and critically evaluates the law from various non-legal perspectives. Thus the essays in this volume largely fall into what has come to be known as critical philosophy of law.

Michael Freeman is an example of a scholar working in human rights studies not limited to the discipline of law. He reflects that “the lawyers who dominate human rights studies” sometimes limit themselves to the view that “human rights are what human rights law says they are.”ⁱ He notes that “the concept of human rights is, to a considerable extent, though not wholly, *legal*,” and that “the UN introduced the concept of human rights into international law and politics.”ⁱⁱ But the UN introduced human rights into international law because they already had an important place in moral philosophy. Richard Pierre Claude, founding editor of *Human Rights Quarterly*, writes that “human rights are no longer the solitary domain of lawyers, but increasingly the central agenda for action and inquiry for thinking people worldwide.”ⁱⁱⁱ Yet it is equally true that, because of international human rights law, human rights are no longer the solitary domain of ethicists.

The Convention on the Rights of the Child makes reference to itself as legally “binding” (Article 50). That is how the discipline of international law interprets the Convention, which should never be discounted. It is a strict constructionist textual interpretation of the wording of the law. But this formal interpretation of the legal text is only one way of interpreting it. If we take it as the only way of interpreting it, we discount the importance of complementing such an interpretation by contextual interpretation, specifically in the international social context in which the Convention is only weakly enforced. Thomas Hobbes and legal positivists generally have argued that text of the law is correctly interpreted contextually, sociologically, not merely textually. Wherever it is disobeyed with impunity, it is at most paper, not genuine law.

From this perspective, what is a true legal text depends on going beyond the text to see whether penalties actually exist for disobeying it. The Convention is admittedly legally binding in the heaven of international human rights law, but that legal heaven is still far from fully coming down to earth. As a matter of sociological fact, the Convention clearly fails to bind the behavior of many nations that have nonetheless ratified it. But the less the Convention is able to justify itself as enforceable law, the greater the importance of shifting attention to its function as a pedagogical instrument and standard for further moral education.

We need to be clear, however, about what it means to say the CRC is “legally binding.” It does not mean that all ratifying nations are legally bound to legislate the children’s rights in the Convention as domestic law. It means, rather, that ratifying nations are legally bound to participate in the monitoring procedure spelled out in the Convention. They are legally bound to show that they are trying to legally implement children’s rights, to file reports on their success in implementing those rights, to be examined by the UN Child Rights Committee, and to receive recommendations from the Committee. They are not legally bound to follow the recommendations or to actually pass domestic legislation, however great the displeasure which the Committee may show toward such countries in future reports. States sometimes feel conflicting pressures from different governmental or nongovernmental agents of the world human rights movement, and sometimes have to make hard decisions and set their own budgetary priorities.

Yet even in this weaker sense of a “legally binding” human rights convention, the CRC fails to consistently bind in fact the action of ratifying nations that fail to submit reports in the required time frames, that submit frivolous or unresponsive reports, or that do not seriously attempt to follow the Committee’s recommendations. No punitive actions beyond shaming and blaming exist to enforce compliance with what nations have legally bound themselves to do. The Committee issues recommendations, but the CRC regime provides for no court empowered to issue legally binding verdicts. It may be difficult for the Committee to judge whether a nation has made serious efforts. In part this is because the Child Rights Committee can more easily verify concrete external governmental actions than the inner commitment of government office holders. And it may be difficult for the Committee to judge whether a government is justified in claiming it must limit funding for the promotion of children’s rights in favor of a higher level of funding for what it says is the more urgent promotion of other human rights. Human rights are said to be indivisible, not standing in a hierarchical order of priority. Yet actions on behalf of one right may be placed in a higher or lower level of priority than another right, depending on what is most urgent given the current situation of the nation.

Part One of the volume explores ways in which the global children’s rights movement [including educators, social scientists, child psychologists] has positively interpreted and used the Convention on the Rights of the Child.

ⁱMichael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge, UK, and Malden, MA: Polity 2002), pp. 9-10.

ⁱⁱ*Ibid.*, p. 4.

ⁱⁱⁱRichard Pierre Claude, “Michael Freeman, *Human Rights: An Interdisciplinary Approach*,” *Human Rights Quarterly*, vol. 25, no. 2 (2003), pp. 563-566.