RIGHTS, CHILDREN'S RIGHTS AND COMPULSORY EDUCATION

BY

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To Dr. W.M. Humes

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I stayed in the student union on the first day I arrived at Glasgow in 1986. For various reasons, I had to converse with a member of staff in the union. The poor staff member patiently tried his best to make himself understood at the beginning, but finally failed to do so. Annoyed by my poor English, he suggested that I might stay in Hong Kong to get my degree. I was a little stunned by his straightforwardness, and could only reply that I came from Taiwan not Hong Kong. I tell this story not because I want to let the reader know how frank a Scot can be but how much help I needed and subsequently received during the process of writing this thesis. I wish to offer thanks to the following people in the Department of Education, Glasgow University, for their help:

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CONTENTS

SUMMARY

The ideas of children's rights, children's right to education and compulsory education are widely accepted nowadays, if only in general terms. This thesis is concerned to explore and offer possible reasons for the acceptance of these ideas, and, particularly, to clarify the relation between the ideas of "children's right to education" and "compulsory education".

First, however, it is necessary to consider the general features of rights-talk, on the grounds that the denotations and connotations of rights-talk have some significant bearings on the central issues of the thesis. Thereafter, the emphasis is shifted to the question of children's rights. Certain writers' theories - namely, Hobbes', Mill's and Hart's - were once assumed to be contradictory to the idea of children's rights, but it is argued that these writers' theories have been misunderstood.

Apart from clarifying these writers' theories in relation to children's rights, the thrust of this thesis is to offer a convincing justification for the idea of children's rights in general, and children's right to education in particular. It is argued that the idea of children's rights is rationally acceptable and practically necessary in maintaining satisfactory relationships between children and other parties for people who are rational, self-interested, just and benevolent. It is also argued that children's right to education is justifiable on the grounds that it is an essential good for both children and society as a whole. The issue of children's right to education is tackled within the framework of liberal democracy; hence the form of education proposed is also geared to the cultivation of persons who can play a part in a liberal democracy. The issue of compulsory education is discussed. It is argued that compulsory education can be justified and that its justification is mainly based on paternalism and children's obligation to undertake education.

In the concluding chapter, it is argued that children's right to education

can indeed be used to justify compulsory education, but this line of reasoning should be based on paternalism, which in turn should be rights-based. The thesis finally reaches the conclusion that the option-rights tradition and the claim that rights-talk is not self-referring should be rejected.

INTRODUCTION

It is common for us to hold certain ideas without fully understanding the reasons why. It is also not unusual for us to perform certain actions without knowing exactly why we do so. Even if we do have reasons for holding certain ideas or performing certain actions, they may be ambiguously construed, ideologically biased, internally self-contradictory, or logically inconsistent. And even if the reasons for holding certain ideas or performing certain actions are clear, rational, reasonable, consistent, and free of self-contradiction, there is always a possibility that we may find other reasons which are more appealing to us than the reasons we currently maintain.

The ideas that children have rights, that children have a right to education, and that children should be compelled to receive education have for sometime been taken for granted by many adults in Western societies. And these ideas have also been invoked to support various campaigns or demands for children's welfare or children's freedom. Moreover, these ideas have actually been embodied in, or manifested by, various practical measures. But, as has been suggested by the opening paragraph, it is quite possible for people to endorse these ideas or practical measures without fully understanding the reasons why. And even if they can spell out reasons for subscribing to these ideas and practical measures, their reasons may be ambiguous, inconsistent, unconvincing, or unpersuasive. Further, even if their reasons are clear, consistent, convincing and persuasive, it is still possible to find other reasons more appealing than the ones currently held.

One of the principal purposes of this thesis is, given the context just described, to enquire into the possible reasons why the idea and practice of children's rights is widely accepted and adopted. This enquiry is conducted through an investigation of arguments that have been used by a number of writers to support the idea and practice of children's rights. After this

enquiry, we then can decide whether arguments currently used are satisfactory or not. If they are not satisfactory it will then be necessary to go on to ask whether it is possible to develop a more convincing case.

It would be possible to carry out an empirical investigation to uncover reasons which are commonly used in support of the idea and practice of children's rights. And after this investigation we could then proceed with a philosophical evaluation to see whether currently held reasons are persuasive or not. Nevertheless, an empirical approach is not the only or necessarily the best way of proceeding. There are other options. The alternative that this thesis takes is, as has been indicated, to reveal and analyze arguments that have been used by writers in support of the idea and practice of children's rights. The reason for adopting this approach rather than an empirical one is that arguments provided or revealed by writers are often reflections of deep-rooted ideas or practices in society at large. And, most notably, they are usually put in a refined and systematic way, which is helpful in clarifying the issues at stake. However, it should be noted that arguments provided by writers, as far as the issue of children's rights is concerned, do not stop at only reflecting deep-rooted ideas and practices. They also strengthen people's convictions supporting the ideas and practices concerned. Given this understanding, discovering and analyzing what these arguments are is not very different from understanding what ordinary people may think regarding the issue. Thus, we can take a different approach and still reach the same aim, namely uncovering widely held assumptions about children's rights.

In seeking to understand the possible reasons for endorsing the idea of children's rights, the first obstacle we come across is the notion of "rights". People who campaign for children's rights, or who use the term "children's rights", may know very little about the characteristics of rights-talk. It may be the case that for practical purposes they do not need to know. Without knowing the characteristics of rights-talk, they may still conduct their campaigns successfully or get their messages across. From an intellectual point of view, however, this is not satisfactory. It

can be assumed that the term "rights" has its specific connotations and denotations. These are by no means fixed. They are subject to change. But it can still be suggested that unless the currently understood connotations and denotations of the term "rights" are under serious challenge, it would be better to utilize this term according to its received usage. If not, it would be difficult to make our ideas clear and would hamper our communication with other people. In order to make sure what the term "children's rights" may imply it is necessary to know in the first place the specific connotations and denotations of the term "rights". For it is supposed in this thesis that these connotations and denotations have significant bearings on the notion of children's rights simply because children's rights are a particular case of rights in general. Based on this recognition, the preliminary stage of tackling the issue of children's rights is to understand what the specific connotations and denotations of "rights" are. The principal concern in Chapter One of this thesis is then to explain the characteristic of rights-talk.

Chapters Two and Three of this thesis are concerned with the issue of children's rights. Although the idea of children's rights is now taken as a received idea, this was not the case in the past. The reason why this idea was previously not popular is explained briefly at the beginning of Chapter Two. The main emphasis of Chapter Two is concerned with several writers' theories in relation to the idea of children's rights. The idea of children's rights - like other major moral, political and social ideas - are associated with influential figures, such as Hobbes, Locke, Rousseau, and John Stuart Mill. Some writers' theories support the idea of children's rights. Others can, however, be used to reject children's rights. It is usually assumed that there is no place for the idea of children's rights in Hobbes' and Mill's theories, and that H.L.A. Hart's will theory of rights (which claims that the right-holder's will or choice regarding the duty-bearer's actions is the essence of rights) does not recognize the idea of children's rights. It will be argued that these three writers' theories are misunderstood. It will be argued that the idea of children's rights can indeed be found in Hobbes' and Mill's theories; and that this idea is actually not rejected by Hart's will

theory of rights. Technically, Chapter Two paves the way for Chapter Three, in which the positive arguments supporting children's rights will be discussed and developed.

Chapter Three is about the justification of children's rights. As has been suggested above, there can be different reasons for supporting the idea of children's rights. In the first two parts, a traditional justification and a Rawlsian justification for children's rights are presented. But it is argued that neither the traditional justification nor the Rawlsian justification is satisfactory. Although they are presented as reasons for supporting the idea of children's rights, they are not good reasons. Given their failure to be persuasive, the final part of Chapter Three is aimed at providing a more convincing justification for the idea of children's rights.

The focal issue of Chapter Four is children's right to education. What Chapter Three does is simply to show that the idea of children's rights can be justified. The justification of children's rights in general does not justify children's particular right to education. The reason for choosing to focus on the issue of children's right to education rather than others is that education, given the context of a liberal democracy; is essential not only for children but also for other members of society and indeed society as a whole. But as "education" can be expressed in different forms of activity, based on different ideologies or theories, and different forms of educational activity can have different contents and aims, it is then necessary to identify what sort of educational activity is under consideration. Thus, the task of this thesis is not limited to the cognitive understanding of why we regard the idea of children's rights as a received idea; it is also a political or social task in terms of advocating a specific form of education that children have a right to. The second half of Chapter Four is devoted to the justification of children's right to the specific form of education advocated in the previous section. It is argued that it is for the good of children, parents, other members of society, and society as a whole that children's right to education can be justified.

Chapter Five is concerned with whether the education advocated in Chapter Four should be compulsorily imposed on children. Mill's ideas are relied on in arguing that compulsory education (in its specific form) is justifiable. It is pointed out that compulsory measures are necessary for liberal democratic societies, and the imposition of compulsory education is compatible with other measures of liberal democracies. Moreover, it is argued that the paternalistic argument in general (the doctrine which claims that it is for the interest of children that their freedom can be interfered with) can justify compulsory education. Apart from paternalistic arguments, the justification of compulsory education can also be based on children's obligation to receive education. In the second half of this chapter, cultural conservatism and deschooling are considered as two doctrines which oppose the idea of compulsory education. In order to consolidate the idea that compulsory education is acceptable, objections are raised against these two doctrines.

In the short concluding chapter, the relation between children's right to education and compulsory education/schooling will be clarified. It will be argued that children's right to education can be taken as a reason for compelling children to receive education, on the grounds that children's right to education is too essential for children to decide for themselves whether they should exercise it or not. Finally, some important implications for theories of rights and claims concerning the basic characteristics of rights-talk will be pointed out after the acceptance that compulsory education can be justifed by the idea of children's right to education.

Taken as a whole, this thesis attempts to accomplish several tasks. Firstly, it is hoped that it will clarify what the term "rights" refers to. Secondly, it tries to investigate why the idea of children's rights can be accepted. Thirdly, it endeavours to work out a justification for children's rights. Fourthly, it undertakes to advocate a specific form of education and argues that children have a right to this education. Fifthly, it argues that children can, and should, be compelled to receive the education advocated,

and the reason for compulsory education is mainly based on paternalism and children's duty to receive education. Admittedly, there are some important issues left untouched. These include a number of important practical questions. When should compulsory education start? For how long should the compulsory education advocated be imposed? What sort of role should the state play concerning compulsory education? These issues are certainly worth tackling. But they can be regarded as "second order" questions, once the primary task of conceptual clarification has taken place.

CHAPTER ONE

TOWARDS AN UNDERSTANDING OF RIGHTS-TALK

"When . . . you employ such a word as *right*, a cloud, and that of black hue overshadows the whole field."

Bentham
Securities Against Misrule

Rights-talk has already become part of our daily discourse. Legislators (or rulers) use it in defining the relationship between the state and the individual; social, political and moral theorists invoke it to prescribe human relationships and the ideal society; people who care for animals take it to regulate the relations of animals and human beings; ordinary people employ it to assert their independence or interests; philanthropists wield it to initiate charities. . . . There is, however, one question which frequently crops up given that the word "rights" is widely and heavily used - what does the word "rights" mean? Or, to what does the word "rights" refer when people use it in their discourses? It is this question with which the first chapter of this thesis is concerned.

This chapter consists of four sections. The first section looks at the complexity of rights-talk. The second section sketches the various attempts to define "rights" in a simple and informative way and points out that each is bound to fail in terms of providing a general picture of rights. The third section examines the work of several theorists concerning a general picture of rights-talk. The final section determines the meaning of the word "rights" in this thesis in the light of what has been said in the first three sections.

1. THE COMPLEXITY OF THE LANGUAGE OF RIGHTS

The single word "rights" is a complicated one for many writers.(1) This complexity derives from several sources. Firstly, the term "rights" is not ordinarily used with precise meaning. This criticism can be applied not only to ordinary people, politicians, and human rights advocates, but also to some jurists, judges, and philosophers. In effect, the word "rights" has been given different meanings by different persons or different meanings by the same person in different contexts.(2) Thus, the same word "right", according to the American jurist Hohfeld, can be used in legal contexts to indicate "claim", "privilege" (liberty), "power", "immunity", and each of them has its specific correlative and opposite.(3) It is no wonder that. the use of the word "rights" has become very perplexing.

The second source of this complexity comes from the fact that rights-talk covers both legal rights and moral rights. Originally, the term "rights" was used only as a legal notion, but this boundary did not last very long and it was soon stretched so as to include certain things that cannot be tackled in a legal context but need to be tackled in a moral context.(4) This extension from a legal notion to a moral notion complicates the usage and the content of the language of rights. It might be worth mentioning here that many theorists have been opposed to this extension. Among others, Bentham, Austin, Hohfeld, Lamont, Gregory, Young and Frey are especially notable for their hostility to the idea of moral rights.(5) However, it cannot be ignored that the idea of moral rights, or its sub-division human rights(6), has been broadly accepted and utilized by ordinary people, philosophers and jurists. And given that moral rights or human rights have been widely regarded as integral to discussions about "the morally appropriate way of treating man and organizing society"(7), it will not be improper for us to treat moral rights as a ramification of "rights" in general. Unfortunately, this inclusion has some side-effects. As legal rights and moral rights have different grounds and are protected by different sanctions, they therefore can be defined in different terms. As a result, as pointed out by Acton, it seems to make sense to talk of a legal right that is morally wrong or a

moral right being violated by a conscienceless man with the support of public opinion.(8) Suffice it to say, this awkward situation results from the fact that the same word "rights" has been used to refer to different things regarding what ought to be done and what is commanded.(9)

Thirdly, another factor that complicates the language of rights is that it encapsulates some categorically different sets of rights. Leaving the entanglement of legal rights and moral rights aside, according to Macpherson there are roughly three kinds of rights. They are: civil rights, political rights, economic and social rights. Civil rights include freedom of speech and publication, freedom of association, freedom of religion, freedom of movement, freedom from arbitrary arrest and imprisonment etc. Political rights are mainly about the right to have a voice, directly and indirectly, in the government of the country. Economic and social rights cover the right to work, the right to equal pay, the right to social security, the right to an income consistent with a life of human dignity, the right to leisure, the right to education etc. Concerning the relationship between the individual and the state, civil rights are rights **against** the state in the sense that there are individual rights or liberties that the state should not invade. Political rights are rights to a voice **in** the control of the state. By contrast, economic and social rights are plainly claims for benefits to be provided **by** the state.(10) Apart from these differences, civil rights and political rights can practically be translated into positive rights which are supported by positive law and hence can be actually enjoyed by the rights-holder or enforced by the state; in comparison, it will be difficult, if not impossible, to transform the idea of economic and social rights into positive rights by analogous political and legal actions.(11) Evidently, although there are great differences between these rights, they are all covered by the same name. This conflation inevitably adds to the difficulty of identifying the character of "rights".

Fourthly, the complexity of the language of rights is rooted in the historical development of the concept of rights. From a historical point of view, there are two traditions which interpret the concept of rights in two

different ways. Based on Golding's illustration, one tradition is the tradition of natural rights, which started in the middle ages and prevailed in the seventeenth century and eighteenth century. In this tradition, the concept of rights is set in terms of individual sovereignty, power, faculty, capacity and option. To possess rights in this tradition means that the right-holder is normally free to act on the basis of his own choices and that the right-holder has some kind of rightful control over his own and other people's actions. Rights in this tradition can be named "option rights". Another tradition, which starts earlier than the natural rights tradition, defines "rights" in terms of general goods or justice. This is the welfare rights tradition. Rights, in this tradition, are derived from "claims to the goods of life which are conferred by the social ideal of a community." To possess rights in this tradition means that the right-holder can have entitlements to goods, no matter whether the right-holder is capable of getting the goods in question or practically having some kind of rightful control over himself as well as other people.(12) It is clear that these two traditions are encapsulated in two different concepts and there is no simple way to effect a compromise. From this, it can be said that historically the language of rights contains two different elements which bring out different connotations and consequences.

Finally, the complexity of the language of rights rests not only on its linguistic and logical ambiguity but also on its contents, which can be interpreted differently. This point can be supported by Putnam's illustration of the right to life. According to Putnam, there is hardly any agreement on the details of this right, even though the right to life has a very central role in rights-talk. Thus, for Hobbes, the right to life means the right to self-defence and is an inalienable right. For some other writers, the right to life means not only that the right-holder has a right to life but that other people, whether the state or other individuals, should have certain positive duties towards the right-holder. Nevertheless, in some writers' schemes the right to life is only a *prima facie* right; that is, it is a right which can be overridden or forfeited if and only if a proper justification can be provided. However, a consensus over what is a proper

justification for taking a human life has not yet been achieved.(13) The message from this example is quite clear. Although the idea of a specific right can be very simple, its contents can be very complicated.

From the fact that the word "rights" has different connotations as well as different references, and can be used in different contexts, two points can be made here. First, it may be wrong for us to ask either "What is a right?" or "What are rights?". The proper questions may be: What is a moral right? What is a legal right? What is an option right? What is a welfare right? Or, what is a right in the sense of claim, privilege (liberty), power, immunity? Or, what is a political right? What is a civil right? What is an economic right? What is a social right? And so on. Second, since the language of rights is so complicated and it may not be sensible to ask "What is a right?", it then can be suggested that it is impossible to search for a synonym of "rights" or to define "rights" in a very simple and informative way. These attempts are, according to Wringe, at best unsatisfactory, and at worst "a most fertile source of confusion and conflict".(14)

Given an understanding of the complexity of rights-talk, it is reasonable to say that the simple kind of definition (the traditional mode of definition), or the attempt to explain "rights" by a single term, cannot reveal a general picture of "rights"; it would, however, be wrong to say that those definitions which have been given in the simple way count for nothing. On the contrary, although these definitions are ultimately bound to fail, each of them nevertheless is like an irregularly shaped piece of a jigsaw puzzle. A single piece of a jigsaw puzzle can never display the whole picture; however, it can be critical in helping us to see the whole picture. It is for this reason that a review of those definitions or explanations of "rights" will be given in the following section.

2. A REVIEW OF DEFINITIONS OF RIGHTS

2.1 Rights and Claims

It is not uncommon for theorists to explain "rights" in terms of "claims". Mill in Utilitarianism says: "When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion."(15) Ritchie, for example, defines a "right" (referring to both legal rights and moral rights) as "the claim of an individual upon others recognized by society, irrespective of its recognition by the state."(16) Ryan and Boland, explaining the Catholic view of rights, state: "A right in the moral sense of the term may be defined as an inviolable moral claim to some general good."(17) Feinberg and Haksar are recent writers who also tend to explain rights in terms of claims, or valid claims.(18)

Feinberg is very clear in his mind that to have a formal definition of rights in terms of claims will not get us very far. He therefore declares that he would rather use the idea of claims in informal elucidation of the idea of rights. His concrete undertaking is then to "concentrate on the whole activity of claiming, which is public, familiar, and open to our observation, rather than on its upshot alone."(19) As a result, by observing the activity of claiming, which for Feinberg is a rule-governed activity, he first pinpoints the fact that there is a difference between rights and claims. He says, "Having a claim to X is not the same as having a right to X, but is rather having a case of at least minimal possibility that one has a right to X, a case that does establish a right, not to X, but to a fair hearing and consideration."(20) In this respect, Feinberg suggests that some claims can be stronger than others and therefore claims differ in degree. As to "rights", they are all justified claims, they are justified within a system of rules and hence no one right is more of a right than another.(21) Following this, Feinberg suggests that all rights are valid claims.(22) Hence, the statement, "A has a legal right", can be interpreted as, "A has a valid claim, the official recognition of his claim is called for by the governing rules";

and the statement, "A has a moral right", can then be interpreted as, "A has a valid claim, the recognition of which is called for by moral principles, or the principles of an enlightened conscience."(23) Finally, however, Feinberg gives a definition of a right: "To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles."(24)

Haksar's endeavour is in effect similar to Feinberg's. He, like Feinberg, indicates first that he does not want to provide a definition of "right"; what he would like to do is only to search for the character that rights in different areas of the law have in common.(25) The central character that rights share is, Haksar says, "demand". In fact, in his work, "demand" is another term for "claim". In his own words, he says, ". . . talk of rights is linked with demands, or claims, or complaints, that can validly be made by the person who has the right, or by those who speak on his behalf." And, "When a person is not given what he has a right to, he has been wronged. And he (or someone acting on his behalf) is entitled to complain and censure the guilty party or parties (i.e. the party that has violated the relevant duty). Moreover, he can (validly) demand that he should be given what he has a right to have."(26)

Several remarks can be made about the relationship between "rights" and "claims". Firstly, on the linguistic level, the word "claims" can be used in two ways. On the one hand, "claims" in legal contexts as well as in daily usage can be used as equivalent to "rights".(27) So, the noun "claim" can be replaced by "right" in Feinberg's statement, "One might have a claim without even claiming that to which one is entitled, or without even knowing that one has the claim, for one might simply be ignorant of the fact that one is in a position to claim; or one might be unwilling to exploit that position for one reason or another."(28) It is also the case in Golding's statement: "I may claim what I have a claim to; omit to claim what I have a claim to; and I may claim that to which I have no claim."(29) On the other hand, the word "claims" sometimes is not used as equivalent to "rights" but as "something that is claimed". In this sense, "claims" are used in the

sense of "demands". So, following Golding, it can be said: "I can make claims to which I have no rights."

Secondly, with regard to the analysis of rights in terms of claims (demands), Feinberg is quite correct in pointing out how "rights" can be established from "claims" (demands); and when rights are violated, rights-holders can "stand up like men", "look others in the eye" and claim that something has to be done.(30) Haksar is also correct in echoing Feinberg on this issue. However, the weak point of this line of thinking is that neither Feinberg nor Haksar spells out how the situation appears when rights are functioning. They point out how rights can be formulated and the possible actions the rights-holder can take when his rights are violated, but they do not specify the circumstances when "rights" are possessed or enjoyed. That is why McCloskey argues that the notion of rights is not necessarily attached to "claims"; for the rights-holder can enjoy his rights without making claims on others at all. For example, McCloskey suggests, it can be said that "I may enjoy my club's facilities without claims on others."(31) Melden also says that "claim against others" does not necessarily go with the practice of rights. For it is not self-contradictory to say that "I have a right to special consideration from B, but it would be wrong for B to give me special consideration at this time."(32) Even Haksar admits that "when a person already has that which he has a right to have, it makes no sense for him to demand it."(33)

Thirdly, concerning the equation of rights and valid claims, it can be suggested that given the fact that "rights" are not necessarily attached to "claims" it is therefore not really sensible to identify rights with valid claims. Furthermore, the identification of the two can be misleading. For some rights are quite controversial - such as, the right to abortion or animal rights - and they may be supported by some people but rejected by others. So these rights can be valid claims for some; but for others, they are not. On the other hand, not all valid claims are rights. For example, in the case of "A has an appointment with B", it can be reasonable for A to say that "I have a valid claim on B in asking him to turn up at the appointed

time." But it may be too strong to say that "I have a right as regards B in asking him to turn up at the appointed time."

To sum up. The word "claims" in legal contexts or even in its daily usage can be used as equivalent to "rights". But the understanding of "rights" will not be advanced in this case. In the case of "claims" as "demands", the relationship between rights and claims is mainly manifested during the process of the formulation of rights as well as when rights are violated. But when rights are functioning satisfactorily, there can be no place for "claims".

2.2 Rights and Duties (Obligations)*

The most common approach to understanding "rights" is to start from the language of duties or obligations. This is Bentham's and Austin's view. For Bentham, rights are established or granted by imposing obligations or by abstaining from imposing obligations. All rights, without exception, rest upon the idea of obligations as their necessary foundation. From this, "rights" can be divided into two categories. They are: rights existing from the absence of obligations (these are liberty-rights); and rights established by obligations (these are rights to service of others).(34) In all cases, Bentham would argue that the concept of rights will not be intelligible without an understanding of the concept of duties or obligations. Following Bentham, Austin also explains "rights" from the notion of obligations. Apart from making a distinction between negative obligation (to say A has a negative obligation is to say that A is commanded to forbear or abstain from performing certain actions) and positive obligation (to say A has a positive obligation is to say that A is commanded to do or perform certain actions), Austin also makes a distinction between relative obligation and absolute obligation. A relative obligation, such as obligation of reparation, is incumbent upon one party, and correlates with a right residing in another party; it implies, and is implied by, a right. By contrast, an absolute

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*The words "obligation" and "duty" are used interchangeably in this thesis.

obligation, such as obligation of charity, correlates with no rights; it neither implies nor is implied by a right.(35)

Several things need to be said about Bentham's and Austin's viewpoints. Most importantly, it should be kept in mind that Bentham's and Austin's viewpoints concern not **what a "right" is** but **what it is to have a right.**(36) This approach is notably different from the traditional mode of definition such as Ritchie's. It is therefore not true to say that Bentham and Austin try to define what a right is. Further, Bentham and Austin do not maintain that all obligations imply rights. Austin is quite clear about this. He unequivocally asserts that absolute obligations neither imply nor are implied by rights. Bentham also clearly maintains that rights are conferred only by obligations which generate benefits. Obligations do not correspond to rights unless they protect or serve rather than harm or threaten those they directly concern.(37) He especially indicates that two kinds of duties, self-regarding duties and barren duties (the duties that are not useful to anyone), are not related to rights.(38) Moreover, the concept of obligations or duties is not an atomistic concept which can be independent from other normative concepts in either Bentham's or Austin's theory. Bentham, for example, claims that "the notion of obligations is posterior to the notion of service".(39) Austin plainly puts the notion of obligations in a legal context, and connects it with the notion of command.(40) Hence, according to the Benthamite doctrine, in order to understand "rights", it is not enough to understand the notion of obligations only. It would be better to go further to enquire into the notion of "law", "utility", "service", "command", and so on.

Some writers, such as Brandt, Benn and Peters, go beyond the Benthamite doctrine and argue that the relationship between rights and duties is in effect closer than Bentham and Austin suppose. Their doctrine is usually called the correlativity theory.(41) A classic example can exemplify this doctrine:

> When Bernard owes Alvin ten dollars we have equal reason to ascribe a right to Alvin (to be paid ten dollars by Bernard) and an obligation

> to Bernard (to pay Alvin ten dollars), and whatever would falsify one description would likewise falsify the other. Neither the right nor the obligation can arise without the other. . . . Alvin's right and Bernard's obligation necessarily coexist, and a full statement of one logically implies a full statement of the other.(42)

In the light of this example, it is not difficult to understand why Brandt maintains that "the concept of right can be defined in terms of moral obligation plus certain nonethical concepts", and why Benn and Peters say that "the difference between rights and duties is only the difference between the active and the passive voice" and "rights and duties refer to the same normative relationship".(43) On this doctrine, it can even be suggested that all theories about duties are by implication theories about rights, and vice versa.(44)

After this brief exposition of the Benthamite position and the correlativity theory, a critique of these two positions can be made. Generally, the Benthamite position is more reasonable than the correlativity theory on the issue of the relationships between rights and duties. The Benthamite position is right in suggesting both that duties are not necessarily correlative with rights and that rights are not necessarily correlative with duties (for example, liberty-rights). But the Benthamite position is weak in claiming that the language of duties is the key to the understanding of rights-talk. These points need elaboration.

As has been shown, the correlativity doctrine can be sustained only under the condition that rights imply duties and duties imply rights. If one of these two pillars collapses, this doctrine will subsequently fall. Unfortunately, neither of these two pillars can be maintained. Duties do not necessarily imply rights. Bentham and Austin have already indicated that some duties or obligations are not correlative with rights. Feinberg also holds the view that not all duties imply rights. In his thorough analysis of the relationships between rights and duties, he especially singles out three kinds of duties - duties of status, duties of compelling appropriateness and duties of obedience - which are not necessarily

correlative with other people's rights.(45) Apart from Feinberg, Plamenatz, Acton, Mabbot, Campbell, and MacCormick also take a similar line.(46) However, it should be borne in mind that the collapse of the correlativity doctrine should not blind us to the fact that in some cases rights and duties do correlate; and hence the understanding of the concept of duties is very important in those cases.

However, as has been shown, rights do not necessarily imply duties. Bentham is quite clear in indicating that there are no corresponding duties to liberty-rights. On this point, Hohfeld also shows that some rights are not correlative with duties. In his scheme, the correlatives of privilege (liberty), power, and immunity are no-right, liability and disability respectively.(47) From this, it can therefore be suggested that some rights can be explained by notions other than duties. Lyons also provides an actual case that can be used to support Hohfeld's standpoint. Given the American context, Lyons points out, the constitutional right of free speech, as an immunity-right, correlates not with an obligation but a "disability". The assertion of this right only says that Congress is not empowered to enact certain laws that will violate this right. In Lyons' words:

> There may be some point in speaking of a Congressional "obligation" not to exceed one's legislative powers. . . . But this "obligation" would be a queer one, for the members of Congress are not subject to civil or criminal actions against them if they "breach" it by enacting unconstitutional laws. If they do this their actions could be described as "illegal" or "unlawful" only in the sense of "invalid".(48)

In fact, Lyons is not the only recent writer who explicitly indicates the point that some rights are not necessarily correlative with duties. Wollheim, MacCormick and Dworkin also provide some examples to strengthen this view. Wollheim asks the reader to imagine a legal context in which anyone has a right to keep what he finds. Supposing A and B come across a coin on the pavement at the same time. In this case, both A and B have a right to pick it up and keep it, though only one can do so. Hence, although A and B both have a right to pick the coin up, A has no duty to

allow B to get it, nor the other way round.(49) MacCormick cites Scottish legislation concerning intestate succession to demonstrate that the general principle "rights imply duties" is false. According to Section 2(1) of the Succession (Scotland) Act 1964 "(a) Where an intestate is survived by children, they shall have right to the whole of the intestate estate." MacCormick points out, ". . . whereas the right rests at the moment of the intestate's death, there is not at that moment an executor to bear a correlative duty."(50) In Dworkin's plan, there are two kinds of rights, namely, the strong sense of rights and the weak sense of rights. In the strong sense of rights, when someone has a right to do something it implies that it would be wrong for others to interfere with his doing it; in other words, there is always a duty corresponding to this right. In the weak sense of rights, we may say that someone has a right to do something yet it would not be wrong for someone else to interfere. In this sense, "rights" do not correlate with other people's duties. The example Dworkin gives is: "If our army capture an enemy soldier, we might say that the right thing for him to do is to try to escape, but it would not follow that it is wrong to try to stop him."(51) This statement can be translated into the language of rights and duties like this: a war prisoner has a right to escape, but it would not follow that his enemies have a duty correlative to his right to escape.

Apart from the point that rights are not necessarily correlative with other people's duties, some theorists, such as Raz, go further to argue that rights are logically prior to duties. In Raz's own words, "A right of one person is not a duty on another. It is the ground of a duty, a ground which. . . justifies holding that other person to have the duty."(52) It implies that to understand the concept of duties is not enough, for rights are something prior to duties. The understanding of the suprastructure of an entity does not suggest that the understanding of the infrastructure can automatically be achieved.

From the cases shown above, what emerges is that the relationships between rights and duties are more complex than might be first supposed.

It is very hard to deduce a simple and general formula to signify their relation such as the correlativists have tried to do. The implication of this failure, however, is that "rights" cannot be fully understood or defined in terms of duties; furthermore, some rights are better explained by language other than the language of duties or obligations.

Before concluding this section, it is worthwhile pointing out that even if the language of rights can be fully illuminated in terms of duties, this does not really take us very far. For it could still be argued that the language of duties is no less complicated than the language of rights. It is often assumed that the concept of duties is clearer or less difficult than the concept of rights. This assumption, however, is arguable.(53) The language of duties does emerge historically much earlier than the language of rights, but that is not a reason to say that the concept of duties is easier to tackle than "rights". As Waldron says, "Even in positive law, the concept of a duty is far from a straightforward concept."(54) However, for the sake of clarity, it is assumed here that the notion of "duty" or "obligation" refers to two things. First, it refers to some standard of behaviour which is regulated by either legal or moral principle, breach of which is wrong, either legally or morally. Second, it concerns something that one owes to others, whether it be person or any political institution like the state; duties in this context directly correlate with rights.(55)

To conclude. The whole enterprise of defining rights in terms of duties is notably different from the work that defines rights in terms of claims. The latter puts its emphasis on the analysis of the activity of the right-holder; the former pays attention to the relationship between the rights-holder and other people. From another angle, the latter tries to identify the essence of rights, the former is more concerned with describing what it is like to have "rights". With regard to the relationships between rights and duties, some rights, such as claim-rights, are directly and firmly correlated with other people's duties. Without a proper understanding of the concept of duties, these rights cannot be easily understood. However, some rights are not directly correlative with duties; they are correlative with other

normative concepts. Therefore, in order to understand these rights, normative concepts other than duties should also be introduced.

2.3 Rights and Entitlements

Another term which has often been used to identify the language of rights is "entitlement". McCloskey and Marshall are two exponents. McCloskey perceives the weakness of accounts of rights in terms of claims, powers, expectations, liberties; he therefore uses "entitlements" to explain "rights". In his view, moral rights, legal rights, social rights, institutional rights, and rights that figure in games are essentially entitlements of some sort. This conviction is mainly based on the assumption that the essential character of rights is right **to** rather than right **against**. Therefore, "I have a legal right to marry" can be translated as "I have a legal entitlement to marry" or "According to the law, I am entitled to marry." By parity of reasoning, there is no reason that other "rights" cannot be transformed into "entitlements".(56) Marshall, paralleling McCloskey, also sees the difficulty of explaining rights in terms of powers, claims, duties, and therefore asserts that, "A right, it would be safe to say, is obviously a form of entitlement arising out of moral, social, political, or legal rules." However, not as confident as McCloskey, Marshall immediately admits that this formulation conceals notorious difficulties about the relationship of entitlements to duties and rules.(57)

One of the criticisms of this position is that "entitlement" is at most a verbal synonym of "right" and as such the notion is not particularly illuminating or informative.(58) From this, it can also be suggested that the attempt to use entitlements to illuminate "rights" sheds little light over the whole issue of "rights". For even if we can translate a statement of rights into a statement of entitlements, it can still be asked: what does entitlement mean? This involves no more than shifting the issue of rights to the issue of entitlements. In fact, McCloskey is not unaware of this criticism, but his reply is not satisfactory. He does not directly confront it. All he says is: "My reply is that the whole discussion of this paper

spells out what is meant by an entitlement, and in such a way as to make this account of rights illuminating and informative."(59) It seems that McCloskey's definition is a combination of essential definition and contextual definition, which leaves a great space for the reader to exercise his imagination. Moreover, Wasserstrom suggests that "rights" are constitutive of the domain of entitlements.(60) In other words, rights are the ground on which entitlements can be claimed, not the synonym.

To sum up, the attempt to define rights in terms of entitlements is not a successful endeavour. It sheds little light on the issue of rights. If this approach is counted as a piece of the whole jigsaw puzzle of the general picture of rights, it at best constitutes blank background for the main picture.

2.4 Rights and Powers

Some writers define rights in terms of powers. This approach can be traced back to Hobbes and Spinoza.(61) Green's and Plamenatz's definitions can be taken as examples. Green's definition is: "A right is a power of acting for his own ends, - for what he conceives to be his good, - secured to an individual by the community, on the supposition that its exercise contributes to the good of the community."(62) One of Plamenatz's definitions of "rights" is: "A right is a power in the existence of which all rational beings ought to protect a creature, either because that exercise is itself good or else a means to what is good."(63)

It should be noted firstly that Green actually does not identify "rights" with "powers". What he tries to do is to explicate rights in terms of powers. For him, a right is not a brute power; a right is a power only under the condition that the right is supposed to be contributory to the good of the community. In other words, a right is a qualified power; the notion of "the common good" should always be involved in the explication of "rights" as "powers". As to Plamenatz's definition, he in his later work makes a self-criticism saying this definition is far from satisfactory. He points

out three weaknesses. Firstly, not all rights are powers; a person's right to the services of others can by no means be counted as a power. Secondly, not all powers are rights, the fact that a man can do something he wants does not mean he has the right to do the thing he wants. Thirdly, the word "power" is highly ambiguous as well. Plamenatz says that it is "not because it has several meanings but because it is not habitually so used by philosophers discussing rights that its meaning on any particular occasion is clear."(64) Besides Plamenatz's self-criticism, Benn and Peters claim that the language of rights expresses a normative relationship and prescribes how one person should behave in relation to another; by contrast, the language of powers is mainly a description of facts. To identify "powers" with "rights" is no different from identifying "is" with "ought", and this is fallacious.(65) Moreover, referring to Plamenatz's definition, McCloskey says, "A right is a moral authority which creates the right to the power which the creature ought to possess, rather than the power which the creature ought to possess, as Plamenatz's definition implies."(66) To be sure, McCloskey's explanation is not without problems, but he at least suggests that rights in general are the ground of powers and the two cannot be identified.(67)

Although the view that rights are powers cannot be sustained, the relationship between rights and powers is worth discussing. First of all, the notion that rights in general are the basis of powers has some important implications. It can imply that the language of rights is a kind of compass by which the direction of powers should be guided. For example, the statement "British children have a right to proper medical care" suggests in which direction and in which area children's parents or the community as a whole should exercise their powers. In other words, "powers" are like a dog that should be kept on a lead by its master "rights". On the other hand, rights are supposed to be supported by powers; if not, rights-talk will become merely empty rhetoric. For example, it would not be sensible to claim a right to a materially decent livelihood by Western standards in a materially poor country. From this, it can be suggested that rights-talk should be made relevant to the institutional and economic

structure of society. Actually, this view directly echoes Spinoza's position, summarized by Benn and Peters, that " there is no right where there is no power to secure the object of the right, the power arising from the exercise of a coercive sanction to enforce the correlative duty."(68)

On the whole, the attempt to define rights in terms of powers does not stand up to close scrutiny. "Power" is not the essence of "rights". But the language of rights will not be practically meaningful if it is not supported by power.

2.5 Rights and Liberties (Freedoms)*

One can hardly deny that "liberties" can be reckoned as "rights".(69) Some natural rights theorists claim that natural rights are in fact another term for "liberties". Hobbes says, for example, "The right of nature . . . is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto." And, "To *lay downe* a mans *Right* to any thing, is to *devest* himself of the *Liberty*...."(70)

From another direction, it can also be suggested that the language of rights can be translated into liberties or freedoms. This translation applies not only to active rights, such as the right to free speech, but to passive rights, such as the right to education. Franklin D. Roosevelt's "Four Freedoms" are a good example. Freedom of speech and worship can be treated as the right to free speech and the right to religion; freedom from want and fear are terms for welfare rights in general. Along this line, any specific right can be encapsulated in the language of liberty or freedom. Right to education can be translated roughly as freedom from ignorance and illiteracy; right to proper medical care can be translated as freedom from disease, and so on.

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*The words "liberty" and "freedom" are treated synonymously in this thesis.

Although the attempt to define "rights" in terms of liberties and freedoms is not without foundation, it is, however, problematic. Two points can be noted here. Firstly, as has been pointed out, there are two different traditions of the concept of rights. One is the natural rights tradition in which the choice or liberty of the rights-holder is the essential character of rights. The other explains "rights" in terms of general goods or justice in which rights have little to do with liberty. It is therefore clear that the attempt to define rights in terms of liberties can only cover one tradition. If we stick to this approach, we then will fail to recognize the fact that some rights are closely connected with the idea of general goods, which are formulated by or through the community, and hence are not related to the right-holder's liberties. Assuming that the two traditions of the concept of rights should not be ignored, we then can reject the definition which tries to define rights solely in terms of liberties. Secondly, there is the question of the translation from the language of rights to freedoms or liberties. In some cases, the human relationships projected by the language of rights can be different from the human relationships implied by the language of liberties or freedoms. For example, the claim of "a right to education" implies that education should be provided, or at least available to some extent, for the claimant; however, the claim of "a freedom from ignorance and illiteracy" only suggests that the claimant is entitled to achieve the state of being free from ignorance and illiteracy. Whether education should be provided is not entailed. In short, the language of liberties or freedoms does not exactly match the language of rights. It is therefore problematic to translate rights into liberties or freedoms.

However, on the other hand, the close connection between rights and liberties cannot be ignored. Historically, the language of rights plays an important role in the protection of freedom. This point can be seen in the Declaration of Rights which was made by the French National Assembly in 1791, and by the fact that so called civil rights are in fact various sorts of liberty. Furthermore, Raz argues that we may derive all kinds of individual liberty from the point that individuals have a right to personal autonomy.(71) Apart from that, the word "liberty" in its legal sense can be

used as "right". This can be seen in Bentham and Hohfeld's classification of rights which will be discussed in sections 3.1 and 3.2 of this chapter. Finally, there is a subtle and somewhat paradoxical relationship between rights and liberties. Bentham indirectly points out that the language of rights is to some extent established at the expense of liberty.(72) In some cases, rights-holders or their representative(s) have rightful control over the actions of other people; they will thus subsequently limit other people's liberty and eventually, as Dworkin has suggested, the consequence of the prevalence of the language of rights would lead to a decrease of personal liberties.(73)

2.6 Rights and Interests

The word "interests" is another term that has been used to define "rights". Salmond, for example, says that "a right is an interest recognised and protected by a rule of right".(74) MacCormick also holds the view that "having a right is having one's interests protected in certain ways by the imposition of (legal or moral) normative constraints on the acts and activities of other people with respect to the object of one's interests."(75)

The weakness of this attempt is that the relationship between "rights" and "interests" is not as tidy and straightforward as it is assumed to be; it is hence problematic to use "interests" to define "rights". It can be pointed out firstly that some rights are actually not in the interest of the right-holder. Raz and Haksar make this point fairly clear. Haksar gives an example. He says, "Take a system which gives the monarch a right to advise, and warn the prime minister. This right is set up for the common good, not for the good of the monarch; it is even conceivable that the monarch is worse off (from his personal point of view) with this right, since this right might bring him into political controversy."(76) Raz also says: "Though rights are based on the interests of the right-holders, an individual may have rights which it is against his interest to have. A person may have property which is more trouble than it is worth."(77)

Moreover, Raz indicates that some rights may exist because they serve the interests of other people rather than the right-holder.(78)

To deny the proposition that rights can be defined in terms of interests is, however, not to deny the possibly close relationship between rights-talk and the notion of "interests". What should be noted is that some interests of the individual are so essential and necessary that they should be encapsulated in the language of rights. For example, "the interest of being alive" is solid enough as a basis on which "the right to life" can be claimed. Even if some interests are not so important, they nevertheless can be relevant to the decision whether a right should be granted.(79) Nevertheless, the relationship between "rights" and "interests" still remains problematic. The notion of interests is highly controversial - a consensus over "what is an essential interest" has not been achieved yet. Further, the notion of interests in general is contingent upon changing conditions, which in turn make the language of rights unsettled. This may also be the reason why some rights can go against the rights-holder's interests.

3. TOWARDS A GENERAL PICTURE OF RIGHTS

From the preceding discussion, it is clear that the traditional mode of definition of rights or the attempt to explain rights by a single term is by no means wholly successful. In order to have a better idea about "rights", it is then necessary to move away from this approach and try other alternatives.

One alternative is to give a "better" definition of right, which is different from the traditional mode of definition. Plamenatz, for example, offers a new definition of rights, "A man (or an animal) has a right whenever other men ought not to prevent him doing what he wants or refuse him some service he asks for or needs."(80) However, this definition does not avoid the weakness that the traditional mode of definition suffers from; that is:

it cannot cover all kinds of rights. For example, it does not cover liberty-rights in competitive contexts like a war prisoner's right to escape. It can also be pointed out that Plamenatz's definition is not a strict sense of definition at all; it is at most a description. Apparently, what Plamenatz has done is not to identify the "essence" of rights but to describe what it is, or should be, to have a right.

Brandt also tries to avoid the traditional mode of definition and provides a "deep" definition of a moral right. He clearly sees the fundamental difference between legal rights and moral rights and maintains that a surface definition (another term for the traditional mode of definition) in terms of legal duties can be used to define legal rights, but a definition of a moral right must be put in the form of a deep definition. Brandt's "deep" definition - expressed in cumbersome prose - goes as follows:

> "X has a right to Y" is to mean: "It is *justified* for people in X's society to be strongly motivated, overridingly so normally and always when in conflict with concern for merely marginal benefits in a given case, and to disapprove others who are not so motivated, to enable X - always by refraining from interference, but when necessary also by cooperating substantially to bring about the opportunity, when appropriate by legal means - to do, have, or enjoy Y primarily because of the importance to people in X's situation of being able to do, have, or enjoy things like Y; *and* it is *justified* for X to feel resentment if he is hurt or deprived because of the failure of others to have this motivation, and for him to feel unashamed to protest, and for him to take reasonable steps to protest, calculated to encourage others to have the motivation to enable anyone in a similar situation to do, have, or enjoy things like Y."(81)

This definition seems to espouse the view that moral rights must be recognized by the society in question; if not, they cannot be counted as rights at all. As a matter of fact, from a historical point of view, some moral rights, such as the Jews' right to life in Nazi Germany, were not recognized by the majority of the society in question but could still be counted as moral rights. This suggests that some moral rights may be dependent upon moral principles which go beyond the boundary of a specific

society and are not restricted by the society in question. What is more, like Plamenatz's definition, it can be said that Brandt's deep definition is really a description of what it means for a man to have a moral right, rather than a definition in the strict sense. However, Brandt's merit is that he at least sees the need to define different rights separately. In this respect, his approach is praiseworthy.

The implication of Plamenatz's and Brandt's failure in defining "rights" or "moral rights" may lead to uncertainty about whether it is possible to give a definition of a "right" at all. On this issue, Wittgenstein's theory of language may provide some inspiration.

Wittgenstein does not directly tackle issues about rights. But the way he handles the idea of "games", "language-games", "reading", and "tools" clearly suggests that it is impossible for us to have a definition of a "right". To be more specific, in the case of "games", Wittgenstein claims explicitly that we cannot in fact provide a clear-cut definition of "games". Even if someone offers a clear-cut definition, Wittgenstein says that he will not accept it, for we cannot really find out anything that is common to all games.(82) But it can still be asked, why do we still have a general name "games" to cover so many characteristically different kinds of activity? Does it not mean that activities covered by the same name must have something in common and hence can be defined? Wittgenstein replies: if we examine all kinds of games, what we can find out is a complicated network of similarities overlapping and criss-crossing, sometimes overall similarities, sometimes similarities of detail.(83) From this, it can be inferred that it is the similarities (precisely, family resemblances) rather than the common character of all games that sustain the general name "games". By parity of reasoning, Wittgenstein's message is: different kinds of rights have certain similarities but do not share the same character; hence we have no certain way of defining "rights". If we try to develop one, we are bound to fail.

In the light of Wittgenstein's argument, it seems that what should be done

is to give up the idea of defining a "right" or "rights", and try to find some other approaches that can give us a better idea of rights. In the following discussion, the theories of Bentham, Hohfeld, Wittgenstein and Hart will be briefly discussed. Although their theories are differently characterized and have different aims, they nevertheless can give us some inspiration concerning a general picture of rights-talk.

3.1 Jeremy Bentham

Bentham's handling of the notion of rights is worth mentioning here. Apparently, he does not try to define rights. What he does is to map out the relationships between rights and other legal concepts, and delineate what kinds of rights there can be in legal contexts. It is of course not necessary to agree with him on the issue of whether there are any natural rights or whether the notion of rights must be confined to legal contexts. What should concern us here is his methodology. Putting Bentham's methodology crudely, he does not think that it is proper to tackle the word "rights" alone. If we want to understand the notion of rights, Bentham suggests, we must take whole sentences in which "right" plays a role; and not only that, we must also examine the characteristic role that the whole sentences play in a larger context.(84) Bentham says, "The common method of defining . . . will in many cases not at all answer the purpose."(85) Based on this conviction, he starts his analysis from the general framework of law. "In a code of laws", Bentham points out, "everything turns upon offences, rights, obligations, services."(86) How then can we understand the nature and the meaning of these terms? Bentham's method is to show their mode of generation.(87) He asks readers to imagine firstly a society in which men exist without laws, obligations, crimes and rights. This society originally is constituted only by persons, things, and actions. Unfortunately, Bentham says, some actions will produce great evils, and the experience of these evils will give birth to the first moral and legislative idea ; eventually, a law is enacted in order to stop evil-actions, that is, crimes. He states:

> Hence, to declare by a law that a certain act is prohibited, is to erect such act into *a crime*. To assure to individuals the possession of a certain good is to confer *a right* upon them. To direct men to abstain from all acts which may disturb the enjoyment of certain others, is to impose *an obligation* on them. To make them liable to contribute by a certain act to the enjoyment of their fellows, is to subject them to *a service*.(88)

From which, Bentham concludes: "The ideas of *law*, *offence*, *right*, *obligation*, *service*, are therefore ideas which are born together, which exist together, and which are inseparably connected."(89) Two concrete examples Bentham gives can go further to exemplify their relations:

> The law directs me to support you - it imposes upon me the *obligation* of supporting you - it grants you the *right* of being supported by me - it converts into an *offence* the negative act by which I omit to support you - it obliges me to render you the *services* of supporting you. The law prohibits me from killing you - it imposes upon me the *obligation* not to kill you - it grants you the *right* not to be killed by me - it converts into an *offence* the positive act of killing you - it requires of me the negative *service* of abstaining from killing you.(90)

After the demonstration of the relationships between "rights" and other legal concepts, Bentham then classifies rights into two groups according to their relationship with obligations. They are: rights existing from the absence of obligations and rights established by obligations.(91) A right existing from the absence of obligation is in fact a liberty: when a person holds this kind of right, no duty is laid on him either to perform or not to perform, and no duty is laid on other people either to assist or not to prevent the act in question. Hart gives an example of this: a man has a right to look over his garden fence at his neighbour; he is under no obligation not to look at his neighbour and under no duty to look at him, and this right does not entail that the neighbour has a correlative obligation to let him be looked at or not to interfere with the exercise of this right.(92) Rights established by obligations can be divided into two sub-divisions. The first category covers rights correlative to negative obligation. When a man has this kind of right, the duty-bearer has an obligation not to

interfere with the rights-holder. The right to property, some liberties (such as the right not to be assaulted) and the right to life can be counted as this kind of right. The second category covers rights correlative to positive obligation. When a man has this kind of right, the duty-bearer has an obligation to render the rights-holder positive assistance. A right to proper medical care is an example of this kind of right. Apart from those two kinds of rights mentioned above, Bentham also recognizes "legal power" as another kind of right. Legal powers as rights have two sub-divisions as well. One is power of contrectation; the other, investitive and divestitive power. When a man has a power of contrectation it means the right-holder (power-holder) is allowed by law to interfere with or physically control things or the bodies of persons or animals. A policeman's power of arrest is a case of this kind of rights. With regard to investitive and divestitive powers, when a man has this kind of right, the right-holder is enabled by the law to change the legal positions of others or of himself and others. A man having by law a legal power to make a will or contract is a case of investitive and divestitive power.(93)

After a rough understanding of Bentham's theory, a question can be asked here. Does Bentham identify the essence, or the common feature of all rights during the process of analyzing the relationships between rights and other legal concepts? From Bentham's statement: "To assure to individuals the possession of a certain good is to confer a right to them", one thing can be certain. Bentham does say that to have a right is to possess a certain good. And this expression is not a single case. Similar expressions can also be found in other places.(94) If this understanding is right, it seems Bentham can define a right as an "interest" recognized and protected by legal law, as given by Salmond. Indeed, Bentham can define "rights" in terms of the essence he identifies. But it would not be really meaningful for Bentham. For, to define "rights" in terms of legal interest is to isolate "rights" from other legal concepts, and hence may fail to reveal the generic relationships that "rights" have with other legal concepts, which, Bentham assumes, constitutes the nature of "rights".

To sum up. Bentham identifies the weakness of the traditional mode of definition and is not satisfied with the confusion of the daily use of the word "rights". His method of making clear what rights are is to reveal the generic relationships between rights and other legal concepts and delineate what kinds of rights there are in the legal context, so that the idea of rights will not only be clear but the feature of each kind of right can be exposed.

To be sure, Bentham's analysis is not without difficulties. Some of his basic assumptions can be challenged. For example, must rights be some sorts of interests for the right-holder? Again, are rights and obligations the children of law? Some specific points can also be raised. Can rights that exist from the absence of obligations be meaningful in legal contexts? Are all kinds of rights covered in his analysis?(95) However, as far as the methodology is concerned, Bentham's approach at least has avoided the main weakness of the traditional mode of definition, and gives a better picture of the language of rights.

3.2 Wesley Newcomb Hohfeld

In addition to Bentham, Hohfeld's enterprise also deserves mention here. Like Bentham, Hohfeld also adopts the analytic approach and refuses to give a definition of a "right". However, it should be noted that Hohfeld actually does not intend to provide a general picture of "rights". What he really tries to do is to clarify and regulate the usage of basic legal terms in general and the word "rights" in particular. A general picture of rights is an incidental outcome unveiled from his attempt at prescribing the usage of basic legal terms.

Specifically, Hohfeld regrets that the word "rights" is used loosely to refer to four different legal concepts. Apart from the strictest sense of "rights" (claims), the word "rights" is also used to indicate "privileges" (liberties), "powers", and "immunities". In Hohfeld's view, it is wrong to use the single word "rights" to cover these four characteristically different legal

concepts. It is more sensible, for the sake of judicial clarity, to distinguish these four different concepts and not to lump them together under the single name "rights". In his scheme, he suggests using the word "right" to refer to what he regards as the strictest sense of rights, i.e. claim; and the other three legal concepts, namely, privilege (liberty), power and immunity should be disentangled from the muddy word "rights". It should be noted that Hohfeld's attempt at regulating the usage of the word "rights" is not successful in the sense that his regulation is not followed by other writers. This unsuccessful endeavour, however, reveals the fact that the word "rights" can be, and has been, used to specify four different legal concepts, each of which has its own jural opposite and jural correlative.

To put it simply. The word "right" can firstly be used in its strictest sense. The synonym of this strictest sense of "right" is "claim". In this sense, "right" is the correlative of "duty" and the opposite of "no-right". To have a "right" (claim) is to have "one's affirmative claim against another". In Hohfeld's own example: if X has a right against Y that he shall stay off X's land, then it means that Y is under a duty to stay off X's land.(96)

Secondly, the word "right" can also be taken to indicate "privilege" (liberty). "Privilege" (liberty) is the correlative of "no-right" and the opposite of "duty". To have a right in this sense is to have "one's freedom from the right or claim of another". In Hohfeld's case above, "whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land. . . ." At the same time, Y has no right in relation to X that X shall not enter his own land. In other words, X does not have a duty to stay off his own land.(97)

Thirdly, the word "right" can be used to denote "power". "Right" in the sense of "power" is the correlative of "liability" and the opposite of "disability". To have a right in the sense of power is to have "one's affirmative 'control' over a given legal relation as against another". For example, X, a landowner, can grant his legal power over his land to Y, the principal, and hence creates a correlative liability in Y. To express it differently, in the

case of granting his power to Y over his own land, X does not have a disability in taking action.(98)

Fourthly, the word "right" can be reckoned as "immunity". "Immunity" is the correlative of "disability" and the opposite of "liability". To have a right in the sense of immunity is to have "one's freedom from the legal power or 'control' of another as regards some legal relation". In Hohfeld's example: "X, a landowner, has . . . power to alienate to Y. . . . On the other hand, X has also various immunities as against Y. . . . For Y is under a disability so far as shifting the legal interest either to himself or to a third party is concerned. . . ."(99)

Like Bentham's work, Hohfeld's analysis is not entirely satisfactory. Criticisms have been given from several directions. Generally, Kamba claims that Hohfeld's analysis suffers from a basic weakness in that it lacks a synthesis of all the conceptions it embraces.(100) Specifically, there are many things that can be said. In particular, some critics state that it is wrong for Hohfeld to insist on the doctrine of correlativity, for Bentham and Austin have already pointed out that there are some legal duties to which there are no correlative rights. Then, regarding the jural opposites, there are also some arguable points. For example, G. Williams suggests that the opposite of duty is not privilege but "liberty-not". Moreover, some writers are not happy about the legal terms that Hohfeld uses. They complain that Hohfeld has departed from our ordinary usage; for example, "liability" sounds odd and "liberty" might be preferable to privilege. The most notable accusation, however, is directed to the point that Hohfeld fails to investigate the essence of these concepts, particularly that of a "right".(101)

Taking Bentham and Hohfeld's work together, it can be seen that both of them try to avoid the traditional way of defining "right", and try to find an alternative to make the language of rights clear. They similarly adopt the analytic method: locating the language of rights in a broader context, demonstrating the relationships between the language of rights and other

legal terms, demarcating the scope and the boundary of each kind of rights, recognizing that the word "rights" can have different connotations in different contexts. Suffice it to say, their works are not exempt from weaknesses. But in terms of providing a general picture of rights, their work has certain advantages over the traditional definition of a "right". Nevertheless, it is doubtful whether the picture they provide can really cover all kinds of rights and whether it can serve to prescribe the use of the language of rights.

3.3 Ludwig Wittgenstein

Another alternative that can provide a general picture of "rights" is suggested by Wittgenstein. As has been shown, Wittgenstein does not think that it is either possible or necessary to identify the common character of "games", "language games", "tools" and so on. And this can lead to the supposition that Wittgenstein will not accept a definition of a "right". How then can we know or have an idea about what "games", "language games", and "tools" are? With regard to this question, Wittgenstein suggests that what we can do is simply to collect cases about "games", "language games", "tools" or whatever before us and not try to explain or deduce anything from our collection.(102) In fact, Wittgenstein's suggestion is grounded on the assumption that, for a large class of cases, "the meaning of a word is its use in the language".(103) Therefore, if we want to understand the meaning of, say, "games", the only way is to see all kinds of games and nothing else. A question will emerge here at once. Does Wittgenstein mean that there is no criterion to tell this is a game and that is not? Is it possible to have a game that is characteristically different from another game and both of them still meriting the same name "game"? Wittgenstein's reply, apparently, is: Yes. As has been explained, the reason that different kinds of activity share the same name is that they have, in one way or another, some family resemblances between them, and these family resemblances are sufficient to let these different activities have the same name. Wittgenstein's suggestion is closely related to the question of how we use our language. In our daily language, Wittgenstein says, when we employ a

word, for example "number", we will not regard it as a rigidly limited concept; on the contrary, we usually use the word "number" in a very open way. And this is also the way we use the word "game" and other terms. From this, Wittgenstein claims that the use of words is in effect unregulated.(104)

Let us now go back to the issue of the language of rights. In the face of the various and confusing uses of the word "rights", Wittgenstein's suggestion would be: accept them. There is nothing wrong, for Wittgenstein, in the fact that the word "rights" can be employed in different contexts and used to signify somewhat different connotations. It is futile to attempt to regulate and prescribe the use of "rights"; and most of all, it is wrong to set up a fixed boundary for the use of the word "rights". The most effective way of revealing the meaning, and hence the general picture of rights, is to present all kinds of uses of the language of rights, no matter whether those uses are contradictory or not. It can be reasoned that the hope behind this presentation is that observers can comprehend how the word "rights" can be used in different contexts; and ideally, the observers can employ the word "rights" in accord with what they learn and even can extend the use of the word "rights" to new territory.

Concerning the weakness of the traditional way of definition and the limited success of Bentham's and Hohfeld's attempts to regulate and prescribe the use of the language of rights, the Wittgensteinian offer seems not a bad alternative. However, whether this approach can fulfil our practical needs in terms of having a feasible communicating framework remains in question. The attitude of "Let it be!" is not usually the attitude that philosophers or ordinary people hold when they are facing ambiguous and contentious use of some words. Mill in A System of Logic demonstrates succinctly the need for identifying the common character of a word or name and clarifying and regulating the use of word or name. Mill first supports the claim that "language is not made, but grows". He then goes on to the issue of "name". He says, "a name is not imposed at once and by previous purpose upon a *class* of objects, but is first applied to one thing, and then

extended by a series of transitions to another and another". Finally, this name may be used to denote "a confused huddle of objects, having nothing whatever in common; and connotes nothing, not even a vague and general resemblance." When a name has achieved this stage, Mill says, "it has become unfit for the purposes either of thought or of the communication of thought; and can only be made serviceable by stripping it of some part of its multifarious denotations, and confining it to objects possessed of some attributes in common, which it may be made to connote." To make his remark clearer, Mill takes an analogy: ". . . it may be compared to a road which is not made, but has made itself: it requires continual mending in order to be passable."(105) Strictly speaking, the difference between Mill's and Wittgenstein's theories might not be so great as we imagine. The key issue lies in the ideas of "family resemblances" and "attributes in common". Mill holds the view that it is intolerable to see a name being used to denote different things which have no attributes in common; Wittgenstein, on the other hand, suggests that it is tolerable to have a name being used to denote different things which have no essential attributes in common but have family resemblances. Their views can lead to the question whether there is any essential difference between the ideas of "family resemblances" and "common attributes". If there is a difference, - for Wittgenstein it seems there is - it is then quite tolerable to see a name signifying different things which have no common attributes but have family resemblances, no matter how ambiguous and unclear these family resemblances may be! If there is no difference - for Mill it seems there is no difference - then any name that is being used to signify different things which have no common attributes is intolerable and needs clarifying. The problem, however, is: what will Wittgenstein do when a name denotes several things which do not even have family resemblances? Is it a situation in which language goes on holiday? Or is it a bewitchment of human intelligence that needs the confrontation of philosophy?

In effect, Wittgenstein does not reject the necessity of prescription in some cases. At least, he suggests, in some "normal" cases prescription is needed; prescription will only become controversial or not necessary when

we are handling "abnormal" cases, such as "games", "language games"(106), or in this place, "rights". In some other places, Wittgenstein maintains that it is perfectly possible for us to improve our terminology so that misunderstandings can be prevented, but - he changes his tone here - "these are not the cases we have to do with", for "the confusions which occupy us arise when language is like an engine idling, not when it is doing work".(107) The question we have to face is whether the word "rights" needs clarifying and prescribing? If we follow Wittgenstein, it can be said that the word "rights" is by no means a "normal" word like the word "horse", hence we cannot and need not clarify and regulate its use. From the fact that Bentham and Hohfeld fail to persuade other writers to follow their regulation, it seems that this suggestion is quite sensible. But from the viewpoint of practical needs, it should be borne in mind that the word "rights" is not just an abstract term but also a connotative term which can have far-reaching practical effects on human relationships. Based on this viewpoint, the confusing use of the language of rights is unacceptable and needs remedying. It is therefore quite right for Bentham and Hohfeld to try to regulate the use of the word "rights". Their limited success, however, only reinforces the idea that the work of clarification and prescription should be constantly renewed.

3.4 Herbert Lionel Adolphus Hart

Apart from the Benthamite doctrine and the Wittgensteinian approach, yet another alternative that may avoid the traditional way of definition and may provide a general picture of rights is offered by Hart. Hart points out that the traditional mode of definition cannot apply to legal terms and hence tries to explain legal terms, such as "rights", from a different direction. Like Bentham and Hohfeld, Hart's account of rights-talk is mainly concerned with legal rights. But his account of legal rights, just like the Benthamite accounts, can be a reference framework by which moral rights can also be enlightened. What makes Hart distinctive from his predecessors is that Hart does not adopt an analytic approach; his approach is that of "nominal essences".(108) In Hart's view, if we want to

understand the concept of rights we had better have a clear idea about "the law" in advance. And the best way to understand the law is not to tackle it directly. The best way, Hart suggests, is to "look away from the law to simpler cases".(109) Inspired by the model theory, Hart suggests using a simple model to understand the law. The simple model he chooses is the rules of a game. Under the assistance of the model of the rules of a game, Hart then goes on to examine the general character of legal terms, and hence "rights". Several points can be noted here. Firstly, he emphasizes that a statement of rights or any other legal statement assumes a special and very complicated setting. The important thing, however, is that the statement of rights cannot, and should not, be assumed to be a statement that refers to some existent facts, no matter whether real or fictitious; rather, it is like the statement "He is out" in cricket. Hart says, " 'He is out' is an expression used to appeal to rules, to make claims, or give decisions under them; it is not a statement *about* the rules to the effect that they will be enforced or acted on in a given case nor any other kind of statement *about* them." Similarly, a statement of rights is at most an expression used to appeal to rules, to make claims or give decisions under rules; it is not a prediction about what is going to happen. Secondly, Hart says, a statement of rights not only presupposes the existence of a legal system, but also has a special connection with a particular rule of the system. But the relationship between the statement of rights and the particular rule is not that the statement of rights expresses the relevant rule of law but that the statement of rights is a legal conclusion of the relevant rule. "He is out" in cricket is only a simple legal conclusion and nothing else. Thirdly, though judges' decisions concerning rights are very important in legal contexts, they cannot tempt us to define laws, and hence rights, in terms of what courts do. For judges' decisions can be wrong and there may be some cases which judges have to decide with little help from the rules.(110)

In the light of these general points about legal concepts, Hart explains the general connotations of "a legal right". In his view:

A statement of the form 'X has a right' is true if the following conditions are satisfied:
(a) There is in existence a legal system.
(b) Under a rule or rules of the system some other person Y is . . . obliged to do or abstain from some action.
(c) This obligation is made by law dependent on the choice either of X or some other person authorised to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorised person) so chooses or alternatively only until X (or such person) chooses otherwise.(111)

Hart's proposal is not wholly satisfactory. To start with, it is quite evident that on the one hand he makes a logical connection between the language of rights and legal rules; on the other hand, he indicates that some decisions about rights may be made by judges with little help from the rules. This provides a basis on which it can be asked whether rights are really logically connected with the law. Moreover, the most controversial point is that he assumes that the choice of right-holders or some authorized person over the duty-bearer(s) constitutes the main character of the language of rights. This, apparently, ignores one of the two traditions of the concept of rights in which rights have little to do with the right-holder's choice but have a strong connection with the idea of general goods and justice.

On the whole, judging Hart's proposal by Wittgenstein's theory, Hart's proposal is evidently not enough to provide a general picture of rights. But the reason why Hart's proposal is highlighted here is that his "model approach" may throw some light on the complex issue of rights in general. It can be useful to employ a simple model to explain a complex phenomenon. The problem, nevertheless, is how we can find a satisfactory model. The model Hart chooses, namely, the rules of a game, can no doubt partly explicate rights, though not completely. But there is no reason why we cannot use this or another model and add some provisos so that the language of rights can be more clearly described. For example, it can be argued that rights in some places are not necessarily connected with rules but may be connected with principles or policies(112); or the concept of

rights may be the raw material for the regulation of rules and hence rights are not necessarily the conclusions of the rules; or it can be added, as suggested by Srzednicki, that the idea of unrecognized rights is not totally meaningless(113); or, the scope of rules is not confined to legal rules and can cover moral rules as well, etc.

4. CONCLUSION

After the discussion of the complexity of the language of rights, of the relationships between rights and other legal as well as moral concepts, and theorists' attempts concerning a general picture of rights, the views that will be adopted in later discussion should be spelt out.

1>. Should the language of rights be confined to legal contexts? It is true that if rights-talk can be confined to legal contexts, things will be easier; but we may also be led to ignore the delicate relation between legal rights and moral principles or ideas in general. Some moral principles or ideas, in some cases, are sources for the formulation of legal rights. For example, it seems few can deny that the idea of equality has paved the way for the struggle for the rights of minorities, such as black people, women, children; and few can deny that the idea of natural law, and hence natural rights, underlies the foundation of the American Constitution and so affects the daily lives of all Americans. The regulation of legal rights, on the other hand, reflects more or less the main moral principles or ideas which the society in question adopts. If the delicate relationship between legal rights and moral principles or moral ideas can be recognized, then the idea of moral rights, which can serve as a bridge between legal rights and moral principles or ideas, can also be acknowledged. To put it briefly, as suggested by David Lyons, legal rights and moral rights are analogous.(114) The main difference between them is, as pointed out by Acton, that they have different grounds and sanctions. Legal rights are grounded on legal rules or cases which are enacted through a public procedure and are recognized by the public; the violation of legal rights is requited by punishment. By contrast, moral rights are based on moral rules or ideas

which may or may not be recognized by the public, and the violation of moral rights can only be requited by opinion (as suggested by Mill), or "by the frowns and avoidances of neighbours".(115)

But a question can be raised. If a moral right can be based on some moral principles or ideas that may not even be recognized by the public, how can we be sure that the moral right in question is not a heresy? What can be said is that it is difficult indeed to tell the difference between a moral right which is not recognized by the public and a heresy. It needs the test of time. Looking back, the claims of rights for women, blacks, etc. were all once treated as heresies. With the help of hindsight, we then can suggest that moral rights which are not recognized by the public are by no means sheer nonsense; some of them might stand the test and could subsequently be considered as moral rights recognized by the public.

In short, the language of rights is not confined to legal contexts in this thesis; the idea of moral rights is acceptable.

2>. Is there an essence of rights? As has been shown, legal advantage is, for Bentham, the essence of legal rights. After the language of rights is broadened to cover moral rights, some writers also take interests as the essence of rights, such as MacCormick. On the other hand, Hart, Lamont and Wellman reckon the choice or the will of the right-holder or some other authorized person to be the essence of rights.(116) But Golding points out that the concept of rights in fact covers both elements, so neither interests nor the rights-holder's choice can be counted as *the* essence of all rights. Based on Golding's analysis and the fact that rights are not always in the rights-holder's interests as well as the fact that some rights-talk does not necessarily involve the rights-holder's choice, essentialism is not adopted here. In other words, it will be reckoned that *the* essence of rights in general is not existent.

3>. What is the function of rights? Given the fact that *the* essence of rights cannot be found, it would then be sensible to enquire the function of

rights. For, from the understanding of the function of rights-talk, a better position can be found in appreciating what "rights" can be. In short, the language of rights, as an evaluative device in general and a normative device in particular, is **mainly** addressed to the issue of human relationships. (Admittedly, some rights-talk is not merely concerned with human beings, such as animal rights-talk. But it should be noted that this sort of rights-talk is not the main concern here.) It can be suggested that rights-talk can be directed at describing and prescribing human relationships; and not only that, rights-talk can also be used to formulate new human relationships. In other words, rights-talk is not only concerned with human relationships, but also with what human relationships **ought to be**. A simple example can illustrate this point.

It can be assumed that some conception of an ideal marital relationship exists in most societies. But how can we know, in the first place, that there is an ideal marital relationship? Or, to put it another way, in what way does this ideal relationship manifest itself? Or, what does this ideal relationship consist of so that it can be known? A very informative way to answer these questions is to describe what husband or wife "ought to" do in relation to each other. But apart from this, this ideal relationship can also be described by what husband and wife can, or indeed are entitled to, do in relation to each other. In the first case, it is the language of duties that is used to describe the ideal marital relationship; it is described as husband or wife "ought to" do X, Y, Z, and so on. But, in the second case, it is the language of rights; the ideal relationship is described as "husband or wife is entitled to do X, Y, Z, and so on." Of course, there are other ways that can be used to describe this ideal relationship. But the point that is being made here is that: rights-talk is a way of describing ideal human relationships; from the use of rights-talk, an ideal marital relationship can be sketched and known.

More generally, it can be suggested that rights-talk is also a way of prescribing and of maintaining ideal human relationships. In the case above, if the established ideal human relationship is spoiled by either husband or

wife or obstructed by some external conditions, then the wife or husband concerned can in effect invoke rights that belong to her or him with a view to restoring the ideal relationship. Moreover, if the established ideal relationship cannot be maintained due to the changing social circumstances or any other reasons, then a new ideal relationship should be developed. But how? It can be suggested that a new human relationship can be formulated by virtue of rights-talk. Thus, in the example above, the husband or the wife can claim: considering the newly-emerged situations, I have a right to do A, B, C, etc., and you have a duty corresponding to my right to do A, B, C, etc. Whether or not this new right-claim could be translated into a moral right or a legal right is not certain; it involves all sorts of considerations that cannot be discussed here. But the point being made is that rights-talk can be used to modify or initiate a new conception of an ideal human relationship.

4>. What does the word "rights" refer to? It is intended to reveal a general picture of rights in this chapter. The task is to be achieved through the demonstration of the relations of "rights" to other legal or moral concepts as well as the description of various attempts at displaying a general picture of rights. What should be noted here is that a general picture of rights is only helpful in assisting us to understand rights-talk in general, which is generally vague. For the sake of clarity, it is necessary to narrow down the scope of rights-talk when the word "rights" is invoked. Briefly, the word "rights" in this thesis will mainly be used to refer to claim-rights, on the grounds that claim-rights are the main thrust of rights in general. In the domain of claim-rights, two categories of claim-rights are especially relevant to the following discussions. They are: welfare-rights and claim-rights of freedom.(117) The distinction between these two categories of claim-rights is geared to the different obligation that the duty-bearer has and the different characteristic of the object of rights. The general structure of welfare-rights can be made clear by using Gewirth's statement, "A has a right to X against B by virtue of Y."(118) In this statement, A is the right-holder, the subject of the right; X is the object of the right and is essential for "a decent minimum level of

subsistence"(119); B is the respondent of the right, the duty-bearer who has obligation to take concrete and practical measures so as to fulfil A's right in relation to X; Y is the justifying basis or ground of the right. British citizens' right to medical care is an example of welfare-rights. Claim-rights of freedom can also be made clear by following Gewirth's statement. The difference is, however, that B's obligation in relation to A's right to X is a negative obligation and that X is not essential for "a decent minimum level of subsistence". B is only obligated not to interfere with A's action in relation to X, he does not have an obligation to take positive measures to fulfil A's demand in relation to X. British citizens' right to free movement is an example of claim-rights.

5>. In short, a simple image can be provided here to make the notion of rights clearer. A right can be imagined as a standing ground, or in some cases a potential standing ground, on which the right-holder (or people on the right-holder's behalf) can ask for other people's action or forbearance by virtue of legal rules, moral principles or moral ideas which sometimes are not recognized by the public. And if other people do not abide by the regulation that the statement of rights prescribes, the right-holder (or other people on his behalf) can openly demand some sort of compensation or correction without feeling embarrassed.

After the general discussion of rights-talk presented here, it is the issue of children's rights that we now turn to.

NOTES:

1. Weldon is an exception. Given the influence of logical positivism, Weldon assumes that although the language of rights is not precise and definite in ordinary language, it is in effect neither difficult nor mystifying. For him, the language of rights can be, and should be, confined to the domain of political institutions and organizations, custom and traditions. It is therefore quite natural for him to claim that the question "Has A a right to do X?" is only a question about political institutions and organizations or a question about customs and traditions. See T.D. Weldon, The Vocabulary of Politics, Harmondsworth: Penguin, 1953, pp. 56-61. MacIntyre shares a similar viewpoint, although he reaches his conclusions from a different direction. See A. MacIntyre, After Virtue, London: Duckworth, 1981, pp. 65-67.
2. See W.W. Cook's introduction to W.N. Hohfeld's Fundamental Legal Conceptions, New Haven: Yale University Press, 1966, p. 6.
3. W.N. Hohfeld, ibid., pp. 35-64.
4. See W.D. Ross, The Right and the Good, Oxford: Clarendon Press, 1930, p. 53.
5. See J. Bentham, Anarchical Fallacies, in A.I. Melden (ed.), Human Rights, California: Wadsworth, 1970, pp. 28-39; J. Austin, Lectures on Jurisprudence, edited by R. Campbell, London: John Murray, 1873, pp. 353-354; W.N. Hohfeld, op. cit.; W.D. Lamont, Rights, Aristotelian Society Supplementary Volume, XXIV, 1950, pp. 83-94. I.M.M. Gregory, The Right to Education, Proceedings of the Philosophy of Education Society of Great Britain, vol. 7, no.1, 1973, pp. 85-102; R. Young, Dispensing with Moral Rights, Political Theory, vol. 6, no. 1, 1978, pp. 63-74; R.G. Frey, Interests and Rights, Oxford: The University Press, 1981, chapter 1.
6. According to Cranston, moral rights can be classified into three groups. They are: moral rights of one person only, moral rights of anyone in a particular situation, and moral rights of all people in all situations. Cranston suggests that human rights are a form of moral rights; they

are moral rights of all people at all times and in all situations. See M. Cranston, Human Rights, Real and Supposed, in D.D. Raphael (ed.), Political Theory and Rights of Man, London: Macmillan, 1967, pp. 47-49

7. See E. Kamenka, The Anatomy of an Idea, in E. Kamenka and A.E.S. Tay (eds.), Human Rights, London: Edward Arnold, 1978, p. 12.
8. See H.B. Acton, Rights, Aristotelian Society Supplementary Volume, XXIV, 1950, p. 106. Kant also makes the same point in The Metaphysical Elements of Justice, translated by J. Ladd, Indianapolis: Bobbs-Merrill, 1965, pp. 39-42.
9. H.B. Acton, ibid., p. 104.
10. C.B. MacPherson, Problems of Human Rights in the Late Twentieth Century, in The Rise and Fall of Economic Justice and Other Papers, New York: Oxford University Press, 1985, pp. 22-23.
11. For Cranston, it is impossible to formulate economic and social rights into positive rights; Okin, however, holds a different view. See M. Cranston, op. cit., pp. 47-53; S.M. Okin, Liberty and Welfare, NOMOS, vol. XXIII, 1981, pp. 230-256.
12. See M.P. Golding, Towards a Theory of Human Rights, The Monist, vol. 52, 1968, pp. 540-546; and, The Primacy of Welfare Rights, Social Philosophy and Policy, vol. 1, no. 2, 1984, pp. 122-125.
13. See R.A. Putnam, Rights of Person and the Liberal Tradition, in T. Honderich (ed.), Social Ends and Political Means, London: Routledge & Kegan Paul, 1976, p. 99.
14. C.A. Wringe, Children's Rights: A Philosophical Study, London: Routledge & Kegan Paul, 1981, p. 37.
15. J.S. Mill, Utilitarianism, in M. Warnock (ed.), John Stuart Mill: Utilitarianism, Glasgow: Collins, 1979, p..309.
16. R.G. Ritchie, Natural Rights, London: George Allen & Unwin, 1952, pp. 78-79.
17. It is quoted in H.J. McCloskey, Rights, Philosophical Quarterly, vol. 15, 1965, p. 115.
18. Haksar is actually aware that there are two kinds of rights, namely, liberty-rights and claim-rights. To say that a person has a liberty-right with regard to X is to say that he has no duty not to do X. To say

that A has a claim-right to X implies that other people (or the state) have corresponding duty to A's right. But he puts his emphasis on claim-rights rather than liberty-rights. See V. Haksar, The Nature of Rights, Archiv für Rechts und Sozialphilosophie, vol. 64, 1978, pp.183-202. Similarly, Feinberg at first admits that liberties, immunities and powers are also "rights", but he still reckons that claim-rights should be the main thrust of rights-talk and "claims" constitute the main characteristic of rights. See J. Feinberg, Nature and Value of Rights, in Rights, Justice and the Bounds of Liberty, 1980, pp. 143-155.

19. J. Feinberg, op. cit., p. 149.
20. Ibid., p. 152.
21. Ibid., p. 152.
22. Ibid., pp. 151-154.
23. Ibid., p. 154.
24. Ibid., p. 155.
25. V. Haksar, op. cit., p. 201.
26. Ibid., p. 183.
27. See W.N. Hohfeld, op. cit., p. 38; and A.I. Melden, Rights and Rights Conduct, Oxford: Basil Blackwell, 1959, p. 13.
28. J. Feinberg, op. cit., p. 151.
29. M.P. Golding, Towards a Theory of Human Rights, pp. 530-531.
30. J. Feinberg, op. cit., p. 151.
31. H.J. McCloskey, op. cit., p. 116.
32. A.I. Melden, Rights and Right Conduct, p. 14.
33. V. Haksar, op. cit., p. 183.
34. J. Bentham, A General View of a Complete Code of Laws, in J. Bowring (ed.), The Works of Jeremy Bentham, vol. III, Edinburgh: W. Tait, 1893, p. 181.
35. J. Austin, op. cit., pp. 355-357.
36. See D. Lyons, Rights, Claimants and Beneficiaries, American Philosophical Quarterly, vol. 6, no. 3, 1969, p. 173, note 1.
37. J. Bentham, A General View of a Complete Code of Laws, p. 159.
38. See H.L.A. Hart, Bentham on Legal Rights, in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Oxford: Clarendon Press, 1973, pp. 176-178.

39. J. Bentham, A General View of a Complete Code of Laws, p. 181.
40. J. Austin, op. cit., p. 355.
41. The correlativity doctrine in Lyons' work actually refers to the doctrine which maintains "all rights imply duties, and not vice versa." See D. Lyons, The Correlativity of Rights and Duties, Noûs, vol. 4, 1970, p. 45. But this doctrine refers differently in this thesis to the claim that rights imply duties and vice versa. See R.B. Brandt, Ethical Theory, Englewood Cliffs, New Jersey: Prentice-Hall, 1959, pp. 433-441; S.I. Benn and R.S. Peters, Social Principles and the Democratic State, London: George Allen & Unwin, 1971, p. 101f.
42. D. Lyons, Rights, Claimants and Beneficiaries, p. 174.
43. See R.B. Brandt, op. cit., p. 434. S.I. Benn and R.S. Peters, op. cit., pp. 88-89.
44. Brandt suggests that all theories about what is morally obligatory are also theories about human rights. However, if the correlativity theory can stand it can be reasoned that theories about duties are also theories about rights and vice versa. See R.B. Brandt, op. cit., p. 434.
45. For the detail, see J. Feinberg, Duties, Rights, and Claims, in Rights, Justice, and the Bounds of Liberty, op. cit., pp. 130-139.
46. See J. Plamenatz and H.B. Acton, Rights, Aristotelian Society Supplementary Volume, 24, 1950, pp. 78, 107-108; J.D. Mabbott, An Introduction to Ethics, London: Hutchinson University Library, 1966, pp. 139-151; T. Campbell, The Left and Rights, London: Routledge & Kegan Paul, 1983, pp. 83-85; D.N. MacCormick, Children's Rights: A Test-Case for Theories of Right, in MacCormick, Legal Rights and Social Democracy, Oxford: Clarendon Press, 1982, pp. 161-162.
47. See W.N. Hohfeld, op. cit., pp. 35-64.
48. D. Lyons, The Correlativity of Rights and Duties, p. 51.
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50. D.N. MacCormick, Rights in Legislation, in P.M.S. Hacker and J. Raz (eds.), Law, Morality, and Society, Oxford: Clarendon Press, 1977, p. 200.
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52. J. Raz, On the Nature of Rights, Mind, vol. XCIII, 1984, p. 199.
53. See G. Marshall, Rights, Options, and Entitlements, in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, pp. 232-234.
54. J. Waldron (ed.), Theories of Rights, Oxford: Oxford University Press, 1984, p. 8.
55. See D. Lyons, Ethics and the Rule of Law, Cambridge: Cambridge University Press, 1984, p. 124.
56. H.J. McCloskey, op. cit., pp. 115-122.
57. G. Marshall, op.cit., pp. 228-229.
58. See R. Martin and J.W. Nickel, Recent Work on the Concept of Rights, American Philosophical Quarterly, vol. 17, no. 3, 1980, p. 170.
59. See H.J. McCloskey, Rights - Some Conceptual Issues, Australasian Journal of Philosophy, vol. 54, no. 2, 1976, p. 105.
60. See R. Wasserstrom, Rights, Human Rights, and Racial Discrimination, in A.I. Melden (ed.), Human Rights, California: Wadsworth, 1970, p. 98.
61. C.A. Wringe, op. cit., p. 23.
62. T.H. Green, Lectures on the Principles of Political Obligation, London: Longmans, Green and Co., 1913, p. 207.
63. J. Plamenatz, op. cit., p. 75.
64. Ibid., pp. 75-76.
65. S.I. Benn and R.S. Peters, op. cit., pp. 90-93.
66. H. J. McCloskey, The State and Evil, Ethics, vol. LXIX, no. 3, 1958, p. 194.
67. McCloskey in this place neglects the point that some legal rights can be morally evil and hence cannot be a moral authority.
68. See S.I. Benn and R.S. Peters, op. cit., p. 91.
69. Mill, for example, reckons that "political liberties" are rights and that "freedom of conscience" is an indefeasible right, see J.S. Mill, On Liberty, Harmondsworth: Penguin, 1985, pp. 59-60, 66.
70. T. Hobbes, Leviathan, edited by C.B. MacPherson, Harmondsworth: Penguin, 1968, pp. 189-190.
71. See J. Raz, The Morality of Freedom, Oxford: Clarendon Press, 1986, pp. 245-247.
72. Bentham, A General View of a Complete Code of Laws, p. 185.

73. R. Dworkin, Taking Rights Seriously, chapter 12.
74. J. Salmond, Jurisprudence, edited by G.L. Williams, London: Sweet and Maxwell, 1947, p. 229.
75. D.N. MacCormick, Children's Rights: A Test-Case for Theories of Right, pp. 155-166.
76. V. Haksar, op. cit., p. 188.
77. J. Raz, On the Nature of Rights, p. 208
78. J. Raz, The Morality of Freedom, pp. 247-248.
79. I.M.M. Gregory, op. cit., p. 99.
80. J. Plamenatz, op. cit., p. 75.
81. R.B. Brandt, The Concept of a Moral Right and its Function, The Journal of Philosophy, 1983, p. 40.
82. L. Wittgenstein, Philosophical Investigations, translated by G.E.M. Anscombe, Oxford: Basil Blackwell, 1953, sections 65, 75, 76.
83. Ibid., section 66.
84. See H.L.A. Hart, Definition and Theory in Jurisprudence, Proceedings of the British Academy, vol. 48, 1962, pp. 41-42 and note 8.
85. It is quoted in H.L.A. Hart, ibid., p. 41, note 8.
86. J. Bentham, A General View of a Complete Code of Laws, p. 158.
87. Ibid., p. 159.
88. Ibid., p. 159.
89. Ibid., p. 159.
90. Ibid., p. 159.
91. Ibid., p.181. Apart from this classification, Bentham also classifies rights according to different criteria. For example, rights can be classified based on the subjects upon which they are exercised, so there can be "rights over things" and "rights over people". See J. Bentham, A General View of a Complete Code of Laws, pp. 181-185.
92. See H.L.A. Hart, Bentham on Legal Rights, pp. 175-176.
93. Ibid., pp. 178-179.
94. See R. Harrison, Bentham, London: Routledge & Kegan Paul, 1983, pp. 91-95.
95. See H.L.A. Hart, Bentham on Legal Rights, passim.
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97. Ibid., pp. 38-50.
98. Ibid., pp. 50-60.
99. Ibid., pp. 60-64.
100. W.J. Kamba, Legal Theory and Hohfeld's Analysis of a Legal Right, The Juridical Review, 1974, vol. 19, p. 250.
101. A critique of Hohfeld's theory can be seen in J.W. Harris, Legal Philosophies, London: Butterworths, 1980, pp. 81-86; and, J. Finnis, Natural Law and Natural Rights, Oxford: Clarendon Press, 1980, pp. 199-205.
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103. Ibid., section 43.
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105. J.S. Mill, A System of Logic, London: Longmans, 1904, p. 99.
106. L. Wittgenstein, op. cit., section 142.
107. Ibid., section 132.
108. J.W. Harries, op. cit., p. 88.
109. H.L.A. Hart, Definition and Theory in Jurisprudence, pp. 41-42.
110. Ibid., pp. 42-44.
111. Ibid., p. 49.
112. See R. Dworkin, Is Law a System of Rules? in Dworkin (ed.), The Philosophy of Law, Oxford: Oxford University Press, 1977, pp. 38-65.
113. See J. Srzednicki, Rights and Rules, The Philosophical Quarterly, vol. 21, 1971, p. 323.
114. See D. Lyons, The Correlativity of Rights and Duties, p. 45, note 3.
115, H.B. Acton, Rights, pp. 105-106.
116. See W.D. Lamont, The Principles of Moral Judgement, Oxford: Clarendon Press, 1946, pp. 70-78; C. Wellman, The Growth of Children's Rights, Archiv für Rechts und Sozialphilosophie, vol. 70, 1984, pp. 441-453.
117. "Claim rights of freedom" is Wringe's term. See C.A. Wringe Children's Rights: A Philosophical Study, pp. 52-56.
118. A. Gewirth, Are There any Absolute Rights? p. 93.
119. C.A. Wringe, op. cit., p. 74.

CHAPTER TWO

ARGUMENTS AGAINST CHILDREN'S RIGHTS

After having made a general review of rights-talk, attention will be paid to the issue of children's rights in this chapter and Chapter Three. The emphasis of this chapter will be put on the exploration of why the notion of children's rights was not popular in the past, and the interpretation of several theorists' accounts with regard to the idea of children's rights. It is hoped that through this elaboration a historical perspective of the notion of children's rights can be revealed and we should be able to understand that arguments employed to oppose the idea of children's rights are misconceived.

1. WHY THE NOTION OF CHILDREN'S RIGHTS WAS NOT POPULAR IN THE PAST

In the first chapter it was suggested that rights-talk is mainly concerned with human relationships: it can be used to describe and prescribe human relationships; and more importantly, it can be used to initiate new human relationships. With this understanding, two ensuing questions can then be asked. First, can the language of rights be invoked to describe and prescribe the relationships that children have with their parents, adults and political institutions (for example, the state)? Second, if the language of rights is not used to describe and prescribe children's relationships with other people or political institutions, can the language of rights be employed to initiate new human relationships in which "rights" can be granted to children? In effect, these two questions seem to be obsolete. For the term and the notion of "children's rights" already have a place in our daily discourse concerning the relationships between children and other people and political institutions; therefore, a positive answer can be given

to the first question and the second question will not arise at all.

It can, however, be suggested that the term "children's rights", or the idea of granting rights to children so as to regulate the relationships between children and other people or political institutions was not so widely accepted as it is nowadays. This suggestion can be supported by two points.

Firstly, rights-talk, as recognized by John Stuart Mill, finds its natural home in a politico-legal context.(1) Unfortunately, it seems that children were not often given a proper place in a politico-legal context. For example, children in the Puritan or Victorian eras were not yet considered as "persons" and they were legally the "property" of their parents.(2) It is therefore not surprising to see that the notion of children's rights was not broadly accepted given the case that children were treated as "things" and "the property of their parents". As far as political contexts are concerned, Rousseau in his influential treatise The Social Contract does declare that children ought to have a right to liberty. In his own words, he says:

> Even if each man could alienate himself, he could not alienate his children: they are born men and free; their liberty belongs to them, and no one but they has the right to dispose of it.(3)

The significance of this statement is twofold. One is that the language of rights is at least nominally used concerning children; the other is that children are, or should be, granted a place like men (they are born **men** and **free**). If Rousseau is consistent, a reasonable position following this statement may be that: the constitution and operation of any level of political institution, such as the legislative assembly or government, should give proper consideration to children. In other words, children should have a place in practical political contexts. After declaring that children are born men and free, Rousseau, however, fails to explain how children can be fitted into practical political activities. He even, incidentally, suggests in a later part of The Social Contract that children are not citizens.(4) He hence gives a ground on which it can be claimed that

since children are not citizens who contribute to the state, children should not be reckoned as members of the state and should not be involved in practical political activities; even if they can be involved, their involvement is, nevertheless, negligible. That is to say, although Rousseau does use the word "right" to regulate the relationships between children and other people or political institutions, he does not put "children's rights" into a practical political context. This may have led to the consequence that the idea of children's rights was soon neglected. It took more than two centuries for the adult-world to rediscover, by the Supreme Court of the United States, that children, like adults, are also protected by the constitution and possess constitutional rights.(5)

Secondly, it was assumed that the relationships between children and other people or political institutions can mainly be described and regulated by other types of normative language, such as the language of duties or obligations, rather than rights-talk; so there was little need to employ the idea of children's rights, even though this idea may be encapsulated in the language of duties. Locke's political theory concerning children is helpful in making this point clear.(6)

The status of children is not neglected in Locke's political scheme.(7) His Two Treatises of Government properly gives a place to children's status concerning their relationships with their parents and the state. And he does grant "rights" to children, although belatedly and without much publicity. The main normative device used to regulate children's relationships with their parents and the state is, however, the language of duties or obligations. It is the parents' obligation, Locke claims, "to preserve, nourish and educate the children they had begotten. . . ."(8) What then is the basis of this parental obligation? Locke's answer is: the law of Nature and the law of reason, which are God's laws and therefore are omnipresent and indispensable. But, it can be asked: are children the subject of the law of reason? Locke's answer is: No. He says:

> For nobody can be under a law that is not promulgated to him; and this law being promulgated or made known by reason only, he that is

not come to the use of his reason cannot be said to be under this law ....(9)

If children are not under the law of reason, what sort of arrangements should be made so that children can reach the age of reason, and be under the governance of the law of reason and the law of Nature so as to fulfil God's will? Apart from the parental obligation of nourishment, preservation and education towards children, Locke also suggests that children are not subjects of the law of reason and they should be guided by their parents, who are "to understand" for them. Under all circumstances, children must be under the governance of parents until they reach a state of reason. Following this general account concerning the relationship between parents and children, Locke claims that this account also holds in civil society, in which the state is obligated to look after children if their parents or guardian fail to fulfil their obligations.(10)

So far, rights-talk is not yet invoked. The picture Locke sketches concerning children, adults and the state is that parents or the state have obligations to children. Whether children have an obligation to be guided by their parents or the state, and whether children have an obligation to be preserved, nourished and educated, Locke does not tackle directly. It seems that these questions are not worth asking, for it appears to be taken for granted that children "want" to be preserved, nourished and educated; and in order to be preserved, nourished and educated children have to be under the governance of their parents or the state. But Locke does say something about children's obligation. What he says is that children have "a perpetual obligation of honouring their parents" in response to the benefits given by their parents.(11) Rights-talk is not invoked until Locke tries to justify and delimit parental power, authority, and rights over their children. What he clearly says is that parents have power, authority, and rights over their children in virtue of their duty towards their children.(12) But how about children's rights? Can we not derive children's rights to preservation, nourishment, education and the guidance of their parents or the state from either the obligations of parents and the state or the law of Nature? In

regard to this question, Locke does not give a direct answer. Although he does recognize that children have rights to life, property, education, and so on, this recognition comes rather belatedly and is not given prominent treatment.(13)

The implication of Locke's arrangement regarding the relationships between children and parents as well as the state seems to be that the notion of children's rights does not play a significant role; it is rather the language of duties which performs a dominant role. It follows that the notion of children's rights is peripheral in Locke's scheme, and this may lead to the neglect of the notion of children's rights.

To summarize. The language of rights is now commonly used to describe and prescribe the relationships between children and adults or the state; but it was not the case in the past. There are mainly two reasons for this. One is that the word "rights" was often used in a politico-legal context, and as children were not taken seriously in a politico-legal context so the idea of children's rights was not common and the word "rights" was not often used to regulate the relationships between children and adults or political institutions. The other is that relationships between children and parents or political institutions were principally regulated by normative devices other than the language of rights; and this resulted in the insignificance and obscurity of the notion of children's rights.

Apart from the two reasons stated above, the fact that some distinguished theorists' works were reckoned as opposing the idea of children's rights also contributed to the unpopularity of this idea. In the following discussions, attention will be paid to Hobbes' and Mill's theories concerning children and Hart's will theory of rights. Hobbes' and Mill's theories concerning children were regarded as doctrines that oppose the concept of children's rights. Hart's will theory of rights was taken as a doctrine advocating that the notion of "rights" should be associated with the right-holder's will or capacity of making choice over the duty-bearer and therefore undermining the claim of children's rights. It will be shown that

Hobbes' and Mill's theories were misunderstood and Hart's will theory of rights does not really reject the idea of children's rights. But before they are tackled it should be made clear what is meant by a child. This clarification is intended to remove the ambiguity surrounding the concept of childhood and hence to specify the subjects that will be under discussion.

2. WHAT IS A CHILD ?

To decide what a child is is not easy. With the advent of modern developmental psychology, it is now widely accepted that the development of human beings, in terms of mental development, is a gradual and continuous process. It is therefore hard to make a clear-cut distinction between children and adults. However, the fact that it is hard to draw a clear-cut line between children and adults does not mean that a line should not be drawn. It rather follows that a line should be more cautiously and properly drawn.

The importance of the adult/child distinction lies in the consequence that persons who are classified as adults usually enjoy full political rights and some other legal rights, such as buying alcohol and cigarettes; and hence in some sense can have a say over their own destiny. In comparison, persons who are classified as children are supposed to be immature and hence should be under parental domination in various respects, and it implies that they cannot decide their own destiny. In other words, adults are given an independent status and children do not have an independent status of the kind that is highly valued in a liberal-democratic society. Traditionally, the criterion of the adult/child distinction is "age". In the British context, from the thirteenth century to 1970 the age of majority has been twenty-one.(14) Under the present law "child" means someone below the age of 18.(15) Briefly, the main advantage of the age-criterion is its fairness. That is, it provides an impartial criterion regardless of sex, race, social class and so on; as long as children reach the age of majority they can at once possess rights or privileges adults are supposed to have.(16) The

disadvantage of the age-criterion, however, is: on the one hand, although some people have not reached the age of majority they have actually matured earlier and are more qualified than some who are above the age-limit; on the other hand, although some people have reached the age of majority they nevertheless are incapable of acting in their own right and are poorly equipped with the capacities which are essential in exercising their responsibilities and rights. The age-criterion may therefore be guilty of violating the principle of justice - that is, "Treat equals equally, unequals unequally."

With the aim of fulfilling the principle of justice, the competence-criterion of the adult/child distinction purports to replace the age-criterion. The idea of taking the competence-criterion as the yardstick of classifying adults and children is that as long as people pass the test of competence, no matter how it is construed, they can immediately possess the status of adulthood and enjoy full political rights and some other privileges. However, it can be asked: what does "competence" stand for? Apart from some traditional ideas, such as "reason" or "rationality", Schrag tentatively suggests two criteria that compose competence; they are experience and understanding.(17)

Unfortunately, although the competence-criterion can idealistically fulfil the principle of justice, it still shares one of the weaknesses of the age-criterion. That is: to set up an artificial limit - either age or competence - by which some basic rights and duties are distributed is simply arbitrary on the grounds that the development of human beings is a gradual and continuous process, even though this weakness applies less to competence-criterion than to age-criterion. Moreover, there are some other thorny problems embedded in the competence-criterion. As pointed out by Graham, since human action is highly complicated there can be no perfect competence-testing system. In other words, the competence-criterion is problematic in practical terms. To be more specific, Graham suggests that the competence-criterion can only be adopted after several questions can be satisfactorily answered, such as: is it certain that competence is

testable over a wide range of human activities? in what would the test consist? who can be a competent and impartial tester? will political power not be seized by a small elite who are responsible for the test of competence?(18) Unfortunately, it seems that no satisfactory answer has been found yet. The most serious problem for the competence-criterion, however, as pointed out by Schrag, is that it provides "the possibility of an extension of paternalism beyond childhood, a possibility which could provide a basis for the kind of hierarchical society we abhor."(19)

In the light of the advantages and disadvantages of the age-criterion and competence-criterion, there are several options we can choose concerning the adult/child distinction. First, it can be suggested that as human development is gradual and continuous and a clear-cut distinction between children and adults is bound to be arbitrary, the adult/child distinction should not be made at all. This view is actually suggested by Herbert Spencer, and more recently, by Holt and Farson.(20) This suggestion can without doubt avoid the problems that the age-criterion and the competence-criterion present, but it is actually against our daily practice which is based on the fact that children and adults have different needs and that children to some extent rely on adults. This position also opposes the common sense view that although children and adults are similar in degree there are significant differences between them and hence the adult/child distinction can still be made. Second, we can choose either the age-criterion or the competence-criterion. However, considering the side-effects that the competence-criterion may have, to opt for the age-criterion seems to be the only choice left.(21) In effect, the present adult/child distinction in the British context is basically age-oriented. But it manifests itself in a complicated form. For instance, the age of majority in politics is 18, in education 16, etc.(22) In other words, the primitive form of the adult/child distinction can be remedied. The age-limit can be flexibly set according to the capacity-requirements of the specific activity concerned; it should be different from context to context.

In the following discussions, as the issue of children's right to education is

the main concern, the word "children" is used to describe persons under the age of sixteen. The main features of children concerned here, following Wringe, are: imperfect rationality (not lack of rationality), need for guidance and protection, and material dependence.(23)

3. THOMAS HOBBES AND CHILDREN'S RIGHTS

Hobbes' theory concerning children is taken by Freeman and Worsfold as a doctrine that totally rejects the idea of children's rights, whether children's natural rights or rights by social contract.(24) The task of this section is aimed at showing that Hobbes' theory is misunderstood and it is not too difficult to find a place in Hobbes' theory for children's rights.

The reason why Hobbes is often assumed to hold that children have no rights is based on several statements in Leviathan and De Cive. In De Cive, Hobbes says:

> We must therefore return to the state of nature. . . . By the right therefore of *nature*, the dominion over the infant first belongs to him who first hath him in his power. But it is manifest that he who is newly born, is in the *mother's* power before any others; insomuch as she may rightly, and at her own will, either breed him up or adventure him to fortune. . . . And thus in the state of nature, every woman that bears children, becomes both a *mother* and a *lord*.(25)

In Leviathan, a similar statement can also be found:

> Again, seeing the Infant is first in the power of the Mother, so as she may either nourish, or expose it, if she nourish it, it oweth its life to the Mother; and is therefore obliged to obey her, rather than any others; and by consequence the Dominion over it is hers. But if she expose it, and another find, and nourish it, the Dominion is in him that nourisheth it. For it ought to obey him by whom it is preserved; because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him.(26)

From these statements, it then can be proposed, at least by Freeman and

Worsfold, that since the parent or guardian has the power of life and death over his (her) children and since children are supposed to promise their obedience to their parent or guardian children hence have no rights.

As distinct from the state of nature, in the state of civil society the civil sovereign has the supreme power over his subordinates; the parent or the guardian of the child henceforth cannot be the sovereign over the child.(27) Both the parent and the child are subjects of the civil sovereign. But one thing, it may be supposed, does not change in the civil society; that is, children still have no rights. For Hobbes makes a statement as follows:

> . . . that the Command of the Common-wealth, is Law onely to those, that have means to take notice of it. Over naturall fooles, children, or mad-men there is no Law, no more than over brute beasts; nor are they capable of the title of just, or unjust; because they had never power to make any covenant, or to understand the consequences thereof; and consequently never took upon them to authorise the actions of any Soveraign, as they must do that make to themselves a Common-wealth.(28)

From this statement, it is inferred by Freeman and Worsfold that children in Hobbes' theory do not have rights by social contract because they are not capable of either making covenants with other people or understanding the consequence of such contracts. Conceivably, from the statement that children are incapable of the title of just and unjust, the conclusion "Children have no rights" can then easily be drawn.

To be sure, there are some elements in the quotations above which may lead to the conclusion that children have no rights. But it can be argued that the inferences from Hobbes' original texts to the conclusion that children have no rights are problematic. It should be noted that although the parent or guardian in the state of nature has dominion over his (her) children to the extent that children's lives are at the mercy of the parent or guardian, it does not follow that children have no rights at all. What Hobbes indicates is only the "fact" that the parent or guardian of children is at liberty to do what he (she) likes in respect of his (her) children. Hobbes in fact does not

say: since the parent or guardian has ultimate right or power over his (her) children so children have no rights against their parent or guardian, or children have no right of self-preservation. This point can be supported by an analogous case made by Hobbes.

With regard to the relationships between slaves and their masters, and between war prisoners and their captors, Hobbes argues that although slaves or war prisoners are totally subjected to the right or power of their masters or captors, slaves or war prisoners may still have absolute liberty to escape by any means whatever.(29) In other words, even though slaves or war prisoners are under the absolute dominion of their masters or captors and hence the masters or captors have the actual right or power of life and death over them, it does not imply that slaves or war prisoners have no rights at all. However, two objections can be raised against this analogy.

First, it can be suggested that the dominion masters or captors have over slaves or war prisoners is an oppressive one, and this oppressive dominion is characteristically different from the natural dominion the parent has over his (her) children. This can then lead to the objection that it is not relevant to adopt either the case of masters and slaves or the case of captors and war prisoners and argue that children, like slaves or war prisoners, also have rights.(30) In reply to this objection, it can be argued that insofar as the parent or guardian has a power (right) of life and death over his (her) children, the relationship between the parent or guardian and his (her) children is not different from the relationship between either captors and war prisoners or masters and slaves, and hence the analogy adopted here should be reckoned as reasonable.

Second, it can be suggested that this analogy is not really meaningful, for war prisoners or slaves can be supposed to be rational beings who are physically and mentally fit for gaining liberty, and hence can have a right to escape; by contrast, children, especially infants, are so immature that they are just incapable of having power or liberty, and hence right, to avoid the

disposal of their parents or guardian.(31) This objection is not without some force, but it arises from a misunderstanding of the concept of rights held by Hobbes.

Hobbes construes the right of nature as "liberty", and he in turn defines "liberty" as "the absence of externall impediments".(32) But as Hobbes does not explicate what kinds of external impediments he has in mind, this therefore leaves space for speculation and debate. It can be claimed that the external impediments concerned are physical external impediments. This is, however, contradictory to what Hobbes has suggested: he argues that even though slaves or war prisoners are physically bound in relation to their masters or captors, they still have a right to escape if their lives are threatened. It is therefore wrong to suggest that it is "physical external impediments" that Hobbes has in mind in referring to "liberty". A more acceptable interpretation is that "the external impediments" should refer to "moral impediments" or "bonds of obligation".(33) In this sense, the right of nature can be defined as "the absence of obligation". And "rights" in Hobbes' theory can therefore be reckoned as a permission regarding what the individual may do.(34) The main focus here is whether children have "the absence of obligation" in the case of self-preservation. It seems there is no reason why children, even infants, cannot have the right of nature to preserve their lives. In order to support this position, it will be useful to quote, once again, one of the famous passages in Leviathan. Hobbes says:

> The Right of Nature . . . is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.(35)

According to this statement, it can be maintained that apart from the fact that children have "the absence of obligation" in preserving their lives, they can, to put it more positively, also use their own power for the preservation of their own lives; they can do anything which is appropriate in their own judgement and reason as long as they conceive what is the aptest means of preserving their lives. For instance, a child can run away

if he feels his life is endangered; a little boy can cry when he needs help from others to preserve his life. Following this, it can be said that the right of nature in Hobbes' plan is like, as suggested by Carmichael, a "definite enabling capacity"(36); or, in Macpherson's terms, a kind of innate compulsion to preserve one's life(37); or, to put it plainly, a kind of instinct that cannot be disposed of.(38) Hobbes, in effect, does not tackle the issue of children's rights, but what can be certain is that he does not declare that children have no capacity for preserving themselves, even though he must be clear that children's capacity in preserving themselves is fairly limited. It is therefore reasonable to claim that there is a space for the notion of children's rights in Hobbes' theory of natural rights, albeit a limited place.

In the case of civil society, it seems the point that children do not have rights can be supported by saying that the law does not apply to children and that children are not capable of "the title of just or unjust". But this inference may go too far. For, Hobbes is quite clear in saying that the right of self-preservation is inalienable(39); thus, there is no reason to say that children's natural right of self-preservation will disappear in the state of civil society. And more than that, Hobbes, while discussing the liberty of subjects in the state of civil society, seems to imply that even children can have liberty against their parents or the civil sovereign if their lives are threatened by their parents or the sovereign. In Hobbes' own terms:

> The Obligation, and Liberty of the subject, is to be derived, either from those Words, (or others equivalent;) or else from the End of the Institution of Soveraignty.... First therefore, seeing Soveraignty by Institution, is by Covenant of every one to every one; and Soveraignty by Acquisition, by Covenants of the Vanquished to the Victor, or Child to the Parent. It is manifest, that every Subject has Liberty in all those things, the right whereof cannot by Covenant be transferred.(40)

A self-contradictory point in Hobbes' theory can be detected here. On the one hand, Hobbes claims that children have no power to make covenants whatsoever; but, on the other hand, he assumes that the relationship

between children and their parents is not based on generation but contract, and therefore the relationship between children and the sovereign is also contractual.(41) How, then, can this contradiction be clarified? One plausible clarification may go as follows.

When Hobbes suggests that over children there is no law and that children are incapable of "the title of just or unjust" because they have no power to make any covenants, he uses the word "covenant" in a different way from saying that the parent has dominion over his (her) children based on a kind of contractual relationship. In the former case, "covenant" should be viewed in the context of civil society in which children are incapable of making civil covenants and incapable of "the title of just or unjust". But in the latter case, the contractual relationship between the parent and children should be examined in the context of the state of nature. Children may have no power to make civil covenants but they can still be supposed to be capable of making a "natural", inevitably hypothetical, covenant with their parent for the reason of self-preservation. They hence can be assumed capable of enjoying the title of natural justice. In response to this account, one objection may arise here. It can be suggested that the "natural covenant" actually has no place in civil society and that no covenants in civil society can be "natural" at all. It can be replied that the whole foundation of civil society is based on the natural covenant - with a view of avoiding the state of nature or war - between people and people, the vanquished and the victor, or children and parents. These natural covenants can never be categorically changed into civil covenants and hence cannot be renounced. Under all circumstances, judging from the purpose of civil society, the natural covenant will always remain untouched.

To sum up. Hobbes' theory concerning children has been taken as a doctrine against the notion of children's rights. This is, as has been shown, a misunderstanding of Hobbes' theory of natural rights. As "the right of nature" indicates an instinctive enabling capacity - which is indisposable and inalienable - directed to self-preservation there is no reason to suggest that children do not have that sort of capacity and hence do not

have rights. Hobbes clearly does not use the term of "children's rights", but considering his theory of natural rights in general children should not be excluded from the subjects that can enjoy "rights".

4. JOHN STUART MILL AND CHILDREN'S RIGHTS

Mill's attitude against paternalism, or more accurately the strong version of paternalism, is well-known. (Mill opposes the strong version of paternalism; he, however, supports the weak version of paternalism. According to Ten, strong-paternalism is the doctrine that maintains "we are justified in interfering to prevent a person from harming himself even when his decision is fully voluntary or totally unimpaired." Weak-paternalism is the doctrine "that we are justified in interfering to prevent a person from harming himself only when there is a defect in his decision to engage in the self-harming activity.").(42) In his monumental work On Liberty, Mill declares one "very simple principle" which is primarily directed to the relationship of the individual and society. According to this principle, namely the principle of liberty:

> . . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. . . . In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.(43)

However, this anti-paternalistic principle of liberty is meant to apply only to human beings "in the maturity of their faculties"; children or "young persons below the age which the law may fix as that of manhood or womanhood" are not under the cover of the principle of liberty.(44) Based on this declaration as well as Mill's view that "[T]he existing generation is master both of the training and the entire circumstances of the generation to come"(45), it is not difficult for Freeman and Worsfold to reach the

conclusion that Mill does not subscribe to the idea of children's rights.(46)

In On Liberty and Utilitarianism Mill does not explicitly accord "rights" to children. But it would be wrong to say either that because Mill excludes children from the subjects to whom the principle of liberty applies he therefore rejects the idea of children's rights altogether, or that Mill's theory does not have "any hints of children's rights".(47) On the contrary, it is possible to pick out evidence from Mill's work by which it can be argued that Mill has implicitly accorded three kinds of rights to children. They are: the right to life or security, the right to education and the right to development. It is the aim of this section to show that the claim made here is well-founded.

The reasoning from the fact that Mill refuses to extend the principle of liberty to children to the conclusion that children have no rights is based on a misjudgement that the principle of liberty is the sole yardstick for judging whether children can have rights. The question of whether a person or a child can have rights is not the main concern of Mill's principle of liberty. The issue of children's rights should be examined from Mill's views on the notion of "justice", "duty", "right" and "the principle of general utility".

To start with, the notion of a "right" in Mill's theory is to be interpreted as a valid claim. In his own words:

> When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it.(48)

Clearly, this passage neither shows "who" can possess rights nor indicates whether rights can only be possessed if and only if they are claimed personally by the right-holder. In fact, as Mill does not systematically tackle the issue of rights in On liberty and Utilitariansim, straightforward answers to these questions cannot be easily found. But that is not to say

that Mill gives no suggestion with regard to these questions. Mill's position can be worked out by examining his view on the idea of general utility and its connection with "rights". He says:

> To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? I can give him no other reason than general utility.(49)

At this point, this statement is not helpful enough. But Mill's following explanation of the notion of general utility can develop a fruitful line from which some substantial points can be made. Mill first points out that the notion of general utility is closely connected with a special kind of sentiment - the sentiment, "not a rational only, but also an animal element, the thirst for retaliation. . . ." After this, he then claims that this sentiment is derived from the concern for security.(50) For "no human being can possibly do without". To be more specific, Mill says:

> Now this most indispensable of all necessaries, after physical nutriment, cannot be had, unless the machinery for providing it is kept unintermittedly in active play. Our notion, therefore, of the claim we have on our fellow-creatures to join in making safe for us the very groundwork of our existence, gathers feeling around it so much more intense than those concerned in any of the more common cases of utility, that the difference in degree becomes a real difference in kind. The claim assumes that character of absoluteness that apparent infinity, and incommensurability with all other consideration. . . . The feelings concerned are so powerful, and we count so positively on finding a responsive feeling in others, that *ought* and *should* grow into *must*, and recognised indispensability becomes a moral necessity, analogous to physical, and often not inferior to it in binding force.(51)

One point can be made about Mill's statement here. It seems that Mill's reply to why "rights" ought to be protected by society is related to the issue of security in particular. The reason why security is so important is that it is a necessary good or interest for all human beings, and most of all, this importance is generally recognized. Personal security is regarded as so important that some kind of device must be set up to protect it.

Manifestly, the mechanism that is established to warrant personal security is finally encapsulated in the language of rights; specifically, the right to life or security. As long as the need for security and the strong sentiment about it has been put into the language of rights, the right to life or security then becomes a moral necessity and has binding force.

Now, based on this interpretation, a better position can be gained to answer two questions. Who can possess the right to life or security? And, can this right only be possessed under the condition that the individual can make a claim about it? It can be pointed out that when Mill was talking about the need for security, he did not have the slightest intention of excluding children or any person who is not capable of rational thinking; if he had such an intention, he would not suggest that security is a thing that "no human being can possibly do without". So it can be inferred that when the need for security is transformed into the language of rights, the right to life or security should also cover children or any human being without the full sense of rationality. Further, with regard to the question of whether the right to life or security should only be effected after the act of claim, it seems Mill's reply would be negative. Since the right to life or security is, or is supposed to be, recognized by all members of society and has become a moral necessity shared by all members, the condition that it must be claimed cannot be a necessary condition of getting this right. In other words, the right to life or security is a kind of universal right; the act of claim will not affect its status as a right.

If the interpretation provided above is not persuasive enough, Mill's support of weak paternalism can be introduced at this point. Kleinig is quite clear in pointing out that the fact that the principle of liberty does not cover children only suggests that Mill denies the child's right to liberty from interference concerning self-regarding behaviour; Mill, at the same time, implies that this does not leave others to interfere with children as they desire. Weak paternalism is justifiable, as far as children are concerned, only in so far as it is designed to promote children's welfare.(52) In other words, children's welfare rights have been recognized by Mill in his weak

paternalism. However, an objection might emerge here. It can be argued that Mill does not really grant welfare rights to children, for what he really says is that society or parents should protect children from harm, just as society should protect its cultural heritage from damage. The fact that we should protect cultural heritage from damage does not imply that cultural heritage has a right to be protected. There is still a possible gap between the statement, "Children should be protected", and the statement, "Children have a right to protection". That is why it can be suggested that Mill would not go further to say that children have welfare rights against society or their parents or guardians. This objection is not totally wrong in the sense that there is indeed a gap between the statement, "Children should be protected", and the statement, "Children have a right to protection"(53), but it is wrong in the sense that it neglects the possibility that the gap can be bridged by Mill's concept of justice. It has been argued that from Mill's notion of "rights" and their connection with the principle of general utility, children's rights to life or security can be traced. In addition, the notion of children's rights to life or security can also be generated from Mill's notion of justice.

In Mill's theory, the notion of rights is an essential part of the notion of justice. In his words:

> Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation.(54)

From this, it is not surprising to see that the two essential ingredients in the idea of justice when justice is abused are similar to the two elements in the situation when a right is violated. They are: a harm to some specific individual or individuals, and the desire to punish those who have done harm.(55) Now, it can be asked: what exactly is meant by justice? In fact, this question can be rephrased as, what are those moral rules which

constitute justice? In general, the quotation above has shown that these rules are mainly concerned with the essentials of human well-being. To be more specific, Mill suggests that these moral rules are mainly devised for preventing the individual from being hurt by others "either directly or by being hindered in his freedom of pursuing his own good".(56) Clearly, children are not fully capable of pursuing or knowing their own good in Mill's theory and hence there is no sense in saying that children can have freedom to pursue their own good. But this should not blind us to another aspect that children are also Mill's "individuals" and therefore should be protected by moral rules so that other people are not allowed to hurt them directly or indirectly. This is not very different from saying, based on the reason that the notion of rights is the essence of the idea of justice, that children have a right not to be hurt, or a right to life or security.

If the line of inference given above is not accepted, there is another source in Mill's work which can be used to support the view that children have some fundamental human rights. In one passage, Mill says:

> To recapitulate: the idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule.(57)

The statement, "Children have rights", is, in fact, not very difficult to derive from the passage above. If Mill is not inconsistent, he would have no objection to the statement: The idea of fundamental rights supposes two things: a rule of conduct, and sentiment which sanctions the rule. The rule must be supposed common to all mankind and intended for their good; the sentiment is a desire that punishment may be suffered by those who infringe the rule. The reason why Mill would not object to this statement is clear. It is simply because the notion of a "right" residing in the individual is the essence of the idea of justice. If there is no sufficient reason to suppose that children are not part of human kind, children should also be protected and covered by the rule of conduct and hence have rights.

As a matter of fact, children may have not only the right to life or security but also a special right of their own; that is, the right to education. Mill, as in the case of the right to life or security, does not directly grant the right of education to children, but evidence is not hard to find to suggest that Mill has implicitly granted this right to children. A starting point is Mill's idea of "duty". Mill generally accepts the distinction between "duties of perfect obligation" and "duties of imperfect obligation". In his own words, duties of imperfect obligation are "those in which, though the act is obligatory, the particular occasions of performing it are left to our choice; as in the case of charity or beneficence, which we are indeed bound to practice, but not towards any definite person, nor at any prescribed time." And, duties of perfect obligation are "those duties in virtue of which a correlative right resides in some person or persons."(58) Mill neither expounds the idea of "duties of perfect obligation" in detail nor provides any concrete example of them in Utilitarianism. Yet, taking "duties of imperfect obligation" as reference, it can be assumed that the occasions of performing duties of perfect obligation are not left to the choice of the duty-bearer. That is, the duty-bearer is not only bound to fulfil his duties but to do so towards a definite person or persons at a prescribed time.

Following from the notion of "duties of perfect obligation", it is then appropriate to enquire whether parents in Mill's mind have a duty to provide education for their children, and whether the state has a duty to provide education for children. If the answers are positive, it then can be asked whether the duty of parents and the state towards children in regard to education is a duty of perfect obligation. If the answer is still positive, then it will not be too bold to say that children have a right to education in relation to their parents and the state.

First of all, with regard to the question whether parents have a duty to provide education for their children, it seems Mill would not be hesitant to say that parents **should** have a duty to provide education for their children, and he would also regret it if this duty were actually ignored. In On Liberty, he says:

> Hardly anyone, indeed, will deny that it is one of the most sacred duties of the parents (or, as law and usage now stand, the father), after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself. But while this is unanimously declared to be the father's duty, scarcely anybody, in this country, will bear to hear of obliging him to perform it.(59)

Then, does the state have a duty to provide education for children? Mill at first only says that it is almost "a self-evident axiom that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen."(60) But it seems unclear whether this statement implies that the state has a duty to provide education for children. However, that the state does have a duty to provide education for children becomes clear when Mill suggests that "if the parent does not fulfil this obligation, the State ought to see it fulfilled at the charge, as far as possible, of the parent."(61) It implies that Mill has suggested that it is a duty of the state to provide education for children.

However, one point should be noted here. Although Mill reckons that both parents and the state have duties to provide education for children, their duties are different. The duty of the state in providing education for children is rather a second-order duty. This duty does not immediately provide a ground on which the state can take actions to manage children's education. The state can fulfil its duty only if parents fail to fulfil their duty towards their children or when children under their parents' patronage fail to achieve a certain standard.(62) It is of course a complicated issue to judge whether parents fulfil their duty or not with regard to their children's education or what kind of criteria should be set up (and by whom?) so that the state can properly intervene without violating parents' rights. However, these questions are not the main concern here. What is certain is that both parents and the state have duties, albeit different, to provide education for their children and future citizens.

But, it can be asked, has this duty provided a solid ground on which children's right to education can be granted? As has been mentioned above,

it depends on whether the duty of parents and the state in question are duties of perfect obligation. If the duty to provide education for children is a duty of perfect obligation, it should at least satisfy two conditions: first, this duty cannot be at the duty-bearer's discretion; second, this duty should be fulfilled towards a definite person or definite persons at a prescribed time. The first of these two conditions is especially important in deciding whether a duty can be a duty of perfect obligation. If a duty is at the discretion of the duty-bearer, it then subsequently fails to satisfy the second condition. Mill's attitude concerning whether the duty to provide education for children fulfils these two conditions can be examined at two levels. Mill admitted and regretted that even though parents' duty to provide education for their children had been recognized in his time, parents still had discretion over whether to provide education for their children or not.(63) As to the state's duty towards children's education, it seems clear that the state was not legally responsible for children's education if parents failed to make educational provision for their children. This was the case at least before 1870 in England and 1872 in Scotland.(64) So, from a legal viewpoint, the duties of the state and parents concerning children's education were by no means duties of perfect obligation; in other words, children did not have the legal right to education in Mill's time.

However, in <u>On Liberty,</u> Mill has no intention of simply putting this issue in a legal context. He, in fact, regards this issue as a moral one. That is why he remarks:

> It still remains unrecognized that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind is a moral crime, both against the unfortunate offspring and against society. . . .(65)

In other words, parents' duty of providing education for their children is **morally** not at their discretion; failing to fulfil this duty is analogously compared with breaking a moral law and hence should be subject to moral sanctions. Moreover, the passage above also implicitly reveals that

parents' duty of providing education should be realized towards definite persons at a prescribed time. To this extent, the duty of parents' providing education to their children can be counted as a duty of perfect obligation and hence gives rise to the children's moral right to education.(66)

In regard to whether the state's duty to provide education for children is a duty of perfect obligation, Mill does not directly tackle this issue either. But from his position on state education - namely, the state is obligated to provide education to a certain extent but the state is not entitled to direct the education it provides, much less the education initiated by parents or other institutions - and his view that the state is under an obligation to supplement parents' enterprise regarding children's education, it would not be unreasonable to assume that the state's duty should not be dependent upon its own deliberation and that the duty should be fulfilled towards definite persons at a prescribed time. From this, children's moral right to education can also be derived from the state's duty to provide education for children.

However, one thing still needs mentioning. Children's rights to education in relation to parents and the state are different in some sense. The key point relates to the idea of punishment. As has been mentioned above, when a right is violated it will involve two elements, namely, a harm to some specific individual or individuals and the desire to punish those who have done harm. Now, supposing that children's right to education in relation to their parents is not respected, it would then be easy to detect the two elements that are supposed to be involved.(67) But it is not the case when children's right to education in relation to the state is violated, for it seems that no punishment can be directly and immediately inflicted on the state by its citizens. Does this therefore undermine the status of children's right to education in relation to the state? Not quite. For it can be suggested that the state - defined as "a particular and special association, existing for the special purpose of maintaining a compulsory scheme of legal order"(68) - can be challenged, hence humiliated, on various occasions, such as in the general elections that western

democracies have. Given this view, it can be claimed that the element of punishment, although put in a different form, can still be involved in children's right to education in relation to the state. And, therefore, the status of children's right to education in relation to the state will not be undermined.

If the reasoning above is correct, it is possible now to go further to suggest that children's right to education is, in effect, underpinned by children's right to develop individuality, or right to development.(69) It is not appropriate to dwell on how important the idea of "individuality" is in Mill's theory.(70) The main concern here is on the connection between "education" and "individuality".

In Mill's scheme, education has a close connection with individuality.(71) Education, in Mill's view, is mainly a device through which individuality can be properly developed; and not only that, the free development of individuality is a necessary part as well as a necessary condition of education.(72) Granted this relation, it can be said that children's right to education has already presupposed children's right to the free development of individuality, although these two rights cannot be identified (for education is only one way of developing individuality). What is more, in discussing the application of the principle of liberty, Mill not only emphasizes that "development" should be a part of national education but also perceives the issue of liberty and the issue of individual development as different, although liberty is the chief ingredient of individuality.(73) The former point confirms that education is meant for the development of individuality and hence children's right to education is a substantive form of children's right to develop individuality. The implication of the latter point is that although the principle of liberty does not apply to children and hence excludes the possibility that children have the right to liberty concerning self-regarding behaviour, it does not negate the possibility that children can have a right to development.

If children's right to development can be confirmed, one point should be

added here. Although it can be argued that children's right to development has been presupposed by children's right to education, children's right to development is, however, a kind of general right. Specifically, when children's right to education is violated it can be quite easy to detect. But it is not the case when children's right to development is violated. The reason for this is that the concepts of "development" and "individuality" are highly abstract and ambiguous, or at least they are not as plain as the tree-growing metaphor that Mill gives.(74) But even so, the importance of developing individuality still deserves to be encapsulated in the language of rights.

To conclude. The understanding that Mill rejects the idea of children's rights is inaccurate. From Mill's accounts concerning "utility", "justice", "duty", and "individuality", the idea of children's rights to life or security, education, and development can certainly be deduced.

5. HERBERT LIONEL ADOLPHUS HART AND CHILDREN'S RIGHTS

As a theory of rights, the will theory of rights (or its other term, the choice theory of rights) advocated by Hart is reckoned by MacCormick, Campbell and Kleinig as a doctrine that rejects the idea that children (or young children) have, or can have, rights.(75) The first purpose of this section is to illustrate that Hart's will theory of rights can actually have two versions, namely the early version and the modified version; and neither of the two versions of the will theory can be invoked to deny the idea of children's rights in general. What can at most be claimed is that Hart in his early version of the will theory does deny children's **moral** rights; he does not at the same time deny the possibility of children's **legal** rights. Children's legal rights are explicitly confirmed in Hart's modified version of the will theory, and Hart implicitly accepts that children's moral rights are also compatible with the modified version of the will theory. The second purpose of this section, therefore, is to argue that the reasoning for holding the view that children do not have moral rights in Hart's early version of the will theory is problematic and hence

should be rejected. More generally, it is hoped to provide an accurate picture of Hart's will theory and its bearings on the issue of children's rights.

Hart's will theory of rights can be perceived as:

> . . . the theory which says that having a right of some kind is to do with the legal or moral recognition of some individual's choice as being pre-eminent over the will of others as to a given subject-matter in a given relationship.(76)

Following this position concerning the nature of rights, it then can be inferred that since children (or infants, animals and adults incapable of choice) lack the capacity of making their own choice over the will of others as to a given subject matter in a given relationship children hence do not have either moral rights or legal rights. This inferential viewpoint is now widely associated with Hart's will theory. But it should be pointed out that Hart would probably only approve part of this inference if he still held his early version of the will theory; and Hart would even totally repudiate this inferential viewpoint on his modified version of the will theory. A further elaboration is needed here.

To start with Hart's modified version of the will theory. In Hart's later work Bentham on Legal Rights and Legal Rights(77), he seems to hold a rather similar viewpoint on the nature of rights as he does in his early work Definition and Theory in Jurisprudence and Are there Any Natural Rights? But the significant difference between these two versions of the will theory is that the application of the will theory has been consciously confined to the level of "ordinary law" - viz., criminal law and civil law - in his modified version of the will theory. In other words, Hart admits in his later work that the will theory is not an all-embracing comprehensive theory of rights at all. There are some rights in which the right-holder's capacity of making choice over the duty-bearer does not count. These rights, Hart says, are related to freedoms and benefits essential for "the maintenance of the life, the security, the development, and the dignity of

the individual."(78) The essential idea of these rights - which are mainly of concern to constitutional lawyers, serious critics of the law and social theorists - is neither the individual's choice nor the individual's benefits (as claimed by a competing theory of rights, the interest theory) but the individual's fundamental needs.(79) The retreat from the will theory as an all-embracing theory of rights to the modified version of the will theory applicable only to the ordinary law hence paves the way for the idea of children's rights, on the grounds that children basically share the fundamental needs of all other human beings and therefore the concern for their lives, security, development and dignity can then be encapsulated in the language of rights. Given the recognition that the right-holder's choice over the duty-bearer is not *the* essence of rights and that human basic needs can also be the grounds of some rights, it seems that Hart's modified version of the will theory has accommodated itself with the idea of children's constitutional rights and moral rights.

Most notably, the retreat from a general comprehensive theory to a parochial theory also goes with an important concession to which Hart does not give prominent publicity. That is, persons with limited capacity who cannot in a strict sense make their own choice over the duty-bearer in a given *ordinary* legal relationship can still have rights. Infants and persons not *sui juris*, for example, can have rights. In other words, children, like adults, can also have legal rights.(80) But how can infants, children and persons not *sui juris* exercise their rights? Hart suggests that their rights are actually not exercised by themselves but by appointed representatives on their behalf. But the exercise of the rights of infants, children or persons not *sui juris* by appointed representatives has three qualifications. Firstly, appointed representatives' exercise of rights for infants, children, or persons not *sui juris* may be subject to approval by a court. Secondly, the exercise of rights by appointed representatives is determined by "what those whom they represent could have done if *sui juris*." Thirdly, when persons not *sui juris* become *sui juris* they can exercise their rights "without any transfer or fresh assignment."(81) On the whole, Hart maintains that although it is appointed representatives

who exercise the rights for persons not *sui juris* during the period of their disability, the rights should be regarded not as belonging to the appointed representatives but to the persons not *sui juris*.(82) Following this, it can be certain that children's legal rights are actually recognized by the modified version of the will theory.

Two problems, however, may be discovered here. Firstly, it can be asked: are children's legal rights really meaningful given the framework of the modified version of the will theory of rights? For it can be suggested that as children do not have full rationality in deciding whether they should claim or enforce their rights over the legal duty-bearer or ask for compensation when their rights are violated, their rights, exercised by appointed representatives, are at best nominal and at worst empty. Secondly, it can be asked: if infants, children or persons not *sui juris* can be legally represented and can have legal rights, why cannot animals be legally represented and hence have legal rights as well? Further, if animals cannot be legally represented and cannot have legal rights in the will theory of rights why is it that infants, children or persons not *sui juris* can? For some animals (like chimpanzees) also have limited rationality and hence they are only different from infants in degree not kind; and it is simply inconsistent for the modified will theory to accommodate the idea of children's rights and to reject the idea of animals rights.

On the face of it, it seems that Hart does not directly respond to these two problems. But from the position he constantly holds in his work, Hart's modified version of the will theory can be defended as follows. With regard to the first problem, Hart surely insists that the individual's choice or will over the duty-bearer is the essence of rights at the level of ordinary law, but he does not maintain that the right-holder must be the person who can actually and personally claim, enforce his rights or ask for compensation if his rights are violated. The notion of "the individual's choice or will over the duty-bearer" should not be understood only as the individual's **personal** choice over the duty-bearer; it can also be

understood as the individual's discretionary **legal** choice or will over the duty-bearer, which can be exercised by appointed representatives on the right-holder's behalf under the supervision of court. As the exercise of the rights of persons not *sui juris* by appointed representatives is subject to the qualifications mentioned and to the supervision of court, there is no need to worry that children's rights would only be nominal or even empty. As to the view that the idea of animals' rights should be treated analogously to the idea of children's rights or infants' rights, it can be pointed out that Hart's views are underpinned by the assumption that animals are categorically different from human beings, and, therefore, there should be a different legal device for protecting them. For animals, legal protection is embodied in the language of duties; but for human beings, legal protection can be phrased both in the language of duties and the language of rights. That is why although infants or children cannot personally exercise their rights they can still be the rights-holders.

Given the understanding that the modified version of the will theory does not in any sense deny the idea of children's moral rights or legal rights, the emphasis should now be put on Hart's early version of the will theory. It has been mentioned that Hart's early version of the will theory does not really renounce the possibility that children can have **legal** rights; and therefore it is problematic to invoke the early version of the will theory to deny the idea of children's rights. This point can be supported by Hart's account given in Definition and Theory in Jurisprudence. In this article, Hart also holds the view that the essence of rights is the right-holder's choice over the duty-bearer. But the essential point is that Hart does not actually declare that it must be the right-holder's own choice that counts. What he really claims is that the duty-bearer's action or absence of action is made by law dependent on the choice either of the right-holder or some other person authorised to act on behalf of the right-holder.(83) It may suggest that Hart does not really deny the possibility of children's legal rights (or the legal rights of persons not *sui juris*). From the fact that Hart explicitly recognizes the legal rights of infants and persons not *sui juris* in his modified version of the will theory and that the reason for his

recognition is very much in line with his early version, it may be reasonable to suggest that children's legal rights are not denied in Hart's early version of the will theory.

However, it is clear that children's **moral** rights are completely rejected in Hart's early version of the will theory. In Are There Any Natural Rights? Hart firstly gives a conditional assertion that if there are any moral rights at all then there must be a natural right - "the equal right of all men to be free". The equal right of all men to be free in Hart's theory, however, is qualified in one significant way. That is, the subjects of this right are restricted to "adult human beings capable of choice".(84) It implies that infants, children, the insane and the senile (let alone animals) do not have an equal right to be free.

It nevertheless can be suggested that even if children (leaving other special cases aside) are denied the equal right to be free, Hart possibly does not claim that children cannot have other sorts of moral rights, such as a moral right to development; and hence the idea of children's moral rights is not totally renounced in Hart's early version of the will theory. This possibility, unfortunately, is closed by Hart in two ways.

Firstly, moral rights in general are classified into two categories by Hart, viz., general rights and special rights. General moral rights are rights against anyone, such as "I have the right to say what I think" or "I have the right to worship as I please".(85) By contrast, special rights are rights which "arise out of special transactions between individuals or out of some special relationship in which they stand to each other," such as "I have a right to be paid what you promised for my service" or "parents' right to obedience from their children".(86) After this classification, Hart claims that the assertion of general moral rights directly invokes the principle "that all men equally have the right to be free" and that the assertion of special moral rights invokes this principle indirectly.(87) The implication of Hart's claim can then be that children do not have any moral rights, on the grounds that all moral rights are directly or indirectly based on the

principle, "All men equally have the right to be free", which does not cover children.

Secondly, Hart simply asserts that children do not have moral rights. Children of course should not be ill-treated and adults of course have a duty to treat children properly, but this moral provision cannot be the grounds for claiming, "Children have a right to be treated properly."(88) The reason for Hart's confining the subjects of moral rights to adults capable of choice is mainly related to his conviction that the language of rights, as a distinctive form of moral language, should play a pivotal role in "regulating the proper distribution of human freedom".(89) To be more specific, Hart assumes that the language of rights must have its own distinctive character which makes it different from other moral concepts. And the distinctive character of rights-talk, along with the notion of justice, fairness and obligation (Hart uses this term in a specific way), is its legitimacy "in the use of force or the threat of force to secure that what is just or fair or someone's right to have done shall in fact be done. . . ."(90) And not only that, but in order to fulfil its role in regulating the proper distribution of human freedom, the right-holder should be given a special ground on which he can decide whether to exercise or enforce his rights, or to ask for compensation if the rights concerned are violated. Only through the employment of the language of rights, Hart seems to assume, can human freedom be guaranteed and distributed in a satisfactory way.

Given the distinctive character, or function, of the language of rights, we are now in a better position to understand why Hart does not want to translate the statement of duties (such as, we have a duty not to ill-treat children) into the statement of rights (such as, children have a right not to be ill-treated). If this sort of translation can be done then the language of rights will soon lose its identity; for it seems this translation will make the distinctive character of the language of rights incomprehensible. It would be ridiculous for children or their appointed representatives to waive "children's rights not to be ill-treated". So, in order to keep the

identity of the language of rights, rights-talk must have its own distinctive character or function that cannot be replaced by other moral concepts. The recognition of this distinctive character of rights-talk can, on the one hand, disentangle the language of rights from other moral concepts and make the translation from the language of duties into the language of rights impossible ; on the other hand, it becomes an obstacle to the idea of children's moral rights by reason of the imcompetency of children in making their own choice over the duty-bearer.

The main reason why only adults capable of choice can have moral rights is also related to the specific function that the language of rights is supposed to perform; that is, to distribute human freedom properly and satisfactorily. Presumably, it is Hart's view that only adults capable of choice are able to participate in the activity of the distribution of human freedom. Hart does not make clear what he means by "human freedom" in Are There Any Natural Rights? But it should be pointed out that "freedom" in Hart's plan should not simply be reckoned as "negative freedom" - the absence of moral or physical external impediments. What Hart is really driving at is that the freedom should be gained through the operation of deliberate capacity manifested in making rational decisions after various relevant factors (such as, moral rules, moral ideas and changing circumstances) have been taken into account. In this sense, animals, infants, children, or some special adults who are not capable of making this sort of decision are undoubtedly not suitable for involving in the activity of the distribution of human freedom, and hence have no rights.

If the understanding about Hart's early version of the will theory above is correct, it now can be concluded that the reason why children do not have moral rights is that moral rights are solely concerned with the activity of the distribution of human freedom which children are unable to participate in. It is worth examining this assumption further.

The problem of Hart's assumption is, as can be seen in Hart's modified version of the will theory, that it tries to delimit the possible boundary of

the language of moral rights. The language of moral rights does have a close connection with the distribution of human freedom, but it is not true to say that all moral rights should be concerned with freedom based on the deliberation of the right-holder's choice. Some rights, as suggested by Hart is his later work, can be concerned with fundamental human needs. They are no less rights than the moral rights that concern human freedom.

But it may be asked: does the diffuse use of the concept of moral rights undermine the concept of moral rights as a distinctive form of moral language? In a way the answer is "Yes." As has been shown in Chapter One, the language of rights can be associated with so many other moral and legal concepts, such as liberty, duty, interest, entitlement, power, immunity and so on; therefore, the whole picture of the use of the language of rights does appear confusing, and the character of rights-talk not clear. But it can be suggested that the diffuse use of the language of moral rights is exactly the distinctive character of the language of moral rights. It seems there is no moral concept that can be related to so many other moral concepts as the concept of moral rights. From this angle, Hart's intentional attempt to confine the boundary of the concept of rights is bound to be futile.

What Hart tries to do in his early version of the will theory is to prescribe the use of the language of rights. In his plan, moral rights can only be ascribed to adults capable of choice. Hart's moral scheme is very much in line with Kant's moral scheme developed from the principle of respect for persons, in which, as interpreted by Downie and Telfer, children are not supposed to be respected on the grounds that children are not rational beings.(91) Whether Hart is successful in establishing his moral scheme and regulating the use of the language of rights can be tested by the case of children's rights. With the advantage of hindsight, from the fact that the idea of children's moral rights is widely accepted and employed in ordinary usage it can be claimed that Hart's moral scheme is unworkable and his attempt to regulate the use of the language of rights unsuccessful.

To summarize. Hart's version of the will theory is taken as a doctrine that

rejects the idea of children's rights in general. This, however, is a misunderstanding. Hart has two versions of the will theory. His early version does straightforwardly deny children's **moral** rights; but this version does not renounce the possibility of children's **legal** rights. Hence it is problematic to suggest that Hart's early version of the will theory completely rejects children's rights in general. Most remarkably, the modified version of the will theory is not only a theory that explicitly recognizes children's legal rights at the level of ordinary law but also a theory that accommodates itself to the idea of children's moral rights. Taken as a whole, it is wrong to suggest that Hart denies the idea of children's rights. Hart's early version of the will theory concerning moral rights can indeed be developed into a general theory of rights in which the idea of children's rights would have no place, but it should be noted that Hart did not do this.

NOTES:

1. This is pointed out by Kleinig, see J. Kleinig, Mill, Children and Rights, Educational Philosophy and Theory, vol. 8, no. 1, 1976, pp. 1-16.
2. See M.D.A. Freeman, The Rights and the Wrongs of Children, London: Frances Pinter, 1983, pp. 17-18.
3. J.J. Rousseau, The Social Contract, translated by G.D.H. Cole, in The Social Contract and Discourses, London: Dent, 1986, p. 186.
4. Rousseau does not really declare directly that children are not citizens. But from the way he uses the term "citizen", it seems he suggests that children are not citizens. For he says, "The last census showed that there were in Rome four hundred thousand citizens capable of bearing arms, and the last computation of the population of the Empire showed over four million citizens, excluding subjects, foreigners, women, children, and slaves." See The Social Contract and Discourses, p. 262.
5. In the case of Tinker v. Des Moines School District, 1969, the American Supreme Court says, ". . . minors, as well as adults, are protected by the Constitution and possess constitutional rights." This is quoted in M.D.A. Freeman, op. cit., p. 20.
6. This point can also be made clear by invoking Aristotle's political theory, see his Politics, translated by J. Warrington, London: Heron.
7. In comparison with Locke's political theory, contemporary political theory and philosophy do not consider children's status seriously. See, G. Haydon, Political Theory and the Child, Political Studies, vol. 27, no. 3, 1979, pp. 405-420.
8. J. Locke, The Second Treatise of Government, in Two Treatises of Government, introduced by W.S. Carpenter, London: Dent, 1986, sec. 56.
9. Ibid., sec. 57.
10. Ibid., sec. 54-59.
11. Ibid., sec. 63-64.
12. Ibid., sec. 65.
13. It is interesting to note that Locke does not explicitly declare that children have rights when the issue of the relationships between

children, parents and the state is being discussed. That children have a right to be nourished and maintained by parents and the state is clearly stated when Locke tries to develop his arguments concerning civil society in general. See "The Second Treatise of Government", sec. 78, 84.

14. M.D.A. Freeman, op. cit., p. 21.
15. See B.M. Hoggett, Parents and Children: The Law of Parental Responsibility, London: Sweet and Maxwell, 1987, p. 7.
16. See G. Graham, Contemporary Social Philosophy, Oxford: Basil Blackwell, 1988, pp. 146-147; F. Schrag, From Childhood to Adulthood, in K.A. Strike and K. Egan (eds.), Ethics and Educational Policy, London: Routledge and Kegan Paul, 1978, p. 68.
17. For the detail, see F. Schrag, The Child in the Moral Order, Philosophy, vol. 52, 1977, p. 175
18. G. Graham, op. cit., pp. 143-145.
19. F. Schrag, The Child in the Moral Order, p. 176.
20. See H. Spencer, Social Statics, London: Williams & Norgate, 1868, pp. 191-193; J. Holt, Escape from Childhood, Harmondsworth: Penguin, 1975; R. Farson, Birthrights, Harmondsworth: Penguin, 1978.
21. Haydon and Schrag, among others, are clearly aware of the disadvantages of the age-criterion; but after comparing the age-criterion and the competence-criterion, they end up by endorsing the age-criterion. See G. Haydon, op. cit.; F. Schrag, The Child in the Moral Order.
22. B.M. Hoggett, op. cit., p. 54; also see R. Adler & A. Dearling, Children's Rights: A Scottish Perspective, in B. Franklin (ed.), The Rights of Children, Oxford: Basil Blackwell, 1986, pp. 219-221.
23. C.A. Wringe, Children's Rights: A Philosophical Study, London: Routledge and Kegan Paul, 1981, p. 89.
24. M.D.A. Freeman, op. cit., pp. 52-53; V.L. Worsfold, A Philosophical Justification for Children's Rights, Harvard Educational Review, vol. 44, no. 1, 1974, pp. 143-144.
25. T. Hobbes, De Cive (Philosophical Rudiments Concerning Government and Society), in The English Works of Thomas Hobbes, edited by W. Molesworth, London: John Bohn, 1839, vol. 2, pp. 115-116.

26. T. Hobbes, Leviathan, edited by C.B. MacPherson, Harmondsworth: Penguin, 1968, p. 254.
27. This is pointed out by D.P. Gauthier, The Logic of Leviathan, Oxford: Clarendon Press, 1966, p. 118.
28. T. Hobbes, Leviathan, p. 317.
29. See T. Hobbes, Leviathan, chapter 20, 21; and D.J.C. Carmichael, The Right of Nature in Leviathan, Canadian Journal of Philosophy, vol. 18, no. 2, 1988, p. 262.
30. I am indebted to Dr. W.M. Humes for raising this objection.
31. Notably, Aristotle would not agree that slaves are mentally fit for gaining liberty, for he suggests that slaves have no deliberative faculty but that children have an immature deliberative faculty. Aristotle's point, however, cannot stand the test of modern psychology. See Aristotle, Politics, 1260a.
32. T. Hobbes, Leviathan, p. 189.
33. See D. Gauthier, op. cit., p. 66; Hart also holds the same view, see H.L.A. Hart, Are There Any Natural Rights? Philosophical Review, vol. LXIV, 1955, P. 179.
34. See D.J.C. Carmichael, op. cit., pp. 259-260.
35. T. Hobbes, Leviathan, p.189.
36. D.J.C. Carmichael, op. cit., pp. 265-266.
37. See C.B. MacPherson, Natural Rights in Hobbes and Locke, in D.D. Raphael (ed.), Political Theory and the Rights of Man, London: Macmillan, 1967, pp. 2-5
38. See T. Hobbes, Leviathan, pp. 42-43. Also see R. Tuck, Natural Rights Theories, Cambridge: Cambridge University Press, 1979, pp. 119-132. Tuck points out that the right to self-preservation is reckoned as renunciable in Hobbes' early work The Elements of Laws; Hobbes changes his position, however, in his later work Leviathan and "De Cive", in which the right of self-preservation is inalienable.
39. T. Hobbes, Leviathan, p. 192.
40. Ibid., p. 268.
41. Ibid., p. 253.
42. See C.L. Ten, Mill on Liberty, Oxford: Clarendon Press, 1980, p. 110.

Mill's paternalism will be further discussed in Chapter Five of this thesis.

43. J.S Mill, On Liberty, Harmondsworth: Penguin, 1985, pp. 68-69.
44. Ibid., p. 69.
45. Ibid., p. 149.
46. M.D.A. Freeman, op. cit., pp. 53-54; V. Worsfold, op. cit., pp. 145-146.
47. It is Freeman's view that Mill's theory excludes "any hints of children's rights". See M.D.A. Freeman, op. cit., p. 54.
48. J.S. Mill, Utilitarianism, in M. Warnock (ed.) Utilitarianism, Glasgow: Collins, 1962, p. 309.
49. Ibid., p. 309.
50. Ibid., pp. 309-310.
51. Ibid., p. 310.
52. J. Kleinig, op. cit., pp. 2-3.
53. According to MacCormick's analysis, it can be said that there are various justifications for claiming "Children should be protected", such as children are important for the state or society as a whole. But children's right to protection is most appropriately connected with the ultimate concern for the well-being of children as human beings. So, the claims, "Children should be protected" and "Children have a right to protection", can be very different. See D.N. MacCormick, Children's Rights: A Test Case for Theories of Right, in Legal Rights and Social Democracy, Oxford: Clarendon Press, 1982, pp. 154-166.
54. J.S. Mill, Utilitarianism, pp. 315-316.
55. Ibid., pp. 306-308.
56. Ibid., p. 315.
57. Ibid., p. 308.
58. Ibid., p. 305.
59. J.S. Mill, On Liberty, p. 176.
60. Ibid., p. 176.
61. Ibid., p. 176.
62. Ibid., pp. 176-178.
63. Ibid., p. 176.
64. I am grateful to Dr. W.M. Humes for pointing this out.

65. J.S. Mill, On Liberty, pp. 176.
66. This point echoes Mill's recognition of moral rights. See, H.L.A. Hart, Natural Rights: Bentham and John Stuart Mill, in Essay on Bentham, Oxford: Clarendon Press, 1982, pp. 79-104.
67. J.S. Mill, On Liberty, pp. 177-178.
68. This is defined by E. Barker, see Principles of Social and Political Theory, Oxford: Oxford University Press, 1967, p. 3.
69. In Mill's view, individuality is the same thing as development. See, J.S. Mill, On Liberty, p. 128.
70. For further detail, see J.S. Mill, On Liberty, chapter 3; and C.L. Ten's elucidation, op. cit., chapter 5.
71. J.S. Mill, On Liberty, p. 177.
72. Ibid., p. 120.
73. Ibid., pp. 180-181; C.L. Ten, op. cit., p. 74.
74. J.S. Mill, On Liberty, p. 123.
75. See D.N. MacCormick, Children's Rights: A Test Case for Theories of Right; D.N. MacCormick, Rights in Legislation, in P.M.S. Hacker and J. Raz (eds.), Law, Morality and Society, Oxford: Clarendon Press, 1977, pp. 189-209; T. Campbell, The Left and Rights, London: Routledge & Kegan Paul, 1983, pp. 87-88; J. Kleinig, Mill, Children, and Rights, p. 10.
76. D.N. MacCormick, Children Rights: A Test Case for Theories of Right, p. 154.
77. H.L.A. Hart, Bentham on Legal Rights, in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Oxford: Clarendon Press, 1973, pp. 171-201; H.L.A. Hart, Legal Rights, in Essay on Bentham, pp. 162-193. There are only minor differences between these two essays.
78. H.L.A. Hart, Bentham on Legal Rights, p. 197.
79. Ibid., pp. 196-201.
80. Ibid., pp. 192-193, note 86.
81. Ibid., pp. 192-193.
82. Ibid., pp. 192-193.
83. H.L.A. Hart, Definition and Theory in Jurisprudence, Proceedings of the British Academy, vol. 48, 1962, p. 49.
84. H.L.A. Hart, Are There Any Natural Rights? p. 175.

85. Ibid., pp. 187-188.
86. Ibid., pp. 183-187.
87. Ibid., p. 188.
88. Ibid., p. 181.
89. Ibid., pp. 177-182.
90. Ibid., pp. 177-182.
91. See R.S. Downie and E. Telfer, Respect for Persons, London: George Allen and Unwin, 1971, chapter 1.

CHAPTER THREE

ARGUMENTS FOR CHILDREN'S RIGHTS

In the preceding chapter, it was firstly pointed out that the language of rights was not normally employed in children's relationships with adults and political institutions in the past. Following that, attention was given principally to the theories of Hobbes, Mill and Hart. Their theories have often been reckoned as theories that exclude the idea of children's rights from the domain of rights-talk. It was argued that this reckoning was unsound. Owing to the requirement of theoretical consistency, the concept of children's rights should be given a place in Hobbes' and Mill's theories, even though the terminology of "children's rights" is not used explicitly in their writings. Hart's will theory of rights is complicated. But it was shown that Hart's modified version of the will theory accommodates itself to the idea of children's rights; and, as the exercise of legal rights can be undertaken by the representative of the right-holder in Hart's early version of the will theory, Hart's early version of the will theory should not be regarded as a theory that denies the idea of children's rights.

It should be noted, however, that the elucidation of the theories of Hobbes, Mill and Hart concerning children in Chapter Two does not in any sense amount to a justification for children's rights. It was only meant to convey the message that the idea of children's rights can be found in, or accommodated with, those writers' theories. In other words, even though the idea of children's rights can be found in some writers' theories the idea itself is still not justified in a literal sense. The aim of this chapter, therefore, is to advance a justification for the idea of children's rights. Actually, several justifications for children's rights have already been tendered. These justifications are, however, not entirely satisfactory. In one way or another, they suffer from various weaknesses. A more satisfactory justification is thus needed. In the following three sections,

two sorts of justification that have been advanced for children's rights will be examined in the first two sections; based on dissatisfaction with these justifications, an alternative justification for children's rights will then be developed in the final section.

1. THE TRADITIONAL JUSTIFICATION FOR CHILDREN'S RIGHTS

The traditional justification for children's rights is to try to demonstrate that children are part of a class that is the subjects of rights. This sort of justification can be illustrated in a syllogistic form: X are the sort of beings that (can) have rights (major premise), children are part of X (minor premise), therefore children also (can) have rights (conclusion). There are several things that can be said in respect of this sort of justification.

Firstly, the issue of children's rights in this traditional justification does not occupy a central place. The statement that "Children have rights" or "Children can have rights" is only a derivative from a general statement which needs justification. Thus the main emphasis of the traditional justification will be put on the major premise rather than on the issue of children's rights itself. Secondly, the traditional justification has presupposed that there must be one (or some) common characteristic(s) that children share with the subjects of the class that children belong to. Without this presupposition, the minor premise will not be valid. But the problem is: what is this characteristic? And, what is the ground for identifying this common characteristic? The answers to these questions are contingent on the major premise and on the argument aimed at supporting the major premise. Thirdly, the traditional justification also implies a formal principle of justice; that is, treat equals equally, unequals unequally.(1) Following this formal principle, it then can be reasoned that if children are part of a class that is the subjects of rights then children also have the rights that other members of the class have on the grounds that they should be treated equally.

In this section, two examples of the traditional justification for children's

rights will be presented and examined. Without exception, both examples have the three features mentioned above and hence are subject to the difficulties attached to these features. First of all, it can be suggested that since the question of children's rights is the central issue, any justification of children's rights had better start from the concept of childhood, children's relationships with adults or political institutions, and the framework (whether moral, social, political or cultural) to which children can be referred, rather than from a remote logical connection between children and a class of beings that children belong to.(2) Second, it is hard to single out a common characteristic or a group of common characteristics that children share with other beings who are the subjects of rights. The common characteristic that has been identified is also the criterion by which we can judge what sort of beings can have rights, such as, rationality, the liability to pain and suffering, transcendental properties like "an intrinsic dignity", or physical attributes like features that human beings have. Unfortunately, these characteristics are often reckoned to be ambiguous, mysterious, or assertive and hence unsatisfactory.(3) Apart from this, the characteristic singled out may be too strict and thus exclude some important classes of beings (if the strict sense of rationality is taken as the criterion, only rational adults can have rights) or too loose and thus include too many beings (if the capacity of suffering is taken as the criterion, then all kinds of animals can have rights).(4) Third, most seriously, the traditional justification for children's rights often fails to furnish an adequate justification for the major premise. For example, if the claim "All human beings (can) have human rights" is to be taken as the major premise, then it must be asked: on what ground does this premise stand? With regard to this question, what is really needed is not an "assertion" that all human beings (can) have human rights but an "argument" (or a set of arguments) which can convince us that human beings (can) have human rights. But, unfortunately, as Young indicates:

> The biggest problem for the theory of human rights is the problem of finding an adequate justification. The characteristics usually offered in support of the theory . . . seem *either* to be too weak to

> sustain the whole apparatus of human rights, *or* to introduce new mysteries that only compound worries about the justifiability of rights-talk.(5)

Young's criticism of the theory of human rights seems to be applicable to other arguments that support a major premise from which the idea of children's rights can be derived. This difficulty will be further revealed in the following two traditional justifications for children's rights.

1.1 Human Rights and Children's Rights

The first traditional justification for children's rights starts from a statement concerning human rights. It is Gewirth's proposition that "All persons can equally have human rights simply insofar as they are human."(6) Based on this proposition, the justification of children's rights can be developed as: 1>. All persons can equally have human rights on the grounds that they are human beings (major premise); 2>. Children are human beings (minor premise); 3>. Children can have equal human rights (conclusion). Before going on to consider the arguments for Gewirth's main proposition, attention should be paid to the concepts of "persons" and "humans" embodied in the main proposition.

It can be pointed out that Gewirth's proposition blurs the concept of "persons" and "human beings". Briefly, the term "human beings" is a descriptive term. It is a term for describing animated beings with human form. By contrast, the term "persons" arises in a legal context; it is an evaluative rather than a descriptive term. A "person" is an entity recognized in law. It can be a natural person or an artificial person, such as a corporation.(7) Most importantly, as it is a legal concept, it can then be subject to change owing to the possible changes of legal framework. This point can be further exemplified by the fact that the idea of "persons" has varied. On the one hand, gods, idols, unborn and dead human beings, animals or even inanimate things have been classified as persons in the law(8); on the other hand, some natural persons such as children were once

treated as "property" rather than "persons".(9) Given this understanding of the concepts of "persons" and "human beings", the statement, "All persons can have equal human rights insofar as they are human", actually can be read in two ways. First, it may be read as saying that under the category of "persons" only persons with human form can have human rights, persons without human form (e. g. corporations) cannot have human rights; and some human beings who are not recognized as persons (possibly, foetuses, children or even women) cannot have human rights even though they have human form. Second, it may be reckoned that all human beings are persons and it is impossible to be a human being without also being a person; hence Gewirth's statement can be read as saying, "All human beings can have equal human rights." The question we are now facing is: between these two readings, which reading is more in line with Gewirth's intention? Judging from the fact that Gewirth does not pay attention to the distinction between "persons" and "human beings" and his later statement "The Subject of the human rights are all human beings equally"(10), it seems more likely that the second reading is in tune with Gewirth.

We now turn to examine Gewirth's justification for the proposition that "All human beings can have equal human rights." Gewirth's justification for human rights arises from his dissatisfaction with other theories which have been used to justify equal human rights.(11) In his view, all these other theories, in one way or another, have some difficulties. He hence sets up twelve conditions on which a successful justification for equal human rights depends. These conditions are: providing an argument, determinancy, sufficiency, adequate egalitarian premises, logical derivability of "ought" from "is", rational justification of the criterion of relevance, rationally necessary acceptability to all rational persons, adequate account of the objects of rights, justified premises, truth, non-circulation and empirical reference.(12) Bearing these conditions in mind, Gewirth then proceeds with his own justification for equal human rights.

To put it simply, Gewirth starts from the assumption that any action of a prospective purposive agent contains two elements; viz., voluntariness (or,

freedom) and purposiveness (or, intentionality). Based on this assumption, Gewirth argues that when a prospective purposive agent performs an action he must aim for an end or purpose E, and E is something that the agent freely chooses to attain; this implies that E is good. Generally, freedom and well-being are necessary goods for attaining E. From this, it can be claimed that the agent has rights to freedom and well-being given the sense that rights are justified claims or entitlements. This claim cannot be denied, for if it is denied then it suggests that it would not be wrong for other people to interfere with any prospective purposive agent's rights to freedom and well-being; however, no prospective purposive agent will accept the case that his rights to freedom and well-being can be interfered with by other persons. If it is the case that any prospective purposive agent wants to have rights to freedom and well-being and his rights should not be interfered with, then each agent is bound to respect other agents' rights; if not, his own rights to freedom and well-being will also be endangered. Up to this stage, it then can be concluded that "All prospective purposive agents have rights to freedom and well-being and all agents should act accordingly." And, to move a step forward, Gewirth says: "Since all humans are actual, prospective, or potential agents, the rights in question belong equally to all humans."(13)

Bearing the issue of children's rights in mind, we can now scrutinize Gewirth's argument. The focus of this scrutiny is neither on whether Gewirth's argument is consistently and logically developed(14), nor on whether his twelve conditions of a satisfactory argument for equal human rights are plausible.(15) The main focus is rather on whether Gewirth's argument is solid enough to support the claim that **all** human beings can have equal human rights. If Gewirth's argument cannot support this claim, the deductive statement that children also can have equal human rights will then be undermined. Unfortunately, it seems that Gewirth's argument for equal human rights is too weak to support his claim. For Gewirth seemingly omits those people who can be counted as human beings but who cannot be regarded as "prospective purposive agents", such as foetuses, new-born babies, very young children, the severely mentally-handicapped and the like.

These people, for different reasons, cannot *de facto* undertake prudential reasoning (which leads the prospective purposive agent to claim and pursue freedom and well-being, and to recognize other agents' rights to freedom and well-being on the grounds that if he does not respect other agents' rights his own rights will not be respected by others), let alone moral reasoning (which leads to the agent's unconditional respect for other agents' rights). So, it can be suggested that as Gewirth's arguments for equal human rights are based on the reasoning and undertaking of the prospective purposive agent, so the equal human rights justified in this way can apply to the prospective purposive agent, but not other agents. Actually, Gewirth is aware of this problem. And he admits that the term of "prospective purposive agents" only refers to "normal humans"; that is, persons who can control their behaviour freely and purposively. From this, he acknowledges that human beings who are not prospective and purposive do not enjoy the same equal human rights as normal humans.(16)

In the light of Gewirth's own admission, it then can be suggested that his arguments can at most justify the equal human rights of normal humans. The discrepancy between Gewirth's arguments and his proposition that all human beings can have equal human rights can be rectified in two ways. One can either modify his main proposition or strengthen his arguments. This, however, is not a task to be undertaken here.

To conclude. As far as children's rights are concerned, Gewirth's arguments for equal human rights fail to provide a solid ground on which children's human rights can be claimed. The failure to justify the major premise that all human beings can have equal human rights subsequently makes the minor premise and the conclusion unconvincing. Without a persuasive and coherent argument for the major premise on which the idea of children's rights can depend, the traditional justification for children's rights is bound to fail.

1.2 The Interest Principle and Children's Rights

Another general statement that may give grounds for claiming, "Children

have rights", is provided by Feinberg. On the issue of animal rights, Feinberg maintains that as long as beings can have interests they can have rights and beings incapable of having interests are incapable of having rights. In other words, to have interests is a logically necessary and sufficient condition for beings to be the subjects of rights.(17) Given Feinberg's proposition, it then can be said that since children can have interests, they can have rights. Following this syllogism, it can be suggested that since children can have rights there is no reason not to accord rights to them given the condition that other agents (such as adults) who can have rights do have rights.

One thing should be done before we can examine whether Feinberg provides a satisfactory argument for his proposition. As the concept of "interests" plays a key role in Feinberg's proposition it is therefore worthwhile paying attention to this concept in the first place. Generally, the concept of "interests" can be meaningful in two contexts. In the first, when we say that "A has an interest in X" it means that "A is interested in X". In the second, when we say that "A has an interest in X" it means that "X is in A's interest".(18) In the former case, the connection between A and X is built on the condition that A possesses some kind of psychological propensity which makes A feel interested in X. In other words, A must be a conative being. It is not so, however, in the latter case. In the latter case, A may or may not be a conative being. For example, it is quite common for us to say that unleaded petrol is in the interests of our natural environment. Thus, the connection between A and X can be either a psychological one or a purely instrumental one.

Between these two senses of "interests", which does Feinberg adopt? According to Regan's analysis, Feinberg's use of "interests" is in the first sense; that is, "interests" in the sense of psychological propensity of conative beings.(19) Hence, in Feinberg's scheme, beings who can have rights are exactly those beings who can be psychologically interested in things. It is in this context that Feinberg argues that since animals can have interests they can have rights and that since mere things cannot have

interests they cannot have rights. It is also in this context that we can assume that children can have rights on the grounds that children are conative beings and are capable of being interested in things.

After the clarification of Feinberg's position, we are better placed to examine his argument for the proposition that only beings who can be interested in things can have rights. In effect, Feinberg does not labour the point. He provides two reasons for it. In the first place, he claims that "a right-holder must be capable of being represented and it is impossible to represent a being that has no interests." Second, "a right-holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefited, having no good or 'sake' of its own."(20)

We now can ask: can Feinberg's two reasons supporting the proposition that "beings who can have rights are those who can have interests" constitute a satisfactory justification for his proposition? It seems the answer is negative. Feinberg's first reason for supporting his proposition is rather an assertion. He does not make clear why a being without psychological propensity cannot be represented. Even if he made it clear, it can still be suggested that this judgement is not sound. For it is not difficult to come across some counter-evidence which goes against Feinberg's position. For example, a dead person, who cannot have psychological propensity, can still be represented and hence can have rights. To propose that the right-holder must be the being who can have psychological propensity is to oppose the legal practice that is commonly accepted. As to the suggestion that a right-holder must be capable of being a beneficiary in his own person, it seems that this judgement, too, cannot stand the test of legal practice in which even though a dead man cannot have benefit in his own person he can still have rights.(21) Taken together, it is dubious whether Feinberg provides a satisfactory justification for his proposition on which the idea of children's rights can be based.

Further, even if Feinberg's two judgements could be taken as non-

problematic, it can still be argued that his concept of interests would make the justification for children's rights mentioned above unsatisfactory. As has been mentioned, the concept of interests in Feinberg's theory is based on psychological propensity in relation to the object of rights. However, it is worth going further to point out that this psychological propensity is by no means a primitive propensity; on the contrary, it is a highly sophisticated psychological capacity of which some human beings may be incapable. In Feinberg's own words:

> Interests are compounded out of *desires* and *aims*, both of which presuppose something like *belief*, or cognitive awareness. A desiring creature may want X because he seeks anything that is Ø, and X appears to be Ø to him; or he may be seeking Y, and he believes, or expects, or hopes that X will be a means to Y. If he desires X in order to get Y, this implies that he believes that X will bring Y about, or at least that he has some sort of brute expectation that is a primitive correlate of belief.(22)

Based on this statement, it can be suggested that the relation between the agent's desires (or aims) and the agent's interests is a highly instrumental one. A being who can have interests must be a being who is capable of believing that for the sake of satisfying his desire Y or achieving his aim Z he must take action X. By this standard, as argued by Regan, some beings who can have beliefs, desires and interests - such as the severely disoriented, retarded but sentient offspring of human parents - but cannot have the particular kind of beliefs or interests specified by Feinberg are excluded from the subjects that can have rights. And it is against the widely accepted judgement that those human beings can, and should, have rights. So, to put it plainly, what Feinberg's arguments can achieve concerning animal rights is that only animals of the higher orders rather than all animals can have rights. This criticism is also relevant to the issue of children's rights. It can be suggested that Feinberg's position can only justify the rights of some children who can have the sort of interests he describes. The very young child or foetus who does not have interests in Feinberg's sense cannot have rights.

To conclude. Feinberg's position in regard to the subjects of rights does pave the way to a justification for children's rights. However, his arguments are not convincing and are at most assertions. More importantly, his concept of interest is too narrow to grant universal rights to all children; children who are incapable of having interests in his sense cannot have rights.

2. JOHN RAWLS' THEORY OF JUSTICE AND CHILDREN'S RIGHTS

With a view to avoiding some of the difficulties from which the traditional justification for children's rights suffers, a justification of children's rights has been developed by Worsfold, using Rawls' theory of justice. In this section, Rawls' theory of justice will firstly be sketched; after the sketching of Rawls' theory, Worsfold's justification of children's rights based on Rawls' theory will then be summarized. Against the background of Rawls' theory and Worsfold's Rawlsian justification of children's rights, it is hoped to demonstrate that Worsfold's Rawlsian arguments are flawed in several respects and hence can hardly constitute a satisfactory justification for children's rights. Finally, it will be shown that Rawlsian arguments for children's rights would be more appropriately based on Rawls' concepts of "considered judgements" and "justification".(23) However, it will be argued that Rawls' concepts of considered judgements and justification are not free from difficulties. On the whole, this section is aimed at showing that the Rawlsian justification for children's rights is problematic and therefore unworkable.

Rawls' theory of justice emerges against the background that "society is a cooperative venture for mutual advantage". Even though society is characterized by cooperation for pursuing each member's interests (benefits, or advantages), it is also marked by the fact that each member of society has conflicting interests. Thus society has two distinct characteristics. First of all, cooperation is a "must" on the grounds that without cooperation a better life for each member of society is impossible to achieve. This implies that there is an identity of interests in society.

Second, the identity of interests in society does not disguise the fact that there is also a conflict of interests. For each member of society has different viewpoints over how interests resulting from cooperation should be distributed given that each member tends to claim a larger share for himself. A set of principles is therefore required to regulate conduct so as to protect each member's interests and to guarantee that interests generated from cooperative undertakings can be satisfactorily distributed. In Rawls' own words, these principles, as social principles of justice, "provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation."(24)

But how can the principles of social justice be satisfactorily drawn up, unobjectionably accepted, and wholeheartedly endorsed by each member of society? In Rawls' theory, this question is sorted out by his concept of "justice as fairness". To put it briefly, the essential point of "justice as fairness" is that "the principles of justice are the result of a fair agreement or bargain".(25) The key question, then, is: how can the substantive principles of justice be the result of a fair agreement or bargain? In order to give an answer, Rawls sets up the device of "the original position". Rawls' original position is another version of "the state of nature" described by Hobbes.(26) One of the main differences between the original position and the state of nature is, however, that participants in the original position are required to live under "the veil of ignorance". The veil of ignorance deters the participants in the original position from knowing particular knowledge about themselves. They know neither their social status, natural assets or abilities, intelligence, strength, and the like, nor their own particular life plans and their own psychological propensities.(27) But significantly, they retain their rationality in the sense that they are capable of taking the most effective means to ends. They are also capable of having a conception of the good (the capacity of knowing the constituent goods for any life plan) and a sense of justice (the capacity to understand and to act upon the principles of justice); their capacities are equal. Moreover, they are self-interested and mutually-

disinterested.(28)

The main task of the participants in the original position, as has been mentioned, is to choose, through the process of deliberation, basic social principles which are supposed to regulate their own lives and any political, economic, or social institutions that are fundamental in their society. In Rawls' scheme, two principles of justice are eventually chosen by all participants. The first principle is that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." The second principle is that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all." Between these two principles, Rawls gives priority to the first principle; that is, that equal liberties cannot, in any case, be violated on the grounds that violations can bring forward greater social and economic advantages. Within the second principle, part (b) has priority over part (a).(29)

What, then, is the connection between Rawls' two principles of justice and rights? It is worth noting that Rawls' main concern is social justice rather than rights. This, however, does not mean that Rawls' theory of justice cannot be a theory of rights as well.(30) Most evidently, the first principle of justice is actually a principle of equal right to liberties. The liberties specified by Rawls are: "political liberty (the right to vote and the right to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."(31) With regard to the second principle, it seems that the principle is not closely relevant to the language of rights, but this need not be the case. It may not be unreasonable to claim that according to the second principle of justice everyone has a right to equal opportunity to political or social positions or offices. And, based on part (a) of the second principle, it might be said that everyone has a right to benefit from any social or economic inequalities. This interpretation may incur the criticism that the language

of rights is too heavily favoured. Nevertheless, it can be argued that it at least sounds reasonable, and is not incompatible with our widely used linguistic expressions.

If the connection between basic rights and Rawls' theory can be established as described above, a viable approach to justifying children's rights will not be too difficult to find in the context of Rawls' theory of justice. Worsfold has demonstrated this approach.

To begin with, Worsfold suggests that children in Rawls' theory are participants in the original position "to the extent that they are capable". (32) If this point can be established, an argument can be developed along these lines: since capable children are members in the original position, they also contribute to the choosing of the two principles of justice and hence they, like adults, should be subject to the two principles of justice; in other words, they are entitled to have all sorts of rights encapsulated in the two principles of justice.

How about children who have not reached "the age of reason" and thus do not have the necessary capacities for participating in the choosing of the principles of justice? With regard to this question, Worsfold refers to Rawls' position that the criterion for judging whether a person is a member of society and hence can be regulated and protected by the two principles of justice is the capacity for moral personality (that is, a conception of the good and a sense of justice) rather than the realization of that moral personality.(33) Thus, from the fact that children have the capacity for being moral persons they should receive the full protection of the principles of justice. That is to say, children who have not fully reached the age of reason should also have rights.

In addition to the emphasis on the "capacity" rather than the "realization" of moral personality as the criterion of being a member of society, Worsfold indirectly refers to Rawls' claim that the participants in the original position are regarded as "representing family lines with ties of

sentiment between successive generations" and therefore the participants in the original position also have duties and obligations to future generations. Given the imposition of duties and obligations towards future generations, the two principles of justice that regulate the present generation should also regulate the relations between persons at different moments of time. This means that not only children but also the generation who are to come should have rights.(34)

Apart from the arguments above, Rawls' paternalism is also invoked by Worsfold to support the point that children are protected by Rawls' two principles of justice. Rawls' argument runs as follows. The principles of justice are worked out from the original position in which the participants are rational but under the veil of ignorance. However, after the two principles are chosen, the participants in the original position would think of a less significant but still important issue. That is, if the veil of ignorance is removed and some of them find out that their powers are underdeveloped and hence cannot pursue their own interests (as in the case of children), who is going to take care of them? In order to insure against this possibility, Rawls maintains that paternalism would be acknowledged in the original position with a view to protecting the participants "against the weakness and infirmities of their reason and will in society".(35) Nevertheless, the argument goes, although paternalism can be acknowledged in the original position, its application has some qualifications. In the first place, paternalistic intervention should take into account the viewpoint of the subjects in question at the time any decision is to be made. To be more specific, the agent who makes any paternalistic decision for others has to make sure that what he is doing is in the interests of the subjects concerned and will be accepted by the subjects when they gain (or, regain) their rational powers. Besides, Rawls also suggests that the way of persuading the subjects to accept paternalistic decisions should not involve dubious measures, such as brainwashing. Secondly, paternalism must be justified by "the evident failure or absence of reason and will". Thirdly, and , most importantly, paternalism should be guided by the two principles of justice and the account of primary goods (which are the

essential conditions of any kind of life plan).(36)

The implication of the acknowledgement of paternalism in the original position concerning children can then be that children's welfare should be properly looked after, children's will should be respected, and any paternalistic conduct should be under the guidance of Rawls' two principle of justice and the account of primary goods. Given this framework, it is possible to reach a conclusion that "Children have rights", grounded on the argument that children's liberty and welfare should be properly taken care of and respected.

On the whole, Worsfold suggests that Rawls' theory of justice is a framework within which the granting of children's rights is practicable and their rights can be assured on the grounds that children are also under the protection of the two principles of justice.(37)

After the elucidation of Rawls' theory of justice and Worsfold's Rawlsian arguments for children's rights, the focus can be put on the critical examination of Worsfold's Rawlsian arguments for children's rights. The aim of this examination is to reveal that Worsfold's arguments are flawed in several places and hence cannot be reckoned as a satisfactory justification for children's rights. Apart from this, it will be shown that the idea of children's rights can indeed be incorporated into Rawls' theory, but it is Rawls' concepts of considered judgements and justification, not the suggestion that children should also be under the protection of the two principles of justice, that pave the way for the justification of children's rights.

Actually, there is an alternative to rejecting Worsfold's arguments. That is, we can directly challenge Rawls' theory of justice. It can be suggested that if Rawls' contract theory of justice cannot hold, Worsfold's Rawlsian arguments for children's rights will subsequently be undermined.(38) This approach would, however, divert our attention from the issue of children's right to Rawls' contract theory of justice or contract theory in general. In

order to concentrate on the issue of children's rights, this approach is not adopted here. We now turn our attention to Worsfold's Rawlsian justification for children's rights.

First of all, there is the issue concerning Worsfold's point that children are participants in the original position "to the extent that they are capable" and hence they can have rights encapsulated in the two principles of justice. It should be recalled that "children" in this thesis refers to a group of people characterized by imperfect rationality, need for guidance and protection, and material dependence. It is therefore reasonable to say that children who can actively participate in the original position are not the main concern of this thesis. The main concern of this thesis is those children who have not reached the age of reason and hence cannot actively become involved in the original position. Besides, Rawls does not actually make a distinction between adults and children. But it seems reasonable to suggest that Rawls' distinction between children and adults would be on the competence-criterion rather than the age-criterion. This means that agents who are capable of participating in the original position should be counted as rational adults. In this sense, Worsfold's first argument for children's rights (that children, to the extent that they are capable of participating in the original position, have rights) is not relevant and just wrongly targeted. It is simply an argument for adults' rights.

Secondly, as to the argument that having the capacity of moral personality is a sufficient condition of being a member in the original position and hence children should be protected by the two principles of justice, it can be said that the criterion is set up without satisfactory foundation. In effect, Rawls admits that he does not provide a literal argument (in the sense of drawing a conclusion from premises) for his capacity-criterion. He says that this position "seems to be the natural completion of justice as fairness." And, this position "accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies."(39) Given these statements, it seems that Rawls' position concerning the criterion of

membership is justified in an extraordinary way.(40) Even if this way of justification is accepted, it is still possible to ask: is Rawls' concept of justice as fairness theoretically sound? Or, can the hypothetical nature of the original position stand the test of empirical experience? The implication of these questions is that if Rawls' concept of justice as fairness or the original position is challenged, the postulate that the capacity of moral personality is the criterion of membership of the original position will be subsequently challenged. Moreover, it can be argued that as Rawls' criterion of capacity can only be valid given the condition that it is part of the concept of "justice as fairness", it is therefore not binding for those who are not convinced by Rawls' idea of justice as fairness. Leaving aside the domain of justice as fairness, the validity of the capacity of moral personality as the criterion of membership is thus dubious. But most significantly, Worsfold neglects Rawls' point that the reason why the capacity of moral persons as the criterion of membership can be accepted and justified (in the Rawlsian sense) is that it is coherent or compatible with the ideas of children's rights and infants' rights.(41) It is hence wrong for Worsfold to invoke Rawls' capacity-criterion to justify the idea of children's rights. It should be the other way round. Worsfold simply puts the cart before the horse.

The point that the parties in the original position are supposed to have a connection with their successive generations and hence the two principles of justice can also apply to children and the future generations to come indeed provides a most fruitful line by which the idea of children's rights can be developed and advanced. But it is worth enquiring whether Rawls' proposition that the parties in the original position are representing family lines is a justified adjustment of his device of the original position in which the parties are in a state of ignorance. Indeed, Rawls acknowledges that this proposition is an adjustment of the veil of ignorance.(42) And this adjustment can also be vindicated by Rawls' notion of reflective equilibrium, by which any proposition concerning the concept of justice as fairness is subject to modification.(43) But the problem is whether this adjustment is consistent with some other basic propositions concerning

the original position. In this case, we are in a position to ask whether "the family lines" proposition deviates from the proposition that the parties in the original position are self-interested. For, the fact that the participants are bound to take the interests of their children and future generations into account is, by implication, a sort of benevolent undertaking which is not really necessary in Rawls' original position. Further, for the sake of argument, there is also a possibility that the participants may discover, incidentally, that some other participants are actually their family members whom they are supposed to represent. And this would contradict Rawls' assumption that the participants in the original position are mutually-disinterested. Given these suspicions, it then can be suggested that Worsfold's justification of children's rights along the family lines proposition is based on a paradox in Rawls' theory. Its internal validity is dubious.

How about Rawls' paternalism? It can be reasoned that even though the participants in the original position acknowledge paternalism it does not automatically constitute a justification for children's rights. Paternalism itself does not necessarily justify children's rights. The language of duties, undertaken by adults and the state, is sufficient in taking care of children's welfare and liberty. However, it can be reckoned that paternalism plus Rawls' account of primary goods can pave the way for the idea of children's rights. But it can be argued that it is the account of primary goods, rather than paternalism, that may play the pivotal role in justifying children's rights. Unfortunately, it seems Worsfold does not fully develop this line of argument. Even if this line of argument were fully developed by Worsfold, it can still be suggested that as the account of primary goods is a prerequisite for Rawls' theory of justice it can actually be treated independently from Rawls' theory of justice proper. It means that the justification of children's rights based on the account of primary goods will not really be a distinct Rawlsian justification, which should be more appropriately based on "justice as fairness".

Finally, even if Worsfold is successful in arguing that children should be

protected by Rawls' two principles of justice and hence can be granted the rights embodied in the two principles, it can still be claimed that those rights are virtually empty for children. For, the two principles of justice are mainly concerned with political, economic and social rights, which are not directly relevant to children's lives qua children. So, even though it can be justified that children can have those rights, those rights for children are at most nominal, and not significantly meaningful.

At this stage, it has been argued that Worsfold's Rawlsian justification for children's rights is not entirely satisfactory and hence fails to provide a solid justification for children's rights. It can however be suggested that Worsfold's failing may partly be due to his negligence of what Rawls really has said about the idea of children's rights. In the following part of this section, it will be demonstrated that it is Rawls' concepts of considered judgements and justification that constitute *the* Rawlsian justification of children's rights.

In discussing the criterion of membership in the original position, Rawls assumes that it is the capacity of moral personality rather than the realization of moral personality that should be the criterion of receiving the full protection of the principles of justice. And in explaining why this criterion should be accepted, Rawls says:

> Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our considered judgements.(44)

From this statement, it seems that the idea of children's rights, or more accurately, the idea of children's basic rights, is considered by Rawls as one of our considered judgements. Two questions can then be asked. First, what are considered judgements? Second, what does it mean to say that the idea of children's rights is one of our considered judgements?

In Rawls' scheme, considered judgements are "those judgements in which

our moral capacities are most likely to be displayed without distortion." (45) As to the question of how considered judgements can be formed, Rawls says that considered judgements are "rendered under conditions favorable to the exercise of the sense of justice, and therefore in circumstances where the more common excuses and explanations for making a mistake do not obtain."(46) Given Rawls' definition of considered judgements and his explanation of how considered judgements can be worked out, it then can be understood that the reason why considered judgements are to be accepted is that they are judgements that we normally make under conditions in which we can fully exercise our moral capacities in general and our sense of justice in particular. In other words, considered judgements are those judgements that we, as moral persons, normally make and accept; sometimes intuitively, sometimes after reflection.

Following these lines, it can be seen that the judgement that children have basic rights, as recognized by Rawls as a considered judgement, should be counted as a judgement that is sanctioned and accepted by moral persons. The implication of this concerning the justification of children's rights is then that the justification of children's rights can be achieved by identifying the idea of children's rights as one of our considered judgements. But, it can be asked, why can a judgement that stands the test of our sense of justice be reckoned as a considered judgement and be justified? With regard to this question, Rawls' general views about political theory or political judgements can provide some inspiration.

Following Kant(47), Rawls does not think that his stipulations about the theory of justice can be proved on theoretical grounds. That is why he particularly emphasizes that the aim of justice as fairness, as a political conception, is practical not metaphysical.(48) Rawls seems to hold the view that the justification of political judgements should not be made by theoretical reason; it should rather be made by practical reason. In this sense, any political judgement can be regarded as justified as long as the political judgement concerned can be accepted and endorsed as a result of

deliberation generated by our moral capacities given a specific political framework. The reason why the idea of children's rights, as a peripheral political judgement, can be counted as justified is exactly on the grounds that it can be, or should be, accepted and endorsed in our daily life.

However, as Rawls does not say much about the issue of children's rights, it seems hasty to take the idea of children's rights as a considered judgement only because of his single statement. It would be better to take the judgement that children have rights as an ordinary judgement and see whether it can be justified. (Worsfold's attempt is generally based on this idea[49], and it has already been shown that his attempt is unsatisfactory.) Or, even if some people insist that the judgement, "Children have rights", should be taken as a considered judgement, it can still be pointed out that even considered judgements need justification in Rawls' theory based on Rawls' concept of "reflective equilibrium" (or match theory).(50) Given this, another attempt for supporting the idea of children's rights can be started from Rawls' concept of justification.

The idea of justification in political theory, on Rawls' view, should not be regarded "simply as valid argument from listed premises, even should these premises be true."(51) What then is a justification in political theory? In Rawls' case, justification should start from a common consensus that the parties in question recognize as true or acceptable.(52) A consensual position is the footing on which a working agreement on the fundamental questions can be struck. But, how can this communal consensus be achieved? Rawls suggests that it is achieved not through any epistemological, metaphysical or *a priori* argument, but through the extraction of fundamental intuitive ideas which are implicit or latent in the public culture of a democratic society and which constitute the basis of the concept of "justice as fairness".(53) Further, it can be asked, how can a justification in a political context be finalized? In this respect, Rawls says that "justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view."(54) Taken together, the justification of a particular judgement can be done

through a coherent viewpoint formed by the argument concerned and many other related considerations, which include considered judgements.

Given the understanding of Rawls' concept of justification, it then can be suggested that the idea of children's rights can be justified through the demonstration that this idea is coherent with the whole device of justice as fairness. Several ideas in Rawls' theory are justified in this way. Paternalism and the idea that the capacity of moral personality should be the criterion of membership in the original position are two distinct examples. If the idea of children's rights is only regarded as a judgement that is waiting for justification, then Rawls' justification would run roughly as follows. First, he would persuade us to accept his concept of justice as fairness. After that, he would convince us that the two principles of justice are the only viable choice for the democratic constitution given the framework of justice as fairness. As long as major political, social and economic issues are sorted out, Rawls would then ask us to contemplate some special cases, such as children. Children, it can be recalled, are a group of people who are not properly equipped with the necessary means which can make them actively participate in the original position. The idea of children's rights would be proffered under this condition. It now can be seen that the idea of children's rights is independently proposed in relation to the concept of justice as fairness and the two principles of justice. Its justification is not dependent upon whether there is a logical, or epistemological connection between the idea of children's rights and the concept of fairness or the two principles of justice; it is rather dependent on whether the idea concerned is compatible, or coherent, with considered judgements, say, the two principles of justice. But how can moral persons with the sense of justice and a conception of the good reject the proposition that children should have rights, given the understanding that rights are necessary goods for any moral person to pursue in realizing his own life plan? They do not really have reasons to refute this proposition. Some of them have their own children, some of them would consider the possibility that they might one day lose their abilities and hence become childlike, some of them would think that

children are extremely important for society as a whole or for their own welfare, and some would tend to think that it is not moral to disregard other persons' rights owing to the fact that they themselves value the importance of rights. So, there is no reason to reject this proposition. Given this understanding, we now can conclude that so long as cases against the idea of children's rights are not sustainable, the idea of children's rights should then be accepted, or justified.

Given the demonstration above, it can now be understood that *the* Rawlsian justification of children's rights is actually geared to Rawls' concepts of considered judgements and justification, not paternalism or any other points put forward by Worsfold. However, two key questions can be asked. First, is Rawls' claim that the idea of children's rights is a considered judgement sufficient to justify the idea of children's rights? Second, can Rawls' concept of justification be taken as a starting point from which the argument for children's rights can develop?

With regard to the first question, it can be pointed out that Rawls actually admits that some considered judgements are subject to "certain irregularities and distortion despite the fact that they are rendered under favorable circumstances."(55) Besides, it can also be suggested that considered judgements, or at least some considered judgements, are contingent upon changing situations. To be more specific, it may be asked: why is the idea of children's moral rights not a considered judgement in Hart's early version of the will theory? This question can lead us to assume that considered judgements are not fixed, they are contingent on changeable circumstances. If this is the case, it will then be inadequate to assume that the idea of children's rights is one of our considered judgements and hence argue that its justification is achieved on the grounds that it is a considered judgement. We have to demonstrate what are the possible reasons that make the idea of children's rights a considered judgement. Failing to do this is to justify the idea of children's rights by assertion.

As to the second question concerning the Rawlsian justification of children's rights developed from his concept of justification, it can be suggested that this justification is not a solid justification at all. For, the idea of children's rights in this form of justification only plays a peripheral role. The basis of this justification is those pre-set considered judgements, not the idea of children's rights. Moreover, the idea of children's rights justified in this way is actually disposable. A coherent moral or political framework can be maintained without the language of children's rights. The functions that the idea of children's rights are supposed to carry out can also be achieved by the idea that adults or the state have duties towards children. In other words, the idea of children's rights is not really a necessary part of a coherent moral or political system, and this makes the justification of children's rights a side issue.

To sum up. Rawls' theory of justice and his comments concerning children are one of the sources from which a justification for children's rights can be developed. Worsfold's Rawlsian justification for children's rights does focus on the status of children and their relationships with adults and the state and hence avoids the first weakness that the traditional justification of children's rights has. But Worsfold's justification is problematic in several places, some self-made and some deriving from problems embedded in Rawls' theory. It is shown that Worsfold's justification is actually not the Rawlsian justification proper. *The* Rawlsian justification for children's rights should be more appropriately based on Rawls' suggestion that the idea of children's rights is one of our considered judgements; or, one step back, the Rawlsian justification of children's rights should start from Rawls' assumption that justification, in political contexts, is a business of fitting various things together. It is then suggested that the Rawlsian justifications for children rights are also not entirely successful. *The* Rawlsian justification fails to point out the possible reasons which make the idea of children's rights a considered judgement. The justification developed from Rawls' concept of justification shifts the main focus from the issue of children's rights to some other predetermined propositions. On the whole, it is argued in this section that Rawlsian

justifications for children's rights are not convincing. This implies that a satisfactory justification for children's rights is needed.

3. A JUSTIFICATION FOR CHILDREN'S RIGHTS

In the foregoing two sections, the difficulties embedded in the traditional justifications and the Rawlsian justifications for children's rights have been considered. The traditional justifications for children's rights often fail to provide convincing arguments for the major premises from which the idea of children's rights can be deduced; and, even if valid arguments can be offered in supporting the major premises, the traditional justifications may still incur the criticism that the idea of children's rights justified as such is characteristically a syllogistic conclusion and fails to inspire the moral sentiments needed for putting the idea into practice. As to the Rawlsian justifications for children's rights, it was pointed out that Worsfold's justification is not quite in line with Rawls' general theory. Further, *the* Rawlsian justification does not spell out the reasons why the idea of children's rights should be counted as a considered judgement; and even if Rawls' proposition concerning children's rights is accepted, his account of "justification" still remains an obstacle to the whole enterprise of the justification of children's rights in the sense that the issue of children's rights would become a disposable side-issue rather than an essential main issue.

In this section, it is hoped to provide a more satisfactory justification for children's rights. The aims of this justification are twofold. One is to avoid the difficulties from which the two sorts of justification discussed above suffer. The other aim is to cultivate a justification that can be understood and accepted without serious difficulty by ordinary people, especially parents, on the grounds that the issue of children's rights should not be taken only as a theoretical issue but a practical issue that concerns our daily life.

To start, the concept of justification in this section should be explained.

Following Rawls, "justification" is not regarded "simply as valid argument from listed premises, even should these premises be true."(56) Justification in this section is rather taken as argument (or a set of arguments) that reveals the acceptability as well as the necessity of the idea or practice concerned. To be more specific, a satisfactory justification for children's rights should be required to show two things. First of all, it should demonstrate that the idea of children's rights can be accepted by rational persons in our modern society. "Rational persons" is understood as persons who can take proper actions to protect their own interests. Apart from their concern for self-interest, rational persons also show concern for other people. Their concern for other people is generally based on two reasons. One is that if they do not pay attention to other people's interests their own interests would be directly and indirectly affected. The other is that they would feel better if people surrounding them can also have their interests properly protected; rational persons are persons with the sentiments of justice and benevolence. In other words, the former reason is a prudential one, and the latter a moral one. The primary characteristic of modern society, to put it simply, is its advancement of technology. Under normal circumstances, each member of modern society can have his subsistence maintained through the operation of the state due to the success of modern technology. This characteristic goes hand in hand with the idea that the interests of each member of society should be taken seriously, which is either an intuitive idea of rational persons or an idea based on the deliberation of rational persons. How this idea is put into practice depends upon the different political ideologies each nation state holds and to what extent each member's interests can actually be protected. Given these qualifications, the first step of justifying children's rights is to show that the idea of children's rights can be accepted by rational persons - who are self-interested, prudent, just and benevolent - under the condition that the interests of each member of society can and should be protected.

Having said this, it should be noted that the notion of justification in the justifying of the acceptability of children's rights is actually not far from

Rawls' concept that "justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view."(57) The difference, however, is that the justification that will be offered is going to appeal directly to rational persons and see whether the idea of children's rights can be incorporated into, or accommodated to, the received ideas that rational persons have. The aim is not to demonstrate or propose the connections of the idea of children's rights with other considered judgements and some basic social principles normally held. The Rawlsian justification appears to be too complicated and too intellectual for ordinary people and hence fails to meet the need of providing a desirable justification of children's rights for ordinary people. Nevertheless, the justification of the acceptability of children's rights may still not avoid the criticism that the idea of children's rights justified as such is only a side issue rather than a main issue. In order to get away from this weakness, a satisfactory justification for children's rights should in the second stage offer an explanation about why the idea of children's rights is necessary or essential in maintaining or cultivating satisfactory relationships of children to other parties, mainly parents and the state. In short, a satisfactory justification of children's rights should fulfil the criteria of "rational acceptability" and "practical necessity". The arguments aimed at fulfilling these two criteria will be demonstrated as follows.

It was particularly emphasized in Chapter One that the language of rights is a moral or legal device in terms of describing, regulating and cultivating human relationships. Following this, to argue that children can and should have rights is another way of arguing that the language of rights can and should be reciprocally invoked to describe, regulate and cultivate the relationships of children to other parties. However, it can be recalled that the idea of children's rights was not fashionable in the past, and the practice of children's rights is a recent social fact. There was a time in which neither the notion of a right nor the idea of children's rights had a part to play. It is therefore quite legitimate to enquire why the notion of a right can be introduced into our daily life and why the idea of children's

rights can be used to prescribe the relationships between children and other parties. Or, for those who know little about the historical background of the language of rights, it is still legitimate for them to ask why the ideas of rights and children's rights can be widely accepted in our daily life. There must be some reasons for the acceptance of rights-talk in general and children's rights in particular. With a view to concentrating on the question of children's rights, the question concerning why the idea of rights can be accepted will not be directly tackled. But it should be borne in mind that these two questions are closely interwoven. The answer that will be offered for the one will also be relevant to the other.

There are several reasons why the idea and practice of children's rights can be accepted by rational persons in modern society.

First of all, it seems that the introduction of the idea and practice of children's rights would not do much harm to modern society. Having said this, it should be noted that the idea of children's rights may indeed pose potential dangers for some specific human societies. In a relatively primitive society, such as Sparta, the introduction of the idea of children's rights may have some serious implications for the survival of that society. Supposing the idea of children's rights were a received moral and legal judgement in Sparta, it can then be reasoned that "the killing of unhealthy young children" would be condemned as immoral as well as illegal and hence would be prohibited. The possible consequences of this received judgement would be quite significant for the Spartans. For it can be imagined that because of this received judgement Sparta would have to allocate part of its resources to looking after unhealthy children, and subsequently unhealthy adults, who can contribute very little to the build-up of the Spartan national strength and wealth which are extremely important for its survival. Consequently, it may put Sparta in an disadvantageous position against its foreign subjects or enemies and eventually lead to its demise. This hypothetical case can be used to exemplify the point that the idea of children's rights (or human rights)

might do harm - "harm" in one particular sense - to society as a whole and hence would not be accepted. Nevertheless, it can be contemplated that this plight will not occur in our modern society, in which natural resources, due to modern technology, are relatively abundant to support some "useless" persons without endangering society as a whole. To accept the idea of children's rights, therefore, would cost relatively little in modern society and would not do much harm to it.

Secondly, it can be suggested that the acceptance of children's rights would not only do little harm to modern society but also promote human happiness. As an idea (or ideal), the idea of children's rights is invented with a view to cultivating satisfactory human relationships between children and other parties and to providing a minimal safety net for children. It is good for children in the first place. For it can provide some definitive constraints by which the undertakings of parents, adults and the state are regulated, and children's welfare as well as freedoms can therefore be discreetly protected. It is also good for parents. For the idea of children's rights and its derivative measures can provide some concrete guidance by which parents can proceed. They hence would feel more informed and exempt from indeterminacy and uncertainty in conducting their actions towards their children. The possible benefits of this may be that they do not have to work out which specific actions they should take. The idea of children's rights and its various specifications can tell parents what they should do and what they should avoid concerning children's welfare or freedoms. But it is not this convenience that would benefit parents the most; it is rather that satisfactory relationships between children and parents would bring about one of the the most fruitful results for parents. That is: the feeling of satisfaction and happiness for parents.

It can nevertheless be asked: how can it be? Why would parents feel happy about the satisfactory parents-children relationships established at the expense of their own material advantages? It can be suggested that it is because satisfactory parents-children relationships can give expression to the assumed natural bond between parents and children so that parents'

sense of achievement or self-esteem can be satisfied by the actualization of this natural bond. Apart from this, Hume's moral theory can be used to explain why parents or any rational adults will be inclined to accept the idea of children's rights given the condition that this idea is originally aimed at benefitting children.

According to Hume, "the benevolent or softer affections are estimable; and wherever they appear, engage the approbation and good-will of mankind."(58) Hume's point is underpinned by his general position that benevolent dispositions with a view to the interests of society should be reckoned as the origin of morality.(59) Notably, he says:

> The epithets *sociable, good-natured, humane, merciful, grateful friendly, generous, beneficient*, or their equivalents, are known in all languages, and universally express the highest merit, which *human nature* is capable of attaining. Where these amiable qualities are attended with birth and power and eminent abilities, and display themselves in the good government or useful instruction of mankind, they seem even to raise the possessors of them above the rank of *human nature*, and make them approach in some measure to *the divine*.(60)

Based on Hume's account, it can be said that the acceptance of the idea and practice of children's rights will be quite in line with our benevolent dispositions which are directed to the benefit of others. To benefit other people within our reach can manifest "the highest merit" we have and fulfil our moral capacity, which in turn can vindicate the value of human beings and bring out the greatest satisfaction that rational persons as moral agents can have. Following this line, it can be claimed that our benevolent dispositions can lead us to accept the idea and practice of children's rights; and, conversely, the acceptance of the idea and practice of children's rights is the embodiment of our benevolent dispositions in the social context.(61) In other words, the acceptance and actualization of children's rights may not only benefit children but also do good, in the way of self-fulfilment, to parents or any rational persons as the benefactors. It maximizes the happiness of all agents involved in the acceptance and fulfilment of

children's rights.

Moreover, some conceivable practical benefits for the benefactors, especially parents, can also be delivered by the acceptance and fulfilment of children's rights. For example, satisfactory parents-children relationships based on the fulfilment of children's rights may pave the way for a more secure backing, emotionally and materially, for parents when they are senile. This is because their children would feel more obliged to provide caring surroundings for their elderly parents in return for the care they received when they were young.

To be sure, the acceptance and fulfilment of children's rights will unavoidably cause inconveniences and extra burdens for parents and related adults due to the fact that they have to satisfy all sorts of requirements directed from the prescription of children's rights. But, by and large, if the gains and the losses of the acceptance and fulfilment of children's rights are weighed, it can be reckoned that the gains would exceed the losses. It is especially so given all factors taken into account, such as that the state would share the burdens with parents and parents' psychological satisfaction would mitigate the troubles that would go with the practice of children's rights.

We can even go further to suggest that the idea and practice of children's rights can also benefit, directly and indirectly, the state. To put it simply, as the idea and practice of children's rights may lead to satisfactory relationships between children and the state, based on established reciprocal relationships, the state would then be in a better position to ask its would-be citizens to fulfil their duties towards it. Besides, as the state has a close relation with the family, the satisfactory parents-children relationships based on the fulfilment of children's rights would indirectly have a positive impact on the functioning of the state.

Taken together, if we make a calculation concerning the utility of children's rights it would not be difficult to find out that the idea and

practice of children's rights may bring about more advantages than disadvantages. It follows that the acceptance of children's rights is a more reasonable and rational undertaking than the opposite of it.

However, it can be argued that the above demonstration does not have sufficient empirical backing; it does not "prove" that the advantages that the idea and practice of children's rights may bring forth will definitely be greater than the disadvantages that go with it. And, it is difficult to claim that a society equipped with the idea and practice of children's rights is generally much better than a society without them. Moreover, it can be argued that the issue of children's rights, or rights in general, should not be contingent upon the calculation of advantages and disadvantages. It should be more geared to the concept of justice in its most common form; that is, children should have their own due irrespective of the consequences.

In the face of the first objection above, what can be said is that it is indeed difficult for anyone to "prove" that the introduction of children's rights would generate more advantages than disadvantages. All that can be suggested is that the idea of children's rights is appealing to our modern mind. And it is an idea that rational persons in modern society would be happy to live with. It is good not only because it may bring about more advantages than disadvantages but also because if it is not actualized children would probably suffer and rational adults (especially, parents) would fail to realize their moral capacity and hence would degrade themselves as moral agents in the framework of our modern society. With regard to the contention that there is no evidence to show that a society with children's rights is better than one without them, it can be replied that this contention does indeed make sense. But it seems quite possible that no rational persons in our modern world would opt for the society without the idea and practice of children's rights. It is not only for the sake of their own children but also for the fear that that sort of society may degrade human beings as moral agents.

As to the claim that the issue of children's rights should be geared to the

concept of justice rather than the calculation of utility, it can be noted that the above account concerning the advantages and disadvantages of children's rights should not be counted as a commitment to any particular form of utilitarianism, though it does employ the reasoning that utilitarians normally adopt. It should be regarded as an account committed to the general welfare of society as a whole. For it has presupposed that rational persons as moral agents would feel insulted if the welfare of individuals is not properly protected. In this sense, the account provided will not necessarily lead to the weakness from which utilitarianism generally suffers; that is, individual rights can be forfeited for the sake of the interests of the majority. In other words, the account provided has implied the concept of justice in its most common form.

Up to this point, the argument for the acceptability of the idea and practice of children's rights appeals mainly to the notion of good and evil that rational persons normally hold. Actually, it is also possible to appeal directly to the conceptions of justice that rational persons have. Apart from the appeal to the idea that each individual should have his own due (the most common form of the conception of justice), we can also appeal to the notion of formal justice: treat equals equally, unequals unequally. Or, in a more specific form: human beings should be treated equally unless there are sufficient reasons for treating them differently. (There are two reasons why other substantive conceptions of justice are not resorted to at this point. One, it may be too complicated to make clear what our substantive conceptions of justice may be; the other, it is hard to reach a consensus over which substantive conception of justice we should appeal to.)

If we accept the assumption that the sense of formal justice is widely shared, we then can claim that in respect of basic human rights children should have the same basic rights as adults. It is not the main concern here to enquire what the contents of basic human rights are. The main concern is to suggest that children's rights can be accepted if our judgements are based on our sense of formal justice given the condition that adults can

have basic human rights on account of their status as human beings. In the light of this reasoning we can even go on to claim that the onus of justification in the debate over children's rights should be put on the shoulders of those people who are against the idea of children's rights. In this sense, the judgement that children should have rights is rather a *prima facie* judgement, its validity should firstly be assumed unless reasons can be found to revoke it. Certainly, the appeal to the sense of formal justice in this case has its weakness; namely, it has presupposed that adults can have basic human rights on account of their status as human beings. This is an assertion which needs justification itself. However, what can be said is that this weakness is tolerable given the condition that the idea of adults' human rights is widely accepted and that the appeal to our sense of formal justice goes with other arguments for the idea of children's rights.

On the whole, what has been argued is that the idea and practice of children's rights can be accepted if the notions of good and justice adopted by rational persons in this modern world are appealed to. Further, it can also be suggested that our notions of good and justice can be manifested by the acceptance of the idea and practice of children's rights; and, the acceptance of children's rights can in turn strengthen our notions of good and justice.

Against the demonstration that the idea and practice of children's rights is acceptable, an objection can be raised here. It can be argued that although rights-talk concerning children can be invoked or accepted in the relationships of children to other parties, it is not really necessary to introduce the idea and practice of children's rights. For it is possible to imagine a social framework in which children's relationships with other parties are regulated by the language of duties rather than the language of rights. Or we can go further to imagine a society in which even the language of duties can have no place, let alone rights-talk. Aristotle's description of an ideal social framework, given some proper modifications, can provide an example of the former case; and Hume has provided an

example to exemplify the latter case.

In his own words, Hume says:

> Again; suppose, that, though the necessities of human race continue the same as at present, yet the mind is so enlarged, and so replete with friendship and generosity, that every man has the utmost tenderness for every man, and feels no more concern for his own interest than for that of his fellows; it seems evident, that the use of justice would, in this case, be suspended by such an extensive benevolence, nor would the divisions and barriers of property and obligation have ever been thought of.(62)

What is implied in this statement is that the concept of justice, on which the concepts of duties and rights are grounded(63), will have no role to play in the human relationships manifested by the sentiment of extensive benevolence. Having made this statement, Hume admits that "it would, perhaps, be difficult to find complete instances of such enlarged affections . . . ."(64) He, nevertheless, suggests : ". . . but still we may observe, that the case of families approaches towards it. . . ."(65) Based on these statements, it is clear that Hume does not really take family as a social organization in which the sentiment of extensive benevolence always prevails; he is rather cautious and therefore suggests that family approaches this sort of ideal case. But it seems reasonable to assume that the languages of duties and rights are not always necessary in some ideal human relationships. And this is more likely the case in a family. (66)

In Aristotle's scheme, father and mother do not stand on equal terms. The parents-children relationships are, strictly speaking, father-children relationships. For Aristotle assumes that women's deliberative faculty is inferior to men's and their limited faculty makes them incapable of standing on an equal footing with men in regard to their children.(67) To be sure, this is not acceptable in our modern world. There is another point. Aristotle explicitly suggests that "there should be a law that no deformed child shall live."(68) This is, of course, repugnant and unacceptable to

most people nowadays. However, if we leave these two extraordinary points aside, the social framework described by Aristotle, as far as children's relationships with other parties are concerned, is largely a society regulated by the language of duties. For example, Aristotle suggests that the legislators "should" be certain that infants shall enjoy "the highest possible state of physical health". And a series of measures is recommended by Aristotle to guarantee this even before babies are born. Once babies have been born, Aristotle suggests that the state and the family should provide a satisfactory environment for children's physical development. After that, he goes further to propose the proper contents of training (education) that the state and family should offer for children.(69) Given Aristotle's description, it is possible to envisage a duties-bound social framework in which the idea of children's rights is not necessary. In this society, the relationships between children and other parties are mainly described and prescribed by the language of duties. On the one hand, parents and the state have duties to bring up and educate children. And, children's welfare and freedoms can be properly protected by the enforcement of the duties of parents and the state. On the other hand, children have duties to respect parents and the law enacted by the state; besides, they also have duties to be obedient to their parents and the state. In short, this society is mainly regulated by the language of duties. Proper and satisfactory relationships between children and other parties are achievable by fulfilling and enforcing the reciprocal duties of all parties involved.

On the whole, in the light of the cases described above, the point that children's rights are essential and necessary in regulating and cultivating the relationships of children to other parties can be repudiated as follows. In the first place, it can be claimed that it is love, caring, and the sentiment of extensive benevolence that count in the ideal relationships between children and other parties. Children's welfare and freedoms would be properly respected and looked after without the use of the languages of rights and duties. Secondly, even if the sort of ideal human relationships described above are not always possible there is still no need to invoke the

language of rights. For the language of duties can be effective enough in regulating and cultivating the possible satisfactory relationships between children and other parties. Taken together, it can be said that although the idea and practice of children's rights are justified as acceptable, they are not really necessary and hence can be disposed of. In other words, the fulfilment of the criterion of rational acceptability is inadequate in providing a convincing justification for children's rights.

In the face of these objections, it can be firstly argued that it is true that the idea and practice of children's rights are not necessary given ideal relationships between children and other parties. But it is worth asking: can the ideal relationships of children to other parties be always maintained? Empirical evidence can, unfortunately, suggest a negative answer to this question. It is known that cases of child abuse are in fact not uncommon, even where the idea of children's rights is widely accepted in theory. Moreover, if parents are required to reflect on their relationships with their children, it can be conjectured that they would admit that their relationships with their children are not always ideally and harmoniously maintained. There can be various reasons for this. But under normal conditions, it is partly that parents, as human beings, are not always rational and reasonable enough. When they are irrational and unreasonable they may alienate themselves from the virtues they normally have. It is also doubtful whether the ideal relationships between children and the state can always be maintained given the condition that the people who run the state are not always rational and reasonable and that the state might be too clumsy and too slow to look after children properly. If the ideal relationships are possible but not always maintained, it then can be suggested that some sort of moral or legal devices are needed either in realizing the ideal relationships or remedying the possible unhealthy relationships between children and other parties. In modern society, the moral or legal devices designed for doing this are often in the form of the language of duties and rights.

Then, many things can be said against the point that the language of duties

can actually do anything that rights-talk is supposed to achieve and hence rights-talk is not necessary. To start, it is doubtful to suggest that the language of duties can do all that the language of rights is supposed to achieve. For some rights, as has been suggested in Chapter One, are not correlated with duties. So it is possible to think of a situation in which parents or the state have already fulfilled their duties but children's rights are still not entirely respected. However, it can still be suggested that rights uncorrelated with duties must be unimportant and hence can be ignored. Against this objection, it can be replied that this contention neglects the point that human relationships embodied in the form of rights-talk are quite different from human relationships embodied in the language of duties even if they are correlated with each other.

Writers who assume that the language of duties can do the same as the language of rights have often presupposed that the languages of duties and rights are like two sides of a coin. These two languages have the same denotations and refer to the same entities. Those entities can be known or actualized by contemplating or practising one or the other. On the issue of children's rights, if we want to describe or work out satisfactory relationships between children and other parties, what we can do is either to invoke or practise the language of duties or the language of rights. But writers maintaining that the language of rights is not necessary often go on to claim that as the notion of rights is ambiguous in a way that the notion of duties is not, so the language of rights becomes redundant.(70) It can however be pointed out that this reasoning is unsound. For it can be suggested that even if these two languages refer to the same entities - namely, human relationships - and hence can be replaced by each other (to use David Lyons' example, "A has a right to be paid ten dollars by B" implies and is implied by "B has a obligation to pay ten dollars to A"), it does not necessarily follow that one or the other is bound to be redundant or unnecessary. It is not difficult to find a case where two terms which refer to the same entity have different meanings. Gottlob Frege's example of "Evening star" and "Morning star", Betrand Russell's of "Scott" and the "the author of Waverley", W.V.O. Quine's of "the term 9" and "the number of the

planets", Gilbert Ryle's of "the previous Prime Minister" and "the father of Randolph Churchill" are all similar cases. They are different ways of referring to one entity, but they are different in meaning.(71) Given these cases, it can be argued that although the language of rights and duties may refer to the same entities, they nevertheless have different connotations, different meanings and different characters.

To put it crudely, the language of duties and rights are different ways of describing and actualizing human relationships. When a person claims that he has a right not to be ill-treated, he is claiming that "he", the subject, should be considered to be put in some kind of condition or be exempt from some kind of condition and other people should have corresponding duties to respect his right. In other words, other people's undertakings are dependent upon the consideration of the right-holder's welfare or freedoms. In this sense, rights-talk logically precedes duties.(72) There is a different tone when a person claims that other people have duties not to ill-treat him. To invoke the language of duties in this context is to resort to some existing, public, moral or legal rules which have bearings on the issue concerned. The intention of invoking the language of duties is to remind the duty-bearers that there are established enforceable rules which prescribe or proscribe some specific undertakings. In short, the language of rights is a kind of first-person perspective, even though some rights can, or must, be claimed by some people on behalf of the right-holder; in contrast, the language of duties commands a kind of third-person perspective.(73) Given this, it can be suggested that even though the languages of rights and duties may refer to the same human relationships and may aim at the same ends, they are different vehicles for describing and actualizing human relationships. If we follow Wittgenstein, we may claim that as the language of rights and duties signify different perspectives of human relationships, the one cannot be replaced by the other and neither of them will be redundant as long as they are still used.

However, it can be argued that the above account still does not face the contention that the language of duties can be so effectively and efficiently

employed that we can totally rely on it in describing and cultivating human relationships; and although the language of rights is a different vehicle for describing and cultivating human relationships, it is practically disposable.

With regard to this objection, it can be replied that to employ the language of duties to describe and prescribe human relationships is only one way of doing this. It is not *the* way; and it is surely not the most effective way. It can be reasoned that satisfactory human relationships are mainly contingent on whether the interests (welfare and freedom) of the parties involved are properly looked after. The question, however, is: how can we be sure that the interests of the parties involved are always properly protected? One way of making sure of this is to invoke the language of duties and check whether the parties involved fulfil their duties or not. For example, in the relationships between children and parents, from checking whether parents fulfil their parental duties we can know, even roughly, whether the interests of the children concerned are properly looked after. We can use the same method to check the relationships between the state and children or any other human relationships. But there is a weakness in adopting this method to assure satisfactory human relationships. That is, this method may be workable in a relatively static and homogeneous society in which the members of society share a consensus over the concept of interests, either individual or social. In this context, duties-bound rules can be assumed to guarantee all essential interests, social and individual. But it may not be the case is a highly heterogeneous and pluralistic society, in which people have different, sometimes very deeply held, views over the concept of interests; in other words, there is no consensus over the concept of individual and social interests.(74) Given this context, the established moral, social, legal and political duties-bound rules are inevitably unable to cover all the possible interests that members of society may wish to have. The question of what the essential interests for individuals and society are is therefore determined, at least partly, by each individual. It follows that if satisfactory human relationships are to be maintained they must be partly based on the ground that individuals can claim for their interests, generally and specifically. In other words, the

language of rights is essential and necessary, due to its first-person perspective, in initiating and cultivating satisfactory human relationships. If this point is accepted it can then be reasoned that whether ideal human relationships are achieved can be better checked by whether the rights of the individuals involved are fully respected.

In short, the necessity of the language of rights is grounded on the fact that it is a first-person perspective by which individuals can initiate, propose and devise ideal human relationships and by which we can check whether ideal human relationships are achieved.

A point can however be raised here. It can be argued that the preceding argument can at most demonstrate the necessity of the language of rights in general, but does not justify the necessity of the idea and practice of children's rights. For children do not, in a strict sense, know their own interests. Even if they know their own interests they will not be able to claim their own interests. Further, even if they can claim their own interests, the interests they claim must be so distinct that they can actually be protected by the device of the language of duties. In this sense, the language of rights is necessary, the idea and practice of children's rights is not.

In the light of the argument for the necessity of the language of rights, it can be suggested that although there may be a consensus about what children's interests are in a pluralistic society there may still be different ideas about the specific substance of those interests. In Chapter One,. it was mentioned that although the idea of the right to life is generally accepted the specific content of this right is still uncertain. The example of the right to life may therefore be helpful in making clear the point that the question of what the specific substance of children's interests is, is still open to contest. Besides, it can also be suggested that children's interests are also contingent upon changing circumstances. It is in this described context that we can claim that the idea of children's rights is still needed on the grounds that children's interests might not be covered

by the established duties-bound rules; and that to employ the language of rights is to assure that children's interests can be properly claimed by either children themselves or other parties, principally parents and the state.

Apart from the above argument for the necessity of children's rights, some advantages accompanied by invoking the idea of children's rights can also be used to reveal the necessity of children's rights in achieving satisfactory relationships between children and other parties. To single out one of the most important advantages of introducing the idea of children's rights, when rights are granted to children the moral relationships between children and other parties have a qualitative change and this change can be very important in the shaping of satisfactory human relationships. In the duties-bound social framework, to examine whether the presumed ideal relationships between children and other parties are maintained is to check whether the other parties concerned fulfil their duties or not. But there are two ways to assess these relationships in modern society; namely, to check whether duties owed to children are fulfilled or not and to check whether children's rights are protected or exercised satisfactorily. The notable point is that to examine whether children's rights are properly protected or exercised is to give a distinctive moral status to children through the recognition of children's independent interests. It is to elevate children from a subordinate place in relation to other parties to a place independent from them. And the elevation of children's status is a positive step towards the ideal relationships between children and other parties. Nevertheless, it can be asked: how can the elevation of children's status, via the introduction of children's rights, help in cultivating the ideal relationships between children and other parties? This question can be answered as follows.

To grant rights to children can modify other parties' perceptions of children. It was suggested that the possible satisfactory relationships between children and other parties are not always maintained: how then can we remind other parties that they should always carry out their duties so

as to strike ideal relationships? Among other means, to grant rights to children is the most viable way of undertaking this task. It can be suggested that after the granting of rights to children, the presence of children in front of other parties would spontaneously remind them of the fact that children have rights and that other parties have duties to respect children's rights. This is because the presence of children would keep conveying the message that children have rights and that their rights should be properly protected and exercised, which would make other parties reflect on whether they fulfil their duties and whether the interests of children are properly looked after. This point can be made clearer if the issue of animal rights can be brought in here. It is a received judgement that human beings have duties concerning animals; for example, human beings have a duty not to treat animals cruelly. But it is still controversial, at least for the time being, to claim that animals have rights on the ground of our duties concerning them or on the ground of their dignity. However, let us imagine a hypothetical framework in which the campaign for animal rights has successfully advocated the idea of animal rights and the public accepts this idea and hence in some way grants an independent moral or legal status to animals, just as we have done to children nowadays. Now, a comparison can be made between our current framework and the hypothetical framework. It can be pointed out that the meanings attached to "animals" in the two frameworks would be different. In the existing framework, it is hard to say that animals, as the subjects we are responsible for, would command our respect for their moral or legal status; we might hold some sort of moral attitude towards them, but not the attitude of respect. It may be another case, however, in the hypothetical framework following the giving of rights to animals. In the hypothetical framework, animals are able to command, by the fact that they have rights, the respect of human beings. And human beings are obliged, either because of legal sanctions or because of their acceptance of the idea, to accept the distinctive moral status of animals and hence prepare the ground for the reciprocal relationships between animals and human beings even though animals cannot use ordinary forms of language. On the whole, the implication is that a change in the status and the meaning

of an entity will incur a change in relationships between this entity and rational human beings, which may lead to satisfactory relationships.

In the light of the issue of animal rights, it can be claimed that following the granting of children's rights, the responsible agents' perception towards children will subsequently change and this makes children have a full reciprocal relationship with other parties. With this additional preventive device, we now have more reasons to believe that other parties should be more aware of their duties and be more conscious about children's interests.

To sum up. A desirable justification of children's rights should satisfy the criteria of "rational acceptability" and "practical necessity". The justification offered satisfies the first criterion by showing that the idea and practice of children's rights is beneficial and desirable to modern society and hence would be accepted by rational persons who are self-interested, just, and benevolent. The second criterion is satisfied by demonstrating that the idea and practice of children's rights is practically necessary in a pluralistic society in respect of protecting children's essential interests and cultivating satisfactory relationships between children and other parties.

NOTES:

1. The justification for the formal principle of justice (treat equals equally, unequals unequally) can be seen in R.S. Peters, Ethics and Education, London: Allen and Unwin, 1966, chapter 4.
2. This position can actually reflect David Hume's idea that moral issues are mainly related to our sentiment rather than reason. Hume says:

> The end of all moral speculations is to teach us our duty; and, by proper representations of the deformity of vice and beauty of virtue, beget correspondent habits, and engage us to avoid the one, and embrace the other. But is this ever to be expected from inferences and conclusions of the understanding, which of themselves have no hold of the affections or set in motion the active powers of men? They discover truths: but where the truths which they discover are indifferent, and beget no desire or aversion, they can have no influence on conduct and behaviour. What is honourable, what is fair, what is becoming, what is noble, what is generous, takes possession of the heart, and animates us to embrace and maintain it. What is intelligible, what is evident, what is probable, what is true, procures only the cool assent of the understanding; and gratifying a speculative curiosity, puts an end to our researches. (An Enquiry Concerning the Principles of Morals, edited by L.A. Selby-Bigges, Hume's Enquiries, Oxford: Clarendon Press, 2nd edition, 1927, p. 172)

Taking Hume's line, it can be suggested that the issue of children's rights is mainly concerned with children's practical relationships with adults and political institutions. The justification of children's rights can be achieved through an epistemological approach, but this approach would lack the strength that can persuade the agents concerned to put their commitments to children into practice.

3. See J. Feinberg, Social Philosophy, Englewood Cliffs, New Jersey: Prentice Hall, 1973, pp. 90-92.
4. See V.L. Worsfold, A Philosophical Justification for Children's Rights, Harvard Educational Review, vol. 44, no. 1, 1974, p. 147.
5. R. Young, Dispensing with Moral Rights, Political Theory, vol. 6, no. 1, 1978, pp. 71-72.

6. A. Gewirth, The Epistemology of Human Rights, in E.F. Paul, J. Paul & F.D. Miller Jr. (eds.), Human Rights, Oxford: Basil Blackwell, 1984, p. 1.
7. R. Scruton, A Dictionary of Political Thought, London: Pan Books, 1983, pp. 351-352.
8. A.R. White, Rights, Oxford: Clarendon Press, 1984, pp. 90-91.
9. M.D.A. Freeman, The Rights and the Wrongs of Children, London: Frances Pinter, 1983, pp. 17-18.
10. A. Gewirth, op. cit., p. 2.
11. These theories are: intuitional theory; the formal argument; J. Feinberg's interest principle, W. Frankena's interest principle and S.M. Okin's needs principle; H.L.A. Hart's theory; J. Rawls' theory of justice and the argument of human dignity. See A. Gewirth, op. cit., pp. 5-10.
12. A. Gewirth, op. cit., pp. 5-10.
13. Ibid., pp. 14-18. The detail of Gewirth's argument can be seen in his Reason and Moraliy, Chicago: University of Chicago Press, 1978, chapters 1-3.
14. For the criticisms of Gewirth's arguments, see F.B. Friedman, The Basis of Human Rights; M.P. Golding, From Prudence to Rights; A.A. Morris, A Differential Theory of Human Rights; and, S.M. Okin, Liberty and Welfare; in NOMOS: Human Rights, XXIII, 1981.
15. It is well known that the question of "the logical derivability of ought from is" is highly controversial. The controversies over whether an "ought" statement can be derived from an "is" statement have not been settled. The inclusion of this condition can therefore incur the criticism that this condition is implausible. It is interesting to refer to Rawls' position on the relation between epistemology and moral theory. Rawls maintains that it is possible to have a moral theory without relying on epistemology. It can be inferred that a theory of human rights or a moral principle concerning human rights does not necessarily depend upon epistemology. Danto goes further to claim that "there are no rights save in the framework of declaration and recognition". From this angle, Danto suggests that "the project of constructing an *epistemology* of human rights reveals itself . . . *a pseudo problem*."

See J. Rawls, The Independence of Moral Theory, Proceedings and Addresses of the American Philosophical Association, 1975, no. 48, pp. 5-22; A.C. Danto, Constructing an Epistemology of Human Rights: A Pseudo Problem? in E.F. Paul et al. (eds.), Human Rights, pp. 25-30.

16. See A. Gewirth, Can Utilitarianism Justify Any Human Rights? NOMOS, XXIV, 1982, p. 190.
17. J. Feinberg, The Rights of Animals and Unborn Generations, in Rights, Justice, and the Bounds of Liberty, Princeton: Princeton University Press, 1980, pp. 159-184.
18. See T. Regan, What Sorts of Beings Can Have Rights? in All That Dwell Therein: Animal Rights and Environmental Ethics, Berkeley: University of California Press, 1982, pp. 169-170.
19. Ibid., pp. 167-172.
20. J. Feinberg, op. cit., p. 167.
21. Feinberg actually anticipates that his interest principle cannot withstand the fact that dead persons can have rights. But he, nevertheless, remarks: "If, nevertheless, we grant dead men rights against us, we would seem to be treating the interests they had while alive as somehow surviving their deaths. There is the sound of paradox in this way of talking, but it may be the least paradoxical way of describing our moral relations to our predecessors. And if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving." See J. Feinberg, op. cit., pp. 173-176.
22. Ibid., p. 168.
23. It is actually possible to develop a Rawlsian justification of children's rights from Rawls' account of primary goods. Confined by limited space, this line of justification will not be pursued in this thesis. See J. Rawls, A Theory of Justice, Oxford: Oxford University Press, 1972; J. Rawls, Social Unity and Primary Goods, in A. Sen & B. Williams (eds.), Utilitarianism and Beyond, Cambridge: Cambridge University Press, 1982, pp. 159-185.
24. J. Rawls, A Theory of Justice, p. 4.
25. Ibid., p. 12.

26. Generally, there are two differences between Rawls' original position and Hobbes' state of nature. First, the original position is a purely hypothetical situation rather than an actual historical state or a primitive condition of culture. Second, the state of nature is a non-moralized state but the original position is an amoralized one. See J. Rawls, A Theory of Justice, p. 12; L.W. Sumner, The Moral Foundation of Rights, Oxford: Clarendon Press, 1987, pp.156-158.

27. J. Rawls, A Theory of Justice, p. 12.

28. Ibid., pp. 11-22.

29. Ibid., pp. 60-61; and J. Rawls, Social Unity and Primary Goods, pp. 161-164.

30. See R. Martin, Rawls and Rights, Kansas: Kansas University Press, 1985; R. Dworkin, Justice and Rights, in Taking Rights Seriously, London: Duckworth, 1977.

31. J. Rawls, A Theory of Justice, p. 61.

32. V.L. Worsfold, op. cit., p. 153.

33. See J. Rawls A Theory of Justice, pp. 504-512; V.L. Worsfold, op. cit., p. 153. Mr H.M. Paterson points out that the term, "the capacities for moral personality", should be understood as, "the potentialities for moral personality".

34. J. Rawls, A Theory of Justice, pp. 292-293; and V.L. Worsfold, op. cit., p. 154.

35. J. Rawls, A Theory of Justice, pp. 248-249.

36. Ibid., pp. 248-249.

37. V.L. Worsfold, op. cit., pp. 156-157.

38. The criticisms of Rawls' theory of justice are advanced from several directions. With regard to Rawls' contractual model characterized by the original position and the veil of ignorance, Warnock claims that it is hard to imagine "how one could choose rationally if one were as ignorant as Rawls sometimes suggests." (M. Warnock, Schools of Thought, London: Faber & Faber, 1977, p. 51). Nozick is critical of Rawls' assumption that past circumstances or actions of people can have no impact on the participants who are going to make a contract. He argues that "past circumstances and actions of people can create differential

entitlements or differential deserts to things." (R. Nozick, Anarchy, State, and Utopia, Oxford: Basil Blackwell, 1974, p. 155). Gray suggests that Rawls' theory of justice "rests ultimately on an intuitionist moral epistemology with strongly subjectivist implications." (J. Gray, Social Contract, Community and Ideology, in P. Birnbaum et al. (eds.), Democracy, Consensus & Social Contract, London: SAGE Modern Politics Series, vol. 2, 1978, pp. 228-229). Dworkin points out that Rawls' theory has presupposed that each participant in the original position has a right to equal concern and respect, and that this therefore undermines Rawls' declaration that his two principles of justice are the result of a fair agreement or bargain. Dworkin argues that Rawls' contractual model is not contract-based but rights-based. (R. Dworkin, op. cit.). Sandel, from a different angle, argues that the participants in the original position are all identical and hence the choice of the two principles of justice is only a decision that will be inevitably made by these identical persons through an identical procedure. This decision is by no means an agreement and hence Rawls' contractual model is only an illusion. (M. Sandel, Liberalism and the Limits of Justice, Cambridge: Cambridge University Press, pp. 122-132.). Most importantly, Marshall and Sumner challenge Rawls' theory by saying that the result of a fair agreement does not have any moral strength over people who are not participants in the original position. (L.W. Sumner, The Moral Foundation of Rights, pp. 154-155; J. Marshall, The Failure of Contract as Justification, Social Theory and Practice, vol. 13, 1974, pp. 441-459.). For a comprehensive critique, see N. Daniel (ed.), Reading Rawls, New York: Basic Books, 1975.

39. J. Rawls, A Theory of Justice, p. 509.

40. Rawls' position is perhaps clearer in the light of Putnam's internalist perspective of philosophy in which truth is "some sort of (idealized) rational acceptability - some sort of ideal coherence of our beliefs with each other and with our experiences *as those experiences are themselves represented in our belief system* - and not correspondence with mind-independent or discourse-independent 'status of affairs.'" See H. Putnam, Reason, Truth and History, Cambridge: Cambridge

University Press, 1981, pp. 49-50.

41. J. Rawls, A Theory of Justice, p. 509.
42. Ibid., p. 140.
43. Ibid., p. 20.
44. Ibid., p. 509.
45. Ibid., p. 47.
46. Ibid., pp. 47-48.
47. In Kant's view, "belief in God, in freedom of the will and in the immortality of the soul cannot be provided on *theoretical* grounds but are postulates of the *practical* reason involved in our duty to obey the moral law." See H.B. Acton, Kant's Moral Philosophy, London: Macmillan, 1970, p. 3.
48. J. Rawls, Justice as Fairness: Political not Metaphysical, Philosophy and Public Affairs, vol. 14, 1985, p. 230.
49. It may be the case that Worsfold ignores the status of the idea of children's rights in Rawls' theory, and so does not specify that the idea of children's rights is one of Rawls' considered judgements.
50. I have to thank Mr M. Lessnoff for reminding me that in Rawls' contract theory "considered judgements" need justification according to his account of reflective equilibrium. However, it should be noted that some "fixed considered judgements" are actually self-justifying in Rawls' scheme. See J. Rawls, A Theory of Justice, pp. 103, 319.
51. J. Rawls, Justice as Fairness, p. 229.
52. See J. Rawls, A Theory of Justice, pp. 580-581; J. Rawls, Justice as Fairness, p. 229.
53. J. Rawls, Justice as Fairness, pp.236-239, note 19.
54. J. Rawls, A Theory of Justice, p. 579.
55. Ibid., p. 48.
56. J. Rawls, Justice as Fairness, p. 229.
57. J. Rawls, A Theory of Justice, p. 579.
58. D. Hume, op. cit., p. 176.
59. Ibid., pp. 218-219.
60. Ibid., p. 176.
61. I am much inspired by Green and Rawls in making this point. See J.

Rawls, A Theory of Justice, pp. 46-53, 251-257; T.H. Green, Lectures on the Principles of Political Obligation, London: Longmans,1913, pp. 29-48.

62. D. Hume, op. cit., pp. 184-185.
63. D. Hume, A Treatise of Human Nature, in D.D. Raphael (ed.), British Moralists, Oxford: Clarendon Press, 1969, vol. 2, pp. 34-35.
64. D. Hume, An Enquiry Concerning the Principles of Morals, p. 185.
65. Ibid., p. 185.
66. The language of rights is also not necessary in Karl Marx's utopian communist society, but Marx's concept of rights and the general framework of Marx's reasoning are different from Hume's. See On the Jewish Question, in R.C Tucker (ed.), The Marx-Engels Reader, New York: Norton, 2nd ed., 1978; I. Mészáros, Marxism and Human Rights, in A.D. Falconer (ed.), Understanding Human Rights, Dublin: Cahills, 1980, pp. 47-61.
67. Aristotle, Politics, edited and translated by J. Warrington, London: Heron , pp. 23-26.
68. Ibid., p. 217.
69. Ibid., pp. 215-233.
70. See C. Arnold, Analyses of Right, in E. Kamenka & A.E.S. Tay (eds.), Human Rights, London: Edward Arnold, 1978, pp. 74-86.
71. See G. Ryle, The Theory of Meaning, in C.A. Mace (ed.), British Philosophy in the Mid-Century, London: George Allen & Unwin, 1957, pp. 239-264; W.V.O. Quine, From a Logical Point of View, New York: Harper & Row, 2nd edition, 1963, pp. 9-21.
72. See J. Raz, The Morality of Freedom, Oxford: Clarendon Press, 1986, pp. 249-250
73. Pennock's statement is helpful in making clear the point that rights-talk is a kind of first-person perspective. He says: ". . . the concept of rights is individualistic in the sense that it is a from-the-bottom-up view of morality rather than one from the top down, and from the related fact that it generally expresses claims of a part against the whole." See J.R. Pennock, Rights, Natural Rights, and Human Rights, NOMOS, XXIII, 1981, p. 1. C.B. MacPherson's view concerning the

characteristic of rights-talk is also relevant here. See C.B. MacPherson, The Political Theory of Possessive Individualism, Oxford: Oxford University Press, 1962.

74. See J. Rawls, A Theory of Justice; R. Dworkin, Liberalism, in S. Hampshire (ed.), Public and Private Morality, Cambridge: Cambridge University Press, 1978, pp. 113-143.

CHAPTER FOUR

CHILDREN'S RIGHT TO EDUCATION AND ITS JUSTIFICATION

A new justification of children's rights was demonstrated in the previous chapter. The justification provided was aimed at showing the acceptability and necessity of the idea and practice of children's rights in cultivating satisfactory relationships between children and other parties. This justification, however, is at most a justification for children's rights in general; it does not amount to justifying some specific children's rights, such as children's right to education. For several reasons, the main focus of this chapter will be put on the issue of children's right to education.

Firstly, it should be noted that the idea of children's right to education can be counted as a modern invention. Although its origin can be traced to the thirteenth century, its acceptance was belatedly confirmed by the Declaration of the Rights of the Child (the United Nations, 1959), in which children's right to a free and compulsory elementary education is explicitly declared.(1) Against this background, it is therefore interesting to explore the possible arguments that may justify children's right to education.

The reason for tackling the issue of children's right to education is also a practical one. The introduction of the idea of children's right to education will inevitably have some effects on the lives and the undertakings of children, parents and the state. But, to what extent should the lives and the undertakings of children, parents and the state be affected? And in what forms should the idea of children's right to education be put into practice? These are questions still to be examined.

Apart from the two reasons above, there is a political reason, or a reason in relation to emancipation, for looking at this issue. It can be suggested

that our daily lives are, either directly or indirectly, guided and influenced by the prevailing ideas (ideals or theories) of the individual and society upheld in our society (these ideas of the individual and society are here understood as ideas concerning how an ideal society, or *the* ideal society, should be construed and what an ideal individual, or *the* ideal individual, should be like in the ideal society espoused). For example, the daily lives of Chinese in China are, at least for the time being, in one way or another guided and influenced by Marxist visions of the individual and society. If we accept this, several questions can then be asked: what are the ideas of the individual and society by which our daily lives **are** guided and regulated? What are the ideas of the individual and society by which our lives **should** be guided and regulated? And, how are those ideas, or how should they be, construed? As moral and rational agents, many people would have an interest in understanding the ideas that have influence on their daily lives. And, arguably, they would not stop at the stage of understanding; they would also be interested in formulating or advocating new ideas of the individual and society that appeal to them when they are not satisfied with the prevailing ideas. But, it can be asked, where can they start their attempt to understand the dominant ideas of the individual and society? And, from what point can they put the new ideas of the individual and society into practice? Against these questions, it can be suggested that the issue of children's right to education, among others, can be taken as a starting point. For education can be reckoned as an embodiment of ideas of the individual and society. For example, Dewey's child-centred education is an education closely related to his theory of democracy; and Emile's education devised by Rousseau is dependent on Rousseau's notion of the ideal individual and how society should be constructed.(2) Having said this, it should be noted that education is more than simply an embodiment of ideas of the individual and society. The relevance of education often goes beyond the scope of ideas on the individual and society. It is also an expression of distinct stands on many other things, such as the characteristics of knowledge, the constitution of the mind, the relationships between knowledge and the mind, and so on. However, if we take a view that theories of knowledge and the mind are

tightly interwoven with ideas of the individual and society, then it would not be unreasonable to put a special emphasis on the latter.

If the above points are accepted, it follows that to understand the kind of education to which children have a right is actually not very different from understanding what the dominant ideas of the individual and society are in our daily undertakings. And, proposing the education to which children have a right is not different from proposing particular ideas of the individual and society. To put it in another way, the education to which children have a right is a reflection, at least partly, of ideas of the individual and society. And, on the other hand, if we have a new set of ideas of the individual and society and we want to put them into practice, we can also start devising the education to which children should have a right and persuade other people to accept it. What should be noted, however, is that education is not just a reflection of ideas of the individual and society; it is also a test by which the ideas of the individual and society concerned can be scrutinized and modified. So, more accurately described, the relation of education to ideas of the individual and society is like this: education can be devised or shaped according to ideas of the individual and society; ideas of the individual and society can be scrutinized and modified through the practice of education devised according to theories. To put it technically, there is a dialectical relation between education and ideas of the individual and society. In the light of the points made above, it then can be claimed that to inquire what sort of education children have a right to is an enterprise involving ideas of the individual and society; to justify children's right to a specific education is an enterprise supporting specific ideas of the individual and society and the reciprocal relation between them.

A few words should be given concerning the aims of this chapter. Briefly, two aims will be advanced. In the first place, it is hoped to clarify what the word "education" stands for in the issue of children's right to education. This will be seen not only as a task of linguistic clarification but also a task concerning the construction of what education ought to be. As has

been suggested above, tackling the issue of children's right to education can be regarded as either an attempt at understanding the dominant ideas of the individual and society that influence us, or an attempt at advocating or constructing some specific ideas of the individual and society. In this chapter, the emphasis will particularly be put on the task of constructing a specific education that embodies specific ideas of the individual and society. The characteristic of this task is therefore political not just linguistic. The second aim of this chapter is to provide a justification for children's right to the specific education delineated in the first section. Again, it will be seen that the justification offered is not just a justification for a specific education that children should have, it is also a justification for specific ideas concerning the individual and society.

1. THE FORM OF EDUCATION TO WHICH CHILDREN HAVE A RIGHT

There is a need to clarify what the word "education" refers to in the discussion of children's right to education. This clarification will aim at providing a specific concept of education. Five reasons are offered here to explain the reason why we need to clarify the word "education" and why a substantive concept of education is necessary in this thesis.

First, it is worth reiterating that one of the reasons for tackling the issue of children's right to education is in relation to emancipation and autonomy. This chapter is undertaken partly to understand what are the dominant ideas of the individual and society influencing us; and, moreover, to advocate some specific ideas of the individual and society. Given this direction, the concept of education involved in this chapter cannot be a general concept of education such as when education is referred to as "a family of processes" aimed at "the development of desirable qualities" in children (3) or when education stands for institutionalized activities conducted with the view to equipping children to fit into the society in which they live. "Education" in this general sense would not help us to understand the dominant ideas of the individual and society prevailing in our modern society. It also cannot be taken as an instrument to advocate

some specific ideas of the individual and society, for the first general concept of education mentioned does not tell us what are the desirable qualities concerned and their relations to the ideas of the individual and society. The second general concept of education mentioned is too simple to inform us what society is under consideration and hence fails to satisfy our interest in emancipation. The stated aims of the chapter can only be achieved under the condition that the education involved is indicated concretely.

Secondly, the need for spelling out a specific concept of education is related to the future development of this thesis. In the latter part of this chapter it will be argued that children should have a right to education mainly on the grounds that education is an essential good for children. And in Chapter Five it will be argued that children should be compelled to receive education primarily for the reason that compulsory education is an essential good both for children and other parties, such as parents, adults without children, the state and society as a whole. It can be suggested that unless a specific concept of education is offered there is no hope to explicate satisfactorily why education is such an essential good that the justification of children's right to education and compulsory education can be based on it. A general concept of education cannot help us to answer the questions: "To what extent is education an essential good?" "In which respect is education an essential good?" "What sorts of good can education deliver to all parties concerned?" "What specific roles does education as an essential good play in society and in the life of the individual?" These are substantive questions: they cannot be answered on the basis of a general concept of education.

The third reason for trying to make clear to what the word "education" refers is based on the observation that the word "education" is ascribed to different things by different writers when the issue of children's right to education is being tackled. For example, in Gregory's work, he firstly refers to "education" as "educational opportunity". For Gregory, "laying claim to the right to education, is partially to demand that someone lays on

opportunities, such that persons can by taking advantage of these opportunities educate themselves."(4) But if it is asked "What are educational opportunities for?" Gregory would then reply that educational opportunities are aimed at equipping children with "basic skills and putting them in the position to further develop those skills, if they wish."(5)

The term "education" refers to something else, however, when the same issue is taken up by Melden. In Melden's scheme, the word "education" should first and foremost refer to "moral education", for "failing the achievement of which there is the failure to achieve moral agency itself."(6) In addition, children's right to education should also be recognized as children's right to "an understanding of their cultural and political heritage along with those skills necessary for their effective participation in the society into which they are born."(7)

Apart from Gregory and Melden, Bandman, Olafson and Wringe also introduce different notions of "education". For Bandman, "education" is straightforwardly attached to "schooling". He maintains that "The right to an education implies that everyone has to go to school" on the grounds that "[T]o get to be free one has to do some things first."(8) By contrast, Wringe is not so straightforward as Bandman. In his discussion of children's right to education as a welfare right, he firstly tries to avoid "any independent analysis of the concept of education".(9) Nevertheless, he still reveals what "education" really stands for in his subsequent discussion. It is that children should have a right to "the provision of education to the required level" so that they can be protected from material deprivation. What is more, children's right to education also implies that children should have a right to education which provides sufficient experience and knowledge for them so that they can participate in "the political life of a democracy".(10) As to Olafson, he explicitly points out that "education" in the term "the right to education" refers to "the acquiring of certain forms of competence through instruction or other appropriate forms of assistance." What then is the specific content of competence? Olafson claims that it means "trained capacity or the ability to carry on some activity or perform some function

more or less on one's own. . . ."(11)

From the above, it seems that although the writers mentioned are talking about the same issue, they are, to some extent, moving in different directions owing to the fact that they have different notions of education in mind. In order to provide a specific framework for discussion and to avoid entanglements that the general term "education" may produce, it is therefore necessary to clarify what education stands for in this thesis and delineate the scope and the content of "education" concerned here.

The fourth reason is that if the education concerned in the discussion of children's right to education is only a general concept of education then this discussion would not satisfy people in a pluralistic society who have different ideas about education. It is of course reasonable to suggest that education can stand for **either** a family of institutionalized processes conducted for the purpose of developing worthwhile knowledge and understanding, and of cultivating desirable qualities in children(12) **or** institutionalized activities conducted with a view to equipping children to fit into the society in which they live. This suggestion is indeed significant in the sense that **not** all children in the past had a right to education of this sort. Thus it is quite legitimate to argue for, or against, the view that **all** children should have a right to have access to education as such. This suggestion is, however, not entirely satisfactory on the grounds that the two general concepts of education do not carry enough evaluative recommendations. The first general concept does not enumerate what worthwhile knowledge (understanding) and desirable qualities are. The second general concept of education fails to state the extent to which children should be fitted into society. Moreover, although the second general concept of education seems to be a general concept adaptable to all human societies - presumably, only anarchists and Nietzscheans would oppose this concept - it is not concrete enough for people living in a pluralistic society in which people have different views and understandings concerning what society is, and, consequently, different ideas about education.

Given this account, it can be presumed that writers who tackle the issue of children's right to education in a pluralistic society would not be satisfied with a general concept of education. They would go further to explicate a specific concept of education. This presumption can actually stand in the light of R.S. Peters' enterprise in justifying "liberal education". In Peters' essay The Justification of Education, he is quite clear on the point that a general concept of education will not carry significant evaluative suggestions essential to his undertakings. In his own words, he says:

> There is a general concept of 'education' which covers almost any process of learning, rearing, or bringing up. Nowadays, when we speak of education in this general way, we usually mean going to school, to an institution devoted to learning. In this sense of 'education' almost any quality of mind can be deemed a product of it - compassion and perseverance included. To say that such qualities of mind are the product of education is to say that they are learned. Education, in this sense, can be accorded any kind of instrumental value and so is not of any significance for its valuative suggestions.(13)

After making this statement, Peters goes on to point out that the education relevant to his justification is "the specific concept of 'education' which emerged in the nineteenth century as a contrast to training."(14)

The same attitude is also reflected in Peters' later writing, notably, Democratic Values and Educational Aims. In this essay, he sketches out painstakingly the aims of education in a democratic society and the content of education corresponding to the educational aims. Both at the beginning and at the end of this essay Peters recognizes that "education", to some extent, is a contestable concept.(15) To be more specific, he argues that there are some essential elements shared by all educational activities. As such, education has its uncontestable aspects. However, there are also some contestable elements in educational activities. Education, for Peters, is similar to "morality" and "democracy", "it marks out features of life that are deemed desirable, but there is no one standard usage that can be taken as a model of correctness. So different groups compete endlessly for their particular interpretations."(16) Between the uncontestable aspects and the

contestable aspects of education, it is the latter that most arouses Peters' interest in his undertakings. He emphasizes that "education is a teleological type of concept in that it indicates processes of learning directed towards some end(17)," and makes it clear that what he tries to advocate is a liberal education - rather than any other form of education - aimed at helping children to encounter human conditions in a democratic society.(18)

The reason why Peters insists on spelling out a specific concept of education in the two essays mentioned can be seen clearly in Dearden's statement made in the discussion of Peters' contribution to the development of philosophy of education. He says:

> If we pursue a general analysis of the concept of education, therefore, it is doubtful whether much of substance of education will emerge beyond a reference to learning which satisfies the requirement of developing understanding, that being very much a matter of degree. This is unsurprising if we reflect that concepts are relative to interests, for who would have an interest in such a general concept? Education, whether general or specific, is a practical field. The important issues relate not to a perfectly general concept of education but to different and typically competing conceptions of it. There is a close parallel with morality here. What is common to Nietzsche and Kant, or to the Mundugumor and the Muslims, is likely to be of much less interest at the level of commitment than their differences.(19)

In the light of Peters' enterprise and Dearden's statement, it should be clearer why a specific concept of education should be offered here. Plainly, it is not of much interest "at the level of commitment" to understand or to advocate a general concept of education. What should be of concern are the contestable aspects of education. It is in this context that a specific concept of education will be offered here.

The final reason, which is related to the preceding two reasons, for offering a specific concept of education is based on the fact that the word "education" can be used, in the words of Walsh, "on a scale that runs from the very open (nominal, general) to the very loaded (substantive,

specific)."(20) Thus, the subject-matter of the statement "Children have a right to education" (or, "Children do not have a right to education") would not be clear enough unless what "education" stands for is made explicit. However, even if the statement can be made clear by delineating the meaning of the word "education", there can still be other problems. For example, if we follow Warnock and take "education", in its purely normative sense, as "something which happens to a child and changes him for the better"(21), then the statement "Children have a right to education" can hardly need any justification. For it would be quite self-evident to say that children have a right to the thing which changes them for the better. This, however, says very little about the whole issue of children's right to education.

A totally different case can also be made to suggest that the term "education" should be used substantively and specifically in the discussion of the issue of children's right to education. While discussing the issue of "political education", Oakeshott uses the term "education" in its widest and rather descriptive sense. In his view, political education "begins in the enjoyment of a tradition, in the observation and imitation of the behaviour of our elders, and there is little or nothing in the world which comes before us as we open our eyes which does not contribute to it."(22) Given this, political education becomes an activity that not only children from good family backgrounds can have, but also children from the most disadvantageous surroundings.(23) In other words, "political education" in Oakeshott's usage is a sort of "socialization". Although Oakeshott does not address the issue of education in general in the discussion of political education, it is however possible to take his "political education" as an essential part of education in general and hence assume that "education" contains an element of socialization. If this is accepted, then the statement "Children have a right to education" would not make significant sense either. For having education in this descriptive sense is a matter of necessity; no matter whether we want to have education or not we are bound to have "education" in this very general sense. In this context there is therefore no point in arguing, or rejecting, the idea that children have a

right to education.

The question left, however, is: to what extent should the term "education" be specified? It can be suggested that although some definitions of education contain normative as well as descriptive aspects, they are nevertheless not helpful in terms of providing a plausible discussion framework. For instance, education can be defined as "the systematic promotion of interest-based learning" or "the systematic initiation into the best that has been taught".(24) It seems these two definitions are better than Warnock's and Oakeshott's in the sense that they have normative as well as descriptive aspects. But the problem still remains; namely, they fail to specify any details concerning "systematic promotion", "systematic initiation", "interest-based learning", and "the best that has been thought and taught". This failure can make us confused about what we are driving at in the discussion of children's right to education.

In order to have a clear framework for discussion concerning children's right to education, it is necessary to make the connotations as well as denotations of "education" as concrete as possible. Peters' early notion of education, among others, is helpful in this respect. Peters' idea entails three aspects (criteria). He firstly claims that the word "education" has normative implications. "Education", in his own words, "implies the transmission of what is worth-while to those who become committed to it."(25) If that were the only criterion of "education", then the definition would be as unhelpful as Warnock's. Fortunately, Peters does not stop at that. He gives two more aspects of education. They are, "that 'education' must involve knowledge and understanding and some kind of cognitive perspective, which are not inert", and "that 'education' at least rules out some procedures of transmission, on the grounds that they lack wittingness and voluntariness on the part of the learner."(26) Up to this point, Peters has spelt out the normative, the descriptive, and the procedural aspects of "education". Most notably, however, apart from the three aspects mentioned, Peters also outlines the content of education. Embracing the

idea of liberal education (in its various senses), he recommends several subjects that should be included in the curriculum. They are: language; the basic skills of reading and writing; science; history; mathematics; religious and aesthetic awareness; and moral, prudential and technical forms of thought and action (the last five subjects are named by Peters as bodies of knowledge, or forms of thought or awareness).(27)

In the light of Peters' notion of education, it can be suggested that the word "education" can be made clear only if its normative, descriptive, and procedural aspects are illustrated in a concrete way. Or, to put it in another way, the aims of education (the normative aspect), the content of education (the descriptive aspect), and how "education" should be conducted (the procedural aspect) should be clearly specified. The question, however, remains: on what ground, and by what approach, can we decide on the aims, the content and the procedure for the education concerned here? A tentative answer to this question will now be offered.

It will be recalled that "education" is being regarded as an embodiment of ideas of the individual and society. One of the implications of this is that education can actually be devised according to the ideas of the individual and society that appeal to us. Following this line of thinking, the starting point of clarifying what "education" refers to is then to find out what are the ideas of the individual and society that appeal to us most. The most appropriate way of doing this is to canvass, firstly, various sorts of ideas of the individual and society, and then decide which ideas suit us most.(28) However, as we are confined by space, this approach cannot be adopted here. The plausible way is to start from reflecting on the society in which we live and then to ponder the basic and distinct characteristics of our society - which inevitably incorporate the dominant ideas of the individual and society. Once we can grasp the basic and distinct characteristics of our society we then can go on to postulate what sort of education we need, which should be indicated in terms of aims, content and procedure.(29)

If a single term can be used to describe the basic characteristics of our

modern society, then this term must be "liberal democracy". In detail, the basic characteristics of a liberal democracy, manifested by a complex of institutions and people's daily undertakings, can be described as follows:

1>. Individual freedoms, no matter what they are, are highly, if not absolutely, esteemed.

2>. Each member of a liberal democracy is supposed to have independent moral and legal status; and his status is publicly recognized and protected by the law, the state, or society as a whole. In this sense, all members of a liberal democracy are supposed to be equal.

3>. A liberal democratic society is a society which tolerates different judgements concerning what is a good life. Hence individuals in a liberal democracy can pursue and experiment with the desirable good life they have in mind as long as their pursuit and experiments do not encroach upon the law which is enacted through a democratic procedure.

4>. Although members of a liberal democracy can have different notions about what is a good life, some sorts of life-style are especially favoured (for example, the life-styles of politicians, businessmen, academics, and so on). In this respect, a liberal democratic society is a society in which each member can have equal opportunity to pursue those positions leading to some favoured life-styles.

5>. A liberal democracy involves widespread participation of all members of society. As to the extent and the form of participation, they vary according to different circumstances. But generally speaking, political participation is often taken in the form of a representative system rather than a direct participatory system.

6>. All human societies are based on some sort of cooperation. A liberal democratic society is no exception in this respect. However, a society characterized by liberal democracy is often a society marked by the division of labour. Cooperation in a liberal democratic society is effected in a rather complicated form of labour division.(30)

Taking the six characteristics mentioned together, it can be suggested that a liberal democratic society is "a fair system of cooperation between free

and equal persons".(31) What should be emphasized here, however, is that the six characteristics are both social facts and ideas, practised and upheld in a liberal democratic society; but whether they are practised to everyone's satisfaction, or whether the substantive content of these ideas is recognized without contention, is still uncertain.

Enlightened by the six characteristics of liberal democracy, we then can have some ideas about what an ideal person in a liberal democratic society can be. Generally, an ideal person has the following features:

1>. An ideal person is a person who understands that the society in which he lives is a fair system of cooperation between free and equal persons. By this understanding, he not only is willing to be part of this society but also strives for the maintenance as well as the actualization of this society.

2>. An ideal person knows how the liberal democracy in which he lives is actually constructed and operated. He is also aware of the relationships between himself and the liberal democracy.

3>. In order to actualize the liberal democratic society, an ideal person values the importance of individual freedom and equality. He not only values his own freedom and equal status in relation to other parties but also respects other people's freedom and equal status in relation to him. Most importantly, he is able to exercise his individual freedom and maintain his equal status in relation to other parties.

4>. An ideal person is rationally capable of arranging, pursuing, and revising his life plan on his own. In the process of arranging and pursuing his life plan he can exempt himself from external interference or internal irrational forces within himself. In other words, an ideal person should be autonomous. Moreover, he also respects other people's right in arranging, pursuing and revising their own life plans.

5>. As a liberal democracy requires members' participation, either directly or indirectly, an ideal person is then a person who is able to participate in political, economic and social activities.

6>. An ideal person can take up some specific occupations, for in a society

characterized by labour division members who are unable to take up a specific occupation may put themselves in a vulnerable position - in terms of exercising individual freedoms and maintaining their equal status - and weaken the structure of society as a whole.

A question can nevertheless be raised here. That is, how can children fit into a fair system of cooperation between free and equal persons if they are not fully rational and in need of guidance and protection, as defined in Chapter Two? The assumption underlying this question is that the above description about liberal democracy and what an ideal person can be like is only relevant to a society constituted by able and rational adults (citizens); it is not relevant at all to children who are unable to participate in normal political, economic and social activities. In response to this question, it can be answered that the fact that children are not fully rational and in need of guidance and protection does not necessarily imply that children cannot be regarded as free and equal persons. They can still be regarded as free and equal, yet their equal and free status is maintained in a special way.

To regard children as equal and free persons is not to assume that children can have the same sorts of freedom and equality as rational adults. There are various sorts of freedom and equality; some are associated with rationality or reason, some are not. Generally, according to Berlin, there are two concepts of liberty (in this thesis, the words "liberty" and "freedom" are used interchangeably; Berlin also refers these two words to the same thing); one is the negative sense of liberty , the other is the positive sense of liberty. The negative sense of liberty refers to the area "within which the subject . . . is or should be left to do or be what he is able to do or be, without interference by others." This is the liberty in the sense of "freedom from". The positive sense of liberty refers to the capacity by which the subject can decide on his own, not contingent upon external interference or internal irrational forces. This is liberty in the sense of "freedom to"(32), or liberty in the sense of autonomy. What can be said about Berlin's scheme is that the name of negative freedom actually

covers two categories of freedom. They can be named as freedom based on rules and freedom detached from rules. Political freedoms are an eminent example of the former, for they are contingent upon some sorts of rules. Children do not have a freedom to vote in general or local elections on the grounds that the related law does not grant this freedom to children. "A's freedom to scratch his hair in classroom" is an example of freedom detached from rules; for there is no rule, at least normally, on regulating whether or not a pupil can scratch his hair in classroom. Personal undertakings that are not regulated by law are freedoms detached from rules.(33) In the light of the analysis made above, it can be suggested that even though children are not free in the sense that they lack the positive sense of liberty (autonomy), they nevertheless can be counted as free in the sense that they have "freedom detached from rules" or, on some occasions, "freedom based on rules". It can be argued that in a complex modern society no one is *absolutely* free (in the negative sense) due to the fact that everyone has to cooperate to some degree with other members, so individual freedom is relative rather than absolute.(34) Based on this, we can suggest that due to the need of labour division and the fact that every member of society has to live together with others, each member's freedom (in the negative sense) hence is only different in degree, not kind. Then, from this, it can be inferred that since children must play a role or gain a place in any existing society, their presence, which goes with the fact that they have rights, in itself forms a kind of perimeter that will protect children from adults or the state's arbitrary interference. In this negative sense, children will be left a place in which they can exercise their personal freedoms.(35)

Similarly, there are also different forms of equality. It is obviously inappropriate to claim that children should be, or can be, equal as adults in participating in all sorts of political, economic and social activities. It is, however, not inappropriate to claim that children can be regarded as equal in relation to adults and the state in the sense that they have a morally and legally independent status, which is constructed by the languages of rights and duties. Their moral status is no different from the moral status of any

other members of society. The moral unit of a liberal democratic society is the human individual irrespective of his/her social status, sex, age, state of mind, and so on. This is also the case concerning children's legal status.

After the understanding that children can also have their freedom, although limited, and minimum equality in relation to other parties, it also should be noted that children have potentials, and it is also desirable that they should have all sorts of freedom and enjoy a full equal status in relation to other parties. Following Locke, it can be claimed that children are not born **in** the full state of equality and freedom but they are born **to** it.(36)

Apart from the points made above, it should also be noted that children can cooperate with other members of society. Green's theory can shed some light on this point. For Green, "all rights depend on that capacity in the individual for being determined by a conception of well-being, as an object at once for himself and for others, which constitutes personality in the moral sense."(37) In plain words, "rights" in Green's view are contingent upon the moral capacity of the individual, which is relevant to the well-being of society. Following this line, it can be reasoned that beings without this moral capacity do not have rights. And it is also Green's position that animals do not have rights.(38) But how about human beings who are "helpless idiots and lunatics"? It may seem they also lack this moral capacity and hence should not have rights, which include the right to life - the most basic right. Green, however, does not accept this reasoning. He argues that even these persons still can have a right to life; for they still can have a "social function", "a passive function as the object of affectionate ministrations arising out of family instincts and memories; and that the right to life protected corresponds to this passive social function."(39) The inspiration we can have from Green's standpoint is that although children cannot positively cooperate with adults in undertaking political, economic and social activities, they can still have their social functions to play. They can have passive social functions in the sense that they can be "the object of affectionate ministrations arising out of family

instincts and memories." But apart from that, from a long-term viewpoint children can also have positive social functions. How can a human society survive without children? A human society without children is a society without a future.(40) It can be suggested that the existence of children is a necessary condition for the survival of human society. From this angle, the social function children play is essential and positive. The fact that children can have social functions to play allows us to conclude that children can actually have cooperative relationships with other parties of society. They are an essential link in society as a whole. In this sense, it can also be claimed that children are also a participating class in a fair system of cooperation.

Given the points argued above, it can be claimed that children can actually fit into the fair system of cooperation between free and equal persons. Even though they are not as equal, free and capable as adults, they still can have a role to play in that system. We now turn to the question of what is the education that children should have a right to in a fair system of cooperation between free and equal persons. What is on the agenda is that if there is to be an education within a fair system of cooperation between free and equal persons, what form should its aims, content and procedure take? The answer to this question can be given as follows.

1>. The specific role that "education" has to play is to cultivate would-be citizens with the view to maintaining, pursuing, and actualizing the society as a fair system of cooperation between free and equal persons. In order to achieve this aim, children should be equipped with necessary knowledge, skills, and virtues so that they can understand the constitution of their society and become part of this society. To be more specific, the aims of education are: children should be equipped with necessary skills, knowledge, and virtues so that they can take up specific occupations and cooperate with other members of society; children should appreciate and pursue the value of freedom and equality, not only for themselves but also for other people; children should understand how a liberal democratic society is constructed and operated and their relationship with this liberal

democracy; children should be capable of planning, pursuing, and experimenting with their own life plans in the awareness that other people also have rights to pursue their own life plans; and finally, children should be capable of participating in political, social and economic activities.

2>. With the aims delineated above, the contents of education can be devised as follows:

2.1>. As children, especially those who are very young, can only cooperate with adults and the state in a rather limited way, the most urgent task for society is then to make children capable enough so that they can cooperate with other members in a more extensive way. This urgent need for making children capable is probably based on society's natural tendency for securing its continuing existence. This, however, is not the main concern here. In terms of providing the cooperating abilities for the would-be adults, the primary object is to make children capable of communicating with other members of society. In a less developed society, the communicating abilities might not be important at all, but in a highly developed society, these abilities become very essential. Because in a modern developed society people tend to use written and numerical symbols, apart from oral language, to communicate with each other. Based on this understanding, **literacy and numeracy** should be part of children's education in a highly developed society.

Except for the communicating abilities, the requirement of cooperating with each other in a positive way also implies that children should be educated in a way that will enable them to take up specific jobs by which a social system of cooperation is possible. It suggests that children should be equipped with some knowledge and skills, which are reckoned as necessary for taking up these specific jobs. In other words, a **vocational education** should be included in the curriculum of children's education. What then are the knowledge and skills that constitute a vocational education? The answer is: it depends on each individual society, but no matter what the knowledge and skills are they should be broad enough to

become the foundation on which the educatee can establish necessarily particular skills required by a given occupation. In other words, the vocational education required is a general education. In line with Dewey's position, two reasons can be found to support the view that vocational education should be put in the form of general education.(41) Firstly, no one in a liberal democratic society is born for a particular kind of work. Every one is entitled to pursue his own life plan, which normally goes with a specific occupation. Further, as has been mentioned, each member of a liberal democracy should have equal opportunity to pursue some favoured life-styles. It is partly for these reasons that children in a liberal democracy should be given a broad and general education so that they can be equipped with the necessary knowledge and skills on which they are able to pursue any desirable life plans. Secondly, in a modern society characterized by highly sophisticated labour division and constantly changing social conditions, it is not appropriate to transmit specialized particular knowledge and skills for certain jobs. For it is possible that those knowledge and skills transmitted to pupils may be obsolete by the time the pupils leave their schools. It follows that the task of vocational education is to provide general knowledge and skills that may have vocational bearings on specific jobs. Generally, the vocational education should include the most prominent forms of knowledge and skills cherished in society, such as mathematics, natural sciences, social sciences, and skills that are relevant to industry.

2.2>. There are some other things that should be taken into the content of education from the viewpoint that children should enjoy the same equality and freedom as adults when they grow up. As has been noted, children's freedom is not as wide as adults' and although they are morally and legally independent from adults and therefore enjoy an equal status in relation to other parties, they are actually not equal to adults in terms of participating in political, economic or social activities. But one day they will grow up and they will also have the same political, social and economic freedoms as adults; and they will be interested in enjoying their full freedom and pursuing their autonomy. What is more, they will also

enjoy an equal position in relation to other parties in terms of participating in various activities. In a system organized by free and equal persons, children therefore should have opportunities to enjoy freedom and equality in their full sense. Literacy and numeracy and a general education in the light of a vocational view have partly contributed to this. But it is not enough. **Political education** and **liberal education for autonomy** should be added on the list.

Political education in a liberal democracy is mainly concerned with the knowledge of how a liberal democracy is constructed and operated as well as the necessary attitudes required for the operation of the liberal democracy. Apart from that, the knowledge concerning the relationship of the individual to major institutions and the state should also be included. It involves the knowledge concerning the possible freedoms or activities each individual can have, or participate in, at different stages and under different circumstances. Moreover, following Pat White, it can be suggested that political education should also cover a liberal education constituted by different forms of knowledge. For political issues involve different kinds of consideration which correspond to different forms of knowledge; so, if children can get acquainted with different forms of knowledge they can also get acquainted with different kinds of consideration employed in political issues. And an enlightened citizen is only possible if he is equipped with different forms of knowledge.(42) What are, then, these forms of knowledge? Generally speaking, they are the forms of knowledge which constitute the vocational education and the liberal education for autonomy. For this reason, there is no need to dwell on this point at this moment. Apart from those indicated in the discussion of vocational education, some others will also be delineated in the following discussion.

With a view to cultivating children's capacity to pursue autonomy, a "liberal education as an education for autonomy" should be provided for children.(43) How can a liberal education for autonomy be developed?

In order to make children capable of arriving at decisions on their own, it is necessary to provide sufficient knowledge or information for them so that their decisions or choices can be exempt from arbitrariness, external manipulation and internal irrational forces. But it can be objected that while an informed capacity may help people avoid the arbitrariness of choice, it is not necessarily helpful in avoiding external manipulation and internal irrationality. For it is quite possible to imagine a society in which all existing forms of knowledge and information are, intentionally or unintentionally, formulated and regulated by a specific social class, so that an informed choice or decision in this framework is still inevitably biased in the sense of favouring the specific social class or being distorted by that class. What can be said against this contention is that: we must start from what is known, mustn't we?(44) It is true that this contention is rightly put, but it is hoped that through the operation of all kinds of activities in the framework of a fair system of cooperation this subtle external manipulation will eventually be purged away. But it can still be asked: how? It then can only be answered that if members of society really take the values of freedom and equality seriously, they will not be happy with the fact that the existing forms of knowledge are biased to a specific social class. Ideally, they would try to free themselves and other people from this bias. And it is through continuously engaging in self-criticism and self-reflection that the bias can possibly be eradicated.

However, it can also be suggested that there is a fundamental dilemma embedded in the practice of liberal education. That is, depending upon an organized and predetermined educational content is by implication relying upon others rather than one's own experience. In other words, it is impossible to "cultivate" or "teach" a child to be autonomous.(45) In the face of this objection, it can be argued that this dilemma is actually an illusion. It is quite clear that education cannot proceed in a social vacuum. A specific social context in which the existing forms of knowledge or information appear is a necessary perimeter where the pursuit of autonomy takes place. It is similar to the pursuit of health where we have to rely on external environment, for instance, we have to take food from without. To

have food itself is clearly not a hindrance to the pursuit of health; on the contrary, it is a necessary, although not sufficient, condition of the quest for health. Along the same lines, it can be suggested that learning from others is not a hindrance to autonomy; on the contrary, it is a necessary, not sufficient, condition, for autonomy. Without the provision of the existing forms of knowledge, autonomy is impossible. In this light, learning from others is logically and practically prior to the pursuit of autonomy, just as having food must be prior to the pursuit of health. Learning from others and autonomy are not located on the same level, hence there is no dilemma in terms of choosing one rather than the other.(46)

How can an informed capacity combat irrational forces internal to the agent himself? It can be suggested that the better we know ourselves - our motives, impulses, consciousness, sub-consciousness, purposes, possible reactions toward external environment and so on - and how we are influenced by nature and other persons, the greater is the possibility that we can bring our action and thought under our control.(47)

Now, back to the issue of the content of education. The arguments demonstrated are trying to show that in so far as children's autonomy is concerned it is essential to provide sufficient knowledge and information for children so that they can be capable of making informed choices concerning their own life-plans. This position, however, echoes the suggestion of a general education in the light of vocational requirements and a political education, both of which contain the provision of different forms of knowledge. What then is the content of education that can be supposed to develop children's autonomy? O'Hear's illustration of liberal education can be very helpful here. The specific content of liberal education, in O'Hear 's view, can be devised on the model of the content of university education. Along this line, he suggests the following subjects that should be included in a liberal education: **knowledge of the physical world (natural sciences, mathematics), knowledge about human society (history, geography, anthropology and other social and behavioral sciences), the study of literature and the arts (or a**

foreign language, useful if not essential), knowledge about religion.(48) It should be noted here that O'Hear's list with regard to liberal education is by no mean comprehensive, but concerning the practical limitations in a given educational context, such as time and resources, O'Hear's suggestion can be reckoned as sensible.

2.3›. What has been argued is that if children have a right to education in the framework of a fair system of cooperation between free and equal persons then children should have a right to literacy, numeracy, a political education, a vocational education and a liberal education (the content of the latter three are overlapping). But it seems that the content of education above is still not well composed, for the emphasis is being put on knowledge and skills that should be provided by adults and the state. There are other aspects that should also be stressed. That is, children should have opportunities to apply the knowledge and skills included in the content of education on the grounds that these knowledge and skills are mainly devised for the maintenance and actualization of the fair system of cooperation and hence they should be manifested in practical activities. Furthermore, as children will eventually play a positive role in the system of cooperation when they grow up, they should also have opportunity to "understand" and "learn" those virtues that are essential in sustaining and actualizing the fair system of cooperation.(49)

What then should be the best activities in which children can practice their knowledge and skills learned from their tutors and cultivate their virtues? Two kinds of activities can be relevant here. Concerning the activities in which children can exercise their knowledge and skills in relation to the necessity of communication and specific jobs they will probably take, one of the sensible provisions is to let children have some sort of **industrial experience.** As to where these activities should take place and what is the specific content of industrial experience, a flexible scheme can be devised according to real circumstances. It might be in a school-run canteen or a private company and so on. The idea of providing a place where communicating ability and all sorts of knowledge and skills can be

performed is not only to prepare children for their future life but also to test the water so that children and adults concerned can know whether or not children are able to cope with real situations.

With regard to activities useful for developing children's virtues, the best choice, arguably, is sport, especially those sports that need team-work, such as basketball, rugby or baseball and so on. The reason for singling out sport as the best activity for shaping virtues is that sport in the form of team-work is a miniature of a fair system of cooperation. What is more, because it always involves two teams it can therefore provide an opportunity for children to reflect on their position in regard to their teammates and their rivals. It also can let them be aware that sometimes they have to compete with other people over some limited resources. It can be assumed that the virtues needed for playing, say, rugby are not significantly different from the virtues needed for maintaining or actualizing a fair system of cooperation between free and equal persons. These virtues are, among others, respect for the rules, justice, prudence, commitment, courage, tolerance, persistence, and so on. It is of course not the case that children can definitively pick up these virtues, but the idea is to provide proper occasions where these virtues are needed and hence can be experienced by children. To be sure, sport is not the only way that these virtues can be learned; any cooperative form of activity will do. But as far as the development of the mind and body are concerned, sport probably is the best.

3>. How then about educational procedures? It can be suggested that the procedures of education should be compatible with the framework of a fair system of cooperation between free and equal persons. Children's status of equality and freedom should be respected. Or, to use Peters' idea, procedures which lack "wittingness and voluntariness on the part of the learner" should be ruled out. Two specific points, however, should be made here. Firstly, the negative freedom and the equal status that children enjoy should be respected. The procedures of education, no matter what they are, should not encroach upon children's freedom and equal status. Punishment

is allowable if and only if it is used compatibly with the freedom and equal status of children. Secondly, as to whether one specific educational procedure is compatible with the framework of a fair system of cooperation between free and equal persons, it should be decided by responsible adults in their capacity as free and equal persons with the view that children's education is aimed at cultivating free and equal persons.

In sum, education in a fair system of cooperation between free and equal persons is aimed at equipping children with necessary capacities, knowledge, skills, experiences and virtues so that the fair system can be substantiated and the ideals of liberty and equality can be actualized. Following this, the content of education to which children have a right is: literacy, numeracy, general education with a view to vocational requirements, political education, liberal education for autonomy, industrial experience, and team sports. And the educational procedures should be compatible with the judgement that children have the status of freedom and equality.

After explaining what the word "education" refers to, it is the issue of whether children have a right to such an education that we shall turn to.

2. A JUSTIFICATION FOR CHILDREN'S RIGHT TO EDUCATION

After the clarification of what "education" stands for in the issue of children's right to education, it is time to ask the critical question: Do children have a right to the education mentioned? And, if they have, on what grounds? In this section it will be argued that children should have a right to the education specified in the last section, and a justification will be offered.

Actually, the former question has two versions. As has been mentioned in Chapter One, the word "rights" in this thesis is mainly referred to two

categories of rights; one is "claim-rights of freedom", the other "welfare-rights". These two categories of rights are located in different contexts and have different correlatives. Generally, "A has a claim-right of freedom to X" means that A has no duty not to do (have) X if he wants to do (have) X and other parties are under obligation not to interfere with A's exercise (possession) of X. By contrast, "A has a welfare-right to X" implies that other parties have corresponding duties to A in terms of providing X to A; and if A is not given what he has a right to have, he (or other people on his behalf) can complain or claim against the responsible parties and the responsible parties can be censured for the neglect of their duties. Given this understanding, the question "Do children have a right to education?" can have two different versions. It can be regarded either as the question "Do children have a claim-right of freedom to education?" or the question "Do children have a welfare-right to education?" If the question is being asked with the view that children's right to education is a welfare-right, then the reason for giving either a positive or a negative answer will be quite different from the reason that would be given in response to the same question but with the view that children's right to education is a claim-right of freedom. To elaborate this point. No matter whether the statement "Children have a claim-right of freedom to education" is accepted or rejected, the central issue on the agenda is the issue of liberty or freedom. The issues concerned are: why may or may not children have liberty or freedom to acquire education? And, what will be the consequences of children's having (or not having) a claim-right of freedom to education? However, the central focus of this question would be shifted if the statement "Children have a welfare-right to education" is made. In this perspective, no matter whether the statement is accepted or rejected, the issues concerned are: what is the moral or social context in which children are located so that other parties have, or have not, obligation to provide education for children? And, is education an essential good?

If the analysis above is accepted it follows that the task of justifying children's right to education involves two separate parts. One is to justify children's claim-right of freedom to education, the other is to argue for

children's welfare-right to education. A question, however, can arise here. That is: between children's claim-right of freedom to education and welfare-right to education, which right should be given a more prominent place in the general issue of the justification of children's right to education? In fact, it can be quite legitimate to claim that children's right to education can at the same time be a welfare-right as well as a claim-right of freedom. Children's right to education as a welfare-right does not necessarily contradict the fact that children's right to education can also be a claim-right of freedom. In other words, children can have a right to pursue education without external interference and at the same time they can claim that a certain kind of education should be provided by the duty-bearers, whoever they are. However, even though children's right to education can be either a welfare-right or a claim-right of freedom, it is still necessary to establish priority between the two versions of children's right to education in terms of their importance to children and the internal relationship between them. And if this order can be made, it then can be decided where the weight should be put.(50)

It will be argued here that between children's welfare-right to education and claim-right of freedom to education, the former is more relevant to children's lives and practically prior to the latter, so the issue of the justification of children's right to education should be focused on the justification of children's welfare-right to education. There is one main reason for making this claim. As far as children are concerned, the claim right of freedom to education is not particularly essential to children's lives. The right to pursue education without external interference does make much sense under the condition that the right-holder is capable of pursuing education on his own and able to protect himself from external interference. In this respect, many children, if not all, would have no idea about what education is; they therefore would have no intention to pursue education at all in the first place. Even though some children may have a strong intention to be educated, they, nevertheless, are not able to pursue the education they want. As a result, they would be left in a state of confusion. Mill's statement can especially make this point clear. He says:

> The uncultivated cannot be judges of cultivation. Those who most need to be wiser and better usually desire it least, and, if they desired it, would be incapable of finding their way to it by their own lights.(51)

From this angle, children's claim-right of freedom to education is rather like an ideal. This ideal is very important in terms of setting up a goal to which children can aspire. But how children can achieve this goal is partly dependent upon how capable they are. Thus this can lead to the suggestion that in order to substantiate children's claim-right of freedom to education it is essential to equip children at the beginning with some necessary means, such as the education described in the last section. And this is also the reason why children's welfare-right to education should be put in the first place.

Given the reason above, the emphasis in this section should then be put on the justification of children's welfare-right to education. The justification of children's welfare-right to education involves different elements from the justification of children's claim-right of freedom to education. As children's welfare-right to education requires the provision of education for children, a justification for this right should firstly demonstrate the practical necessity of this right. And it is on the ground of practical necessity that other parties, namely, parents, adults and the state, should accept their obligations to fulfil children's right to education. The acceptability of children's welfare-right can actually be shown by justifying the practical necessity of children's right to education.

To put it specifically, a satisfactory justification for the necessity of children's right to education consists in two stages. The first stage is to explain why the education concerned is such an essential good for children that without it children would suffer seriously and permanently; it should also explain the reason why the education is an essential good for society as a whole (society as a fair system of cooperation between free and equal persons) so that by failing to provide the education for children the society

in question would not be sustained satisfactorily and would in turn endanger the welfare of all members of society. As the first stage of justification can only demonstrate the practical necessity of children's right to education, it does not specify exactly who should be under the obligation for children's education. The second stage of justification hence should make clear why children's parents, adults without children and the state should jointly have obligations towards children's right to education. The first stage of the justification is meant to address those people who have reservations on the recognition that the education in question is an essential good - no matter whether it is a good for children or society. The critics might argue that children, or at least some children, and society as a whole would not suffer at all even if children do not have that kind of education. The second stage of justification is especially directed to those people, such as Nozick, who seem to hold the idea that the state's function should at most be like a night-watchman's and thus the state should be free from the obligation of providing education for children.(52)

To start with the claim that education is an essential good for children themselves and for society as a whole. It should be recalled that the society concerned is a fair system of cooperation between free and equal persons and that an ideal person is a person who is able to realize the ideas upheld in society for himself and also for society as a whole. Apart from this, it should also be recognized that children have potential to become ideal persons; but as children, they have limited rationality and are in need of protection and guidance. The question now is: how can children's potential be realized so that the ideas of the individual and society can be actualized? The simple answer offered here is: through education. Education, as defined in the last section, is an instrument for equipping children with the necessary means so that they can become free, equal, capable of cooperating with other people and participating in social as well as political activities. Against the background of the specification of an ideal person under the specific framework outlined, and the claim that education is a means to the actualization of the ideas of the individual and society, we then can proceed with our arguments.

Persons without the communicating ability or the ability required for taking up a specific job, or without virtues to undertake a specific job, are doomed to be at the mercy of other people. And it would be very hard for them to maintain the full status of freedom and equality even if they wanted to. They would at most play a negative role in society. To be sure, they can still have all sorts of freedom (freedoms based on rules and freedoms detached from rules) and can have an equal status in terms of participating in all sorts of social or political activities when they reach the age of majority. But the essential opportunity for being autonomous persons would be deprived if they do not have those necessary abilities. For the scope they can exercise in devising, revising and pursuing their life plans would be severely constrained by their incapacities. They would hence retain a semi-independent status. As a result, the value of being free and equal persons would be undermined. This is the reason why literacy, numeracy and a vocational education can be taken as essential for children.

However, literacy, numeracy and vocational education are not enough. Many people can take specific jobs and have good communicating abilities, and hence can gain a solid ground on which they can participate in various kinds of activities and pursue their life plans. But if they do not have political knowledge and the understanding that they can, and should, play a positive role in political activities - which have an all-embracing impact upon their lives - they would be easily manipulated by other people or institutions. They would be like machinery driven by, and subordinated to, other people and institutions. And if they do not know the possible ways of thinking involved in political consideration and judgements, they would easily be misled by other people or institutions. In short, without a political education they are unable to maintain their independent status. Their political judgements would be subjected to the domination of others. It is on these accounts that political education is necessary for children.

Given the provision of vocational education and political education - both

of which contain different forms of knowledge - it may seem that there is no need to include a liberal education for autonomy in the education concerned. For the contents of these three educational activities overlap, and the overlapping areas are exactly in the different forms of knowledge; in other words, a liberal education for autonomy has already been covered by political and vocational education and hence there is no necessity to provide a liberal education for autonomy for children. In response to this contention, it can be said that even though the content of liberal education for autonomy is covered by vocational and political education it is still necessary to include it. As the aims of these educational activities are different, there are hence different ways of employing different forms of knowledge, which in turn have impact on how educational activities should be conducted. In order to achieve the aims of education for autonomy it is therefore necessary for liberal education for autonomy to play a part. The aims of education for autonomy are more directed to the cultivation of capacities which can be used to protect children from external interference and internal irrational forces. Without a proper education for autonomy people would become the slaves of their own irrational selves, other people or institutions. They may have their life plans devised, revised or actualized; but, literally speaking they are not their own masters. They would be more like puppets, their lives are unexamined and hence unworthy. It is for this reason that an education for autonomy constitutes an essential good for children.

If it is necessary to provide an education which covers literacy, numeracy, vocational education, political education and liberal education for autonomy, it is also necessary to provide opportunities for children so that they can practise the knowledge and skills they have learned and pick up the virtues needed for actualizing the ideas of the individual and society. To provide these opportunities is essential for children on the grounds that by joining practical activities children would become aware of the practical value of knowledge and skills and that some virtues can perhaps only be picked up under some arranged settings.

On the whole, the reason why the education advocated is an essential good for children is that if children are not properly equipped with the knowledge, skills, and virtues mentioned they would suffer in one way or another. Uneducated members of society may permanently play a negative role in society and, more seriously, fail to become their own masters. Both are regrettable and unacceptable in a fair system of cooperation between free and equal persons.

From another direction, it can be argued that it is for the interest of society as a whole that children should have a welfare-right to education. The argument can run as follows. The framework of a fair system of cooperation is a society which needs substantial support not only from each member's commitment but also from supportive devices which can either consolidate each member's commitment or embody the ideas upheld in this framework. Education, among others, can be counted as one of these possible devices. Education is mainly aimed at the continuity of society in its ideal form. This point in fact is only an echo of Dewey's position that education in its broader sense is the means of the continuity of social life.(53) Without the device of education, the framework of a fair system of cooperation between free and equal persons probably can survive one or two generations, not more. However, under normal conditions, it is quite natural for men to preserve the things they value. It is under these circumstances that education can be assumed as a "natural social device" resulting from the setting up of a fair system of cooperation. There are many advantages in maintaining and continuing a social system like the one mentioned here. Apart from the actualization of those cherished values, which fulfils human beings as moral agents, and a relatively fear-free society, to sustain the received social framework is to provide a stable environment in which the individual's life plan can be developed. If the society as such cannot be maintained, everyone's interests, including those of children, would be directly under threat.

According to the argument above, it can be assumed that without the education concerned society as a whole would be undermined; and, due to

the fact that children and other members of society fundamentally share the same interests with society, they would be subsequently affected by the damage that society incurs. Hence it can be suggested that children are bound to suffer seriously if they do not receive a proper education.

If the arguments above are accepted, it can be suggested that as education is an essential good for children and for society as a whole, there is then a necessity to provide education for children. Without the provision of education for children, children and society as a whole would suffer.

The line of argument developed above would face one main objection. It can be claimed that the arguments offered are only a series of assertions; they are not backed up by any positive evidence. For it can be claimed that the education specified is neither the necessary nor the sufficient condition for the cultivation of the ideal person. It is possible to imagine that some people can be educated in a different way without receiving the education described and can still achieve the status of being free, equal and capable of cooperating with other people, John Stuart Mill is a prominent example of this.(54) Besides, it is also possible to suppose, or even to prove, that some people might receive an education as such yet fail to achieve the settled aims.(55) Following this, it can be further argued that if the education specified is neither the necessary nor the sufficient condition for the cultivation of the ideal person, the claim that the education specified is essential for society as a whole would also collapse. And, the strength of the arguments for the claim that the education concerned is so essential for children and society that it must be provided for children would therefore be undermined.

In the face of this objection, the response can be given as follows. It is true that no theorist is able to confirm a cause-effect law by which a claim can be made that the education specified is the necessary or the sufficient condition for the cultivation of the ideal person. It is also impossible to prove positivistically the claim that children would be seriously and permanently harmed if the education concerned is not

provided. However, it should be noted that the positivistic contention can be invoked to oppose not only the education advocated here but also all possible forms of education in terms of achieving their aims. Actually, no specific form of education can stand the test of positivistic contention. Does it mean that all forms of education are advocated or practised without sound foundation? It seems not.

Human conditions are too complicated to allow us to justify positivistically the claim that education (any specific forms of education) is an essential good for every child under a specific social framework or for society as a whole. And it is rather a good thing for us to fail to justify this claim positivistically; to justify this claim positivistically is to locate human beings at the same level as material objects which are subject to physical laws, rather than to regard human beings as moral agents who can exercise their minds independently from physical laws in devising their life plans and making decisions. But it is worthwhile asking: if the claim that the education advocated is an essential good for children and for society as a whole cannot be justified positivistically, what is the foundation of its justification? In other words, what is the ground of its appealing strength?

It can be suggested that the arguments proffered in justifying the claim that the education advocated is an essential good for children and for society as a whole are basically moral or political arguments. The line of argument is offered to appeal to rational agents who are just and benevolent, and who uphold the idea that freedom and equality are desirable and essential for any member of society. So, for these rational agents, without the education devised for equipping children with necessary capacities for actualizing their potentials as moral agents, children and society as a whole would suffer, or more seriously, would be degraded. In this sense, the line of argument offered is founded on moral sentiments or intuitions, which are embodied in the society as a fair system of cooperation between free and equal persons, shared by all rational agents in society. It follows that the arguments offered are not empirically

vacuous, even though they are not to be verified positivistically.

Apart from the point made above, we can follow Hampshire and suggest that the line of argument is characteristically different from any scientific statements in the sense that it does not purport to be as accurate as a scientific statement and hence it would not be falsified by some clear and exceptional negative instances, as a scientific statement would be.(56) Moreover, it can be suggested that the line of argument is intended to prescribe a way of life or to recommend a form of social action. Its justification or truth, as suggested by Mill, is not dependent upon the correspondence between the general claim and social actions that are subservient to the general claim.(57).

In short, the foundation of the claim that the education advocated is an essential good for children as well as for society as a whole is grounded on the fact that it is appealing to rational beings who uphold the ideas of freedom and equality rather than on any positivistic evidence. And this claim should be taken as a moral or political recommendation; it is used to dictate which particular acts we should take.

After explaining why the education advocated is an essential good for both children and society , we then can go on to explain why parents, the state and those adults without children should provide education for children. As has been mentioned, children's welfare-right to education has implied that children's education has to be provided. But the question "Who is going to provide this education and on what basis?" has not yet been tackled. It will be suggested here that parents and the state carry the main responsibility for children's education, and they are jointly responsible for it. This position can be viewed as against Mill's stance that parents have the main responsibility and that the state can only interfere under the condition that parents fail to fulfil their obligation.(58) It will also be argued that apart from parents and the state, adults without children should also be responsible for children's education.

First of all, a logical argument can be used to support the claim that to provide education for children is an obligation shared by parents, adults without children, and the state. The central thrust of this argument is that failing to provide education for children is fundamentally incompatible with the basic social framework in question and the ideas of the individual embraced by members of society. For the sake of avoiding self-contradiction and self-defeat, parents, adults without children and the state would impose on themselves an obligation in respect of children's education. This argument runs roughly as follows. A person (or an institution) either upholding the value of autonomy, liberty and equality or emphasizing the importance of cooperation and participation would not be pleased to see any person in his society not equipped with the ability of actualizing the values he embraces; if he were, he would be self-defeating. So, it can be suggested that for the sake of consistency, if not any other honourable reasons, parents et al. would impose on themselves an obligation in terms of helping other members of society to achieve the same status as they have reached or valued.

Apart from the argument offered above, there can be other arguments for justifying the claim that parents, the state and adults without children have obligations to provide education for children. We can start from the claim that parents have an obligation to satisfy children's need of education.

The most common argument for parents' obligation towards their children's education is, as has been argued by Mill, that it is parents who bring their children into the world so that parents have a "sacred duty" to their children in offering an education fitting them to perform their part well in life towards others and towards themselves.(59) In the terms of Olafson, it is a generational duty of parents.(60) This argument contains two points. First, children's coming into existence is due to the actions of their parents. From this, it can be assumed that as children are an extension of their parents thus parents have a natural responsibility for their children.(61) Second, children are not like "things"; they are also "persons",

or at least "potential persons", and are entitled to achieve the status valued in society. However, as they are not competent to achieve the ideal status themselves, not only food but also instruction and training should then be provided.(62)

Actually, the first point can only play a subsidiary role in this argument; for the fact that parents bring their children into existence does not directly lead to the idea that parents should be responsible for their children. In Hobbes' state of nature, for example, parents (or one of the parents) are free to dispose of their children: there is no responsibility whatsoever for parents to bring their children up.(63) Further it can be pointed out that baby-killing has not been uncommon in many human societies. The implication of this is that parental duties are not nature-bounded; they are rather contingent upon social contexts. However, it is quite plausible, from a psychological viewpoint, to argue that since most parents have affection for their children it would be natural for them to impose some sort of duty, like the duty of commitment, on themselves.(64) Nevertheless, this psychological argument would not meet the objection that the presumed innate affection of parents towards their children is by no means a purely psychological mechanism. It is rather partly conditioned by some sort of social, cultural or moral construction and hence the presumed self-imposing duty is unavoidably socially, culturally or morally oriented rather than a purely psychological derivation. From this angle, the main focus of arguing that parents have an obligation to their children should be on explaining the sort of context under which parents must undertake their obligation towards their children. In other words, the essential point is to reveal the basic principles - no matter whether moral, social, political or even divine principles - that direct parents' undertakings with regard to their children. In this respect, Locke's, Mill's and Green's theories can shed some light on the issue.

In Locke's scheme, it is under the law of nature, which is derived from God's will, that parents should have obligation for their children's education. Admittedly, Locke recognizes that children are not born in a full

state of equality, freedom and rationality; but they are born to achieve it. For it is God's will that everyone has an equal right to his natural freedom. But how can children strive for the freedom and equality that God implants in rational beings in the state of nature? Locke's answer is: to make children capable of using their reason; only equipped with reason can children understand and accept the law of nature and hence can gain their natural freedom and happiness. Then, how can children become rational beings? Locke's suggestion is: by "age and education" children can have reason.(65) But, as far as education is concerned, who is under obligation to provide education for children? Locke suggests that parents are, by the law of nature, "under an obligation to preserve, nourish and educate the children they had begotten." It should be noted here that Locke does not say that *only* parents have this obligation towards their children; what he says is : "God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclination of tenderness and concern to temper his power, to apply it as His wisdom designed it, to the children's good as long as they should need to be under it."(66) To sum up. According to Locke, natural parents' obligation to provide education for their children is based on the law of nature, which prescribes an equal right to natural freedom and equality for all rational beings. Given this, parents' obligations are grounded on children's right to freedom and equality. Parents are at most and at best God's agents with regard to their children.

In Mill's political and moral theory, the two basic principles are the principle of liberty and the principle of development. As has been mentioned in Chapter Two it is the principle of development that applies to children. To put it simply, in order to fulfil the principle of development, namely the principle that children are entitled to develop individuality, parents and the state are under an obligation to provide education for children due to the fact that education in Mill's theory is mainly a device for developing individuality and that children are incapable of developing their individuality on their own. The main implication of Mill's theory here is that it is partly under the imposition of the principle of development that parents have a "sacred duty" to provide education for their

children.(67)

In Green's theory, the idea of the common good of community plays a central role. "The common good of community" is not only the source for the authority of the state but also the strength by which the individual's right to free life can be exercised or actualized. But how can the common good of community be recognized and pursued? Green assumes that the common good of community can only be recognized and pursued by the individual with moral capacity. But how can moral capacity be acquired and developed? So far as children are concerned, Green's suggestion is: through education. Yet, who is going to take this responsibility for children's education? Based on different reasons Green designates two responsible agents, one is the parents and the other is the state. As far as parents' obligation to children's education is concerned, Green regards it as a pure moral duty, not the fact that parents brought their children into existence. But if is is asked: On what is parents' moral duty founded? Green would then answer that it is based on the individual's right to free life.(68)

Locke, Mill and Green are invoked here to illustrate the point that parents' obligation to provide education for their children is not mainly based on the physical fact that children are begotten by them but on some basic principles rooted in a specific framework which directly or indirectly implies children's right to education. In the light of Locke's, Mill's and Green's theories, it can be suggested that in the framework of a fair system of cooperation between free and equal persons children are also entitled to achieve the full status of equality and freedom. However, given the naturally imperfect condition of children, they themselves cannot achieve this ideal status on their own, therefore the onus of providing the necessary means (that is, the education) must rest with some other people who are capable. In this context, as parents are the first-hand responsible agents for children, they should normally be under an obligation, in practical terms, to provide an education for their children.

Given the line of perspective outlined above, it can be inferred further that

it is not only parents who should have an obligation towards their children; adults who do not have children and most of all the state also have an obligation to provide education for children. There are two reasons for this suggestion; one is practical, the other is moral. From a pragmatic viewpoint, few parents can provide the education required for their children on their own. Only a group of parents is capable of doing this. But the problem arises here. Supposing twenty groups of parents are able to make educational provision required for their children, it can be imagined that the quality of the education would be various. If this happens, then the basic conviction that society is a fair system of cooperation between free and equal persons would be shaken under the circumstances that some children would be better equipped than others, and this would put some children in a disadvantaged position. In other words, because of the different quality of educational provision, some children are doomed to be poorly-equipped compared to others and therefore are more vulnerable than others in terms of making informed decisions and pursuing the good life they would set up for themselves. Conceivably, these children would be easily subject to manipulation and control. The remedy for this possible flaw is that the state and other adults should take part in the educational activities from the beginning. Their task is to try to ensure that children can be given an equal position on which they can assert their freedom, develop their potentialities, and actualize their life plans.

Besides this consideration, we can also invoke Aristotle's idea to support the view that the state and adults without children have obligations towards children's education. Aristotle argues that the state is more efficient in providing and implementing education for children. From a very pragmatic viewpoint, Aristotle observes that " it is far from easy to obtain a right training in goodness from youth upwards, unless one has been brought up under right law." This indicates, according to Aristotle, several things. Firstly, Aristotle is not optimistic at all about human nature. People may know something about goodness, they may also know that to lead a hard and sober life is to strive for a happy life. But to live such a life is not attractive for most people. That is why the state should step in

to help people to have a good life. Secondly, Aristotle observes that ordinary people are vulnerable in relation to the state, so the state is especially in an advantageous position to engage or inspire its citizens to pursue education for the sake of perfecting its citizens' virtues; if the citizens fail to be obedient, the state is bound to inflict chastisement and penalties on them. However, if the state fails to fulfil its obligation, who should take up this obligation? Aristotle then says it is the plain duty of private citizens to undertake this obligation. Notably, it is not only parents but also other citizens who should take up this duty based on their general obligation to civic society.(69)

From a moral point of view, as Locke, Mill and Green have shown, the guiding principles or ideas of a society should be upheld by every member of that society and each established institution should be under the guidance of the same principles or ideas. Hence, adults without children and the state are also under the imposition of the guiding principles or ideas in the affairs of education. That is why Mill suggests that if parents fail to fulfil their obligation towards their children the state should automatically take up the obligation to children. However, it can be suggested that as the basic principles or ideas have a binding force over every member and institution in society, say, Locke's principle of equal right to liberty or Mill's principle of individual development, or Green's principle of the right to free life, it is unconvincing to claim that some specific groups, such as parents, are entirely responsible for actualizing these principles. These fundamental principles are equally binding for all members of society and institutions. What is possible is that, in terms of practice, parents are initially much better placed to handle their children's education. However, it should be borne in mind that parents, other adults and the state share jointly the same responsibility; the question of who should be the main responsible agents for children's education is decided on the kind of social framework in question.

After the justification of children's right to education, it is the issue of whether the education advocated can be enforced compulsorily in relation

to children to which we now turn.

NOTES:

1. See F. Vollo, The Child's Right to Education, in G. Mialaret (ed.), The Child's Right to Education, Paris: UNESCO, 1979, pp. 19-33; P. Thane, Childhood in History, in M. King (ed.), Childhood, Welfare and Justice, London: Batsford, 1981, pp. 6-25. The issues whether "children's right to education" is a compulsory right and whether the idea of "children's right to a compulsory elementary education" should be accepted will be discussed in the concluding chapter of this thesis.
2. See J. Dewey, Democracy and Education, New York: Macmillan, 1952; J.J. Rousseau, Emile, translated by B. Foxley, London: Dent, 1911.
3. See P.H. Hirst & R.S. Peters, The Logic of Education, London: Routledge and Kegan Paul, 1970, p. 19.
4. I.M.M. Gregory, The Right to Education, Proceedings of the Philosophy of Education Society of Great Britain, vol. 7, no. 1,1973, p. 86.
5. Ibid, p. 89.
6. A.I. Melden, Olafson On the Right to Education, in J.F. Doyle (ed.), Educational Judgements, London: Routledge & Kegan Paul, 1973, p. 205.
7. Ibid., p. 205.
8. B. Bandman, Some Legal, Moral and Intellectual Rights of Children, Educational Theory, vol. 27, no. 3, 1977, pp. 175-76.
9. C.A. Wringe, Children's Rights: A Philosophical Study, London: Routledge & Kegan Paul, 1981, p. 144.
10. Ibid., p. 146-147.
11. F.A. Olafson, Rights and Duties in Education, in J.F. Doyle (ed.), op. cit., p. 177.
12. This is a modified form of Hirst & Peters' concept of education, see their The Logic of Education, pp. 19-25.
13. R.S. Peters, The Justification of Education, in The Philosophy of Education, Oxford: Oxford University Press, 1973, pp. 239-240.
14. Ibid., p. 240.
15. With regard to the idea of educational contestability and its pros and cons, see J. Wilson, Preface to the Philosophy of Education, London:

Routledge & Kegan Paul, 1979, chapter 1; J. Wilson, Concept, Contestability and the Philosophy of Education, Journal of Philosophy of Education, vol. 15, no. 1, 1981, pp. 3-16; M. Naish, Education and Educational Contestability Revisited, Journal of Philosophy of Education, vol. 18, no. 2, 1984, pp. 141-154.

16. R.S. Peters, Democratic Values and Educational Aims, in Essays on Educators, London: George Allen & Unwin, 1981, p. 32.
17. Ibid., p. 49.
18. Ibid., pp. 35-48.
19. R.F. Dearden, Education, Training, and The Preparation of Teachers, in D.E. Cooper (ed.), Education, Values and Mind, London: Routledge & Kegan Paul, 1986, p. 79.
20. See P.D. Walsh, Open and Loaded Uses of Education and Objectivism, Journal of Philosophy of Education, vol. 22, no. 1, 1988, pp. 23-34.
21. See M. Warnock, Schools of Thought, London: Faber & Faber, 1977, p. 32.
22. M. Oakeshott, Political Education, in M. Sandel (ed.), Liberalism and Its Critics, Oxford: Basil Blackwell, 1984, p. 234.
23. Ibid., p. 234.
24. See P. Walsh, op. cit., p. 23.
25. See R.S. Peters, Ethics and Education, London: George Allen & Unwin, 1966, p. 45.
26. Ibid., p. 45.
27. Ibid., pp. 43-45, 46-55.
28. Generally, it is what J. Rawls has done in his A Theory of Justice.
29. Two objections can, however, arise in response to the approach adopted here. Firstly it can be argued that if education can be regarded as an embodiment of ideas of the individual and society, then the current education that children have naturally reflects the ideas of the individual and society currently upheld in society. Hence, it is not necessary to postulate a new form of education which will reflect the basic and distinct characteristics of our society. It will be reasonable to adopt the current form of education - manifested in its aims, content and procedure - and proceed with the discussion of children's right to education. Secondly, it can be pointed out that this approach is rather

conservative and therefore cannot achieve the aim of emancipation mentioned in the beginning of this chapter. For, to extract the currently upheld ideas of the individual and society and then to go forward to devise a new form of education is to restrict ourselves to the established ideas of the individual and society. As a result, the new formed education would still be used for the interests of the status quo and bring no changes. So, a proper approach, with a view to achieving emancipation, is to stand on a new foundation and stipulate new ideas of society and the person rather than to take the dominant ideas of society and the person as a starting point. Against the first objection, it can be argued that the current form of education indeed reflects the current basic characteristics of society and hence the currently held ideas of the individual and society, but their relationship is not exactly corresponding. To be more accurate, the current form of education only partly reflects the currently held ideas of the individual and society. Besides, what the substantive contents of the currently held ideas of the individual and society ought to be is a matter that is still open to contest. In other words, there is still room for us to postulate a new form of education modeled on the currently held ideas of the individual and society. With regard to the second objection, it can be claimed that to identify the currently held ideas of the individual and society and take them as guidelines to devise a form of education will not necessarily lead to the protection of the status quo. And, a form of education thus devised will not necessarily be identical with the current form of education that children have. Apart from the fact that we still have room to devise a new form of education modelled on the currently held ideas of the individual and society, it can also be argued that the new educational device can benefit from some sort of hindsight. To be more specific, when the new form of education is being devised, the reference frameworks that the designer can have are not only the currently held ideas of the individual and society - which are open to interpretation - but also the possibly conceived advantages and disadvantages that the current form of education has. The designer of the new form of education is therefore in a better position in either

pursuing his own ideas or rectifying the possible defects of the current from of education. In other words, the aim of emancipation is actually not left unheeded by adopting the approach proposed above.

30. I am much indebted to the theories of John Stuart Mill, John Rawls and Ronald Dworkin in identifying these six characteristics.

31. This is Rawls' phrase. See J. Rawls, The Basic Structure as Subject, in A.I Goldman and J. Kim (eds.), Values and Morals, London: D. Dridel, 1978, pp. 47-72.

32. I. Berlin, Two Concepts of Liberty, in A. Quinton (ed.), Political Philosophy, Oxford: Oxford University Press, 1967, pp. 141-152.

33. In Two Treatises of Government, Locke in fact argues that all freedoms are rules-based, either in one way or another. He says:

> Freedom, then, is not what Sir Robert Filmer tells us: 'A liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws' ; but freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man, as freedom of nature is to be under no other restraint but the *law of Nature* .(London: Dent, 1986, p. 127)

However, it can be argued that the status of "the law of Nature" is dubious and hence "a liberty to follow my own will in all things when that rule prescribes not" is a liberty detached from rules.

34. See especially R. Dworkin, What Rights Do We Have? in Taking Rights Seriously, London: Duckworth, 1977, pp. 266-278.

35. It should be noted that Kant also assumes that children have freedom. His reasons for assuming this are however different from the reasons suggested in this thesis. Kant has two grounds to claim that children are free. First, human beings, for Kant, are beings endowed with personal freedom; children, as human beings, should therefore be regarded as free agents. Second, children are free on the grounds that "every man is born free, because he has at birth as yet broken no law..." Kant's reasons for supporting children's freedom seem to be assertive and rather metaphysical. See I. Kant, The Science of Right, translated by

W. Hastie, in Kant, London: Encyclopaedia Britannica, 1987, pp. 420-422. By contrast, Hegel declares more modestly that "Children are potentially free and their life directly embodies nothing save potential freedom." See G.W. Hegel, The Philosophy of Right, translated by T.M. Knox, in Hegel, London: Encyclopaedia Britannica, 1987, p. 61.

36. J. Locke, op. cit., pp. 142-143.
37. T.H. Green, Lectures on the Principles of Political Obligation, London: Longmans, 1913 , p. 157.
38. Ibid., p. 207.
39. Ibid., p. 158.
40. Theoretically, it is possible for a human society to recruit its adult members from other human societies without the need of children. It is, however, very unlikely in practical terms.
41. J. Dewey, Vocational Education, in R.W. Clopton & T.C. Ou (eds.), John Dewey: Lectures in China 1919-1920, Honolulu: The University Press of Hawaii, 1973, pp. 279-285.
42. P. White, Education, Democracy, and the Public Interest, in R.S. Peters (ed.), The Philosophy of Education, Oxford: Oxford University Press, 1973, p. 233-236.
43. This is Peters' term, see his "Ambiguities in Liberal Education and the Problem of its Content", in K.A. Strike & K. Egan (eds.) Ethics and Educational Policy, London: Routledge & Kegan Paul, 1978, pp. 3-21.
44. This point is based on Aristotle's idea. In The Nicomachean Ethics, Aristotle says, "We must be careful not to overlook the difference that it makes whether we argue *from* or *to* first principles. Plato used very properly to advert to this distinction. . . . Of course we must start from what is known. But this is an ambiguous expression, for things are known in two ways. Some are known 'to us' and some are known absolutely. For members of the Lyceum there can be little doubt that we must start from what is known to us." Translated by J.A.K. Thomson, Harmondsworth: Penguin, 1953, p. 29. J. Rawls in his discussion of the possibility of having an independent moral theory echoes a very similar idea. In the article "The Independence of Moral Theory" Rawls firstly argues that the notion of moral truth is problematical; but due to the

necessity of having a substantive moral theory by which people can live, it is necessary to carve one out. How can this be properly done? Rawls suggests that we should start from investigating "the substantive moral conceptions that people hold, or would hold, under suitably defined conditions." The so called "objective moral truths" can only be possible after "a sufficient agreement between the moral conceptions affirmed in wide reflective equilibrium, a state rendered when people's moral convictions satisfy certain conditions of rationality." In Proceedings and Addresses of the American Philosophical Association, 48, 1975, pp. 5-22.

45. See R.S Peters, Dilemmas in Liberal Education, in Education and the Education of Teachers, London: Routledge & Kegan Paul, 1977, pp. 83-84.

46. See R.F. Dearden, Autonomy and Education, in R.F. Dearden, P. Hirst and R.S. Peters (eds.), Education and the Development of Reason, London: Routledge & Kegan Paul, 1972, pp. 458-459; E.J. Thiessen's "Two Concepts or Two Phases of Liberal Education?" also conveys the same message, in Journal of Philosophy of Education, vol. 21, no. 2, pp. 223-234. Besides, J. Passmore's analogy of a chess game is very illuminating here. See his "On Teaching to Be Critical", in Dearden, Hirst and Peters (eds.), op. cit., pp. 415--433.

47. See R.F. Dearden, op. cit., p. 456; R.S. Peters, Authority, Responsibility and Education, London: Allen & Unwin, 1959.

48. A. O'Hear, Education, Society and Human Nature, London: Routledge & Kegan Paul, 1981, chapter 2.

49. The question "Can virtue be taught?" has been discussed for a long time, and there is still no final answer to it. But what can be sure is that virtues can be learned. Virtues are by no means congenital. See G. Ryle, Can Virtue Be Taught? in R.F. Dearden, P. Hirst and R.S. Peters (eds.), op. cit., pp. 434-447.

50. It is hard to claim that children's welfare-right to education is theoretically or logically prior to children's claim right of freedom to education, or vice versa. Which right is logically prior to the other is dependent upon which specific discussion framework is in question. In a libertarian framework, individuals' liberty is supremely valued. This

may in turn, for the sake of consistency, place children's claim-right of freedom to education in the first place. However, it may not be the case in a moderate liberal framework or a socialist framework, in which children's liberty is curtailed. Given these frameworks, children's right to education should firstly be regarded as a welfare-right, with the view that children should be equipped properly so that they can fully claim their liberties - which are to be defined in "liberal" or "socialist" terms - when they reach their adulthood.

51. It is quoted in M. Ginsberg, On Justice in Society, Harmondsworth: Penguin, 1965, p. 118.
52. N. Nozick does not say much about education. However, from his general theory revealed in Anarchy, State, and Utopia it seems he would maintain that the state should not play a role in the affairs of education at all. Moreover, individuals are free to arrange their education and parents are also free in deciding whether or not an education will be provided for their children. See W.M. Humes, Rights and Choice in Education, Parental Choice Project, Glasgow University, 1984, unpublished; T. Scanlon, Nozick on Rights, Liberty, and Property, Philosophy and Public Affairs, vol. 6, no. 1, 1977, pp. 3-25.
53. See J. Dewey, Democracy and Education, chapter 1.
54. See J.S. Mill, Autobiography, in F.W. Garforth (ed.), John Stuart Mill on Education, New York: Teachers College Press, 1971.
55. D.J. O'Connor argues that the aim of achieving autonomy can hardly be materialized in formal education. See his "Two Concepts of Education", Journal of Philosophy of Education, vol. 16, no. 2, 1982, pp. 137-146.
56. S. Hampshire, Morality and Conflict, Oxford: Basil Blackwell, 1983, pp. 17-18.
57. J.S. Mill, Utilitarianism, in M. Warnock (ed.), John Stuart Mill: Utilitarianism, Glasgow: Collins, 1979, p. 252.
58. See Chapter One for the detail.
59. J.S. Mill, On Liberty, p. 176.
60. F.A. Olafson, op. cit., pp. 173-195.
61. It should be noted that only the father has this responsibility in Aristotle's theory. See The Nicomachean Ethics, p. 157.

62. J.S. Mill, On Liberty, p. 176.

63. See Chapter Two.

64 About the duty of commitment, see J. Feinberg, Duties, Rights and Claims, in Rights, Justice and the Bounds of Liberty, Princeton: Princeton University Press, 1980, pp. 131-133.

65. J. Locke, The Second Treatise of Government, in Two Treatises of Government, sec. 61.

66. Ibid., sec. 63.

67. See Chapter Two.

68. T.H. Green, Lectures on the Principles of Political Obligation, pp. 154-159, 206-210.

69. Aristotle, The Nicomachean Ethics, pp. 305-310.

CHAPTER FIVE

PATERNALISM, CHILDREN'S OBLIGATION TO RECEIVE EDUCATION AND COMPULSORY EDUCATION

It was argued in the last chapter that children should have a welfare-right to education on the grounds that the education advocated is an essential good for children as well as society as a whole. Apart from that, it was argued that parents, adults without children and the state should have joint obligations to provide the education advocated for children. If the arguments offered for these claims are sound, it follows that parents, adults without children and the state can be compelled to make educational provision for children if they fail to fulfil their obligations towards children voluntarily. What was not discussed in Chapter Four is, however, the issue of whether children have an obligation to receive education, given the understanding that society as a whole would be undermined if children are not properly educated; and, whether children can be compelled to receive education regardless of their wishes on the grounds of their obligation to receive education. Besides this, the issue of whether children can be compelled to receive the education advocated for the reason that it is in the interest of children was also not tackled in the preceding chapter. Taking these two issues together, what was omitted from the last chapter is the issue concerning whether the education advocated should be made compulsory for children in a liberal democratic society.

In this chapter, the focus will be on the issue of compulsory education. Generally speaking, compulsory education is not only a constraint against children but also a restriction for the responsible agents for children's education. But if we accept the arguments offered in the last chapter we then should accept that it is justifiable to compel the responsible agents to provide education for children and this compulsion should be accepted by

the responsible agents either on political or moral grounds. As such, we therefore can leave compulsory education as a restraint to the liberties of parents, adults without children and the state aside and concentrate on the issue whether compulsory education can be justified as a restriction on children's liberties.

It should firstly be indicated why compulsory education as a restriction on children's liberties can be taken as a significant issue and attract much attention. As has been mentioned in Chapter Four, one of the basic features of liberal democratic societies is that the value of individual freedom is highly accorded. Given this context, a *prima facie* contradiction between compulsory education as a restraint on children's liberty and the esteem of individual freedom in a liberal democracy can then easily be detected. For this reason alone the issue of compulsory education deserves our scrutiny. Some other reasons can also be found. Most obviously, it is only children who are to attend educational activities compulsorily for a period of time (normally, ten or more years in Western societies). Adults' liberty of course is also constrained because of the device of compulsory education in the sense that they can be compelled to make educational provision for children. But under the condition that adults' obligation towards children's education is consciously self-imposed and that adults do not have to be confined to educational activities for a period of time, children's involuntary, or voluntary but not self-conscious, confinement to educational activities therefore seems rather unfair. But how can compulsory education still have a place in liberal democratic societies? It is partly because of this question that the issue of compulsory education needs our consideration. Moreover, the fact that the issue of compulsory education can be a test case for various contentions concerning the relationship between individual freedom and autonomy has also invited writers' concern over this issue. For some writers, such as Illich, individual freedom is an indispensable means for achieving personal autonomy.(1) Following this view, compulsory education as a restriction on children's liberty can only be a stumbling block to the development of children's autonomy; compulsory education therefore is unjustifiable. For

some writers, notably W.V. Humboldt and J.S. Mill, individual freedom is, as far as children are concerned, not necessarily the means for the development of personal autonomy; on the contrary, for the sake of developing autonomy individual freedom can and should be curtailed. According to this view, compulsory education cannot be a hindrance to the development of autonomy; it is rather a necessary means for achieving personal autonomy. The question of whether or not compulsory education can be justified is therefore directly related to the issue concerning the relationship between individual freedom and personal autonomy, which is important with regard to the cultivation of the ideal person in liberal democratic societies.

After specifying the reasons why the issue of compulsory education can generate much argument, it is necessary to go further to elucidate several points before we can go on to tackle the question of whether compulsory education can be justified. Firstly, we have to make clear whether the "compulsory education" considered here can be identified with "compulsory schooling". Secondly, it is desirable to show the difference between the "compulsory education" under current consideration and "compulsory state education" as well as any specific form of compulsory education currently adopted by any liberal democratic societies. Thirdly, a few words should be offered concerning compulsory education as an abstract idea and compulsory education as a specific form of practical measure. Finally, we have to clarify the notion of compulsory education and its bearings on the justification of compulsory education. The discussion framework of the justification of compulsory education can only be fixed after the clarification of these four points.

Compulsory education is sometimes identified with compulsory schooling. But it is not necessarily so. In fact, it is not very difficult to make a distinction between education and schooling. Marcus Aurelius saw their difference clearly. He said: "To my great-grandfather I owed the advice to dispense with the education of the schools and have good masters at home instead - and to realize that no expense should be grudged for this

purpose."(2) A point made by John Stuart Mill can also be helpful in establishing the difference between education and schooling. For Mill, compulsory education is justifiable (as to why it can be justified, will be discussed later on). However, the most plausible way to implement compulsory education is through a system of public examinations allied to schooling.(3) Clearly, Mill does not simply equate education with schooling. Apart from the two classical cases, two recent cases can also be invoked to differentiate education and schooling. Illich, for example, strongly attacks schooling and suggests that schooling should be replaced by educational webs or networks.(4) The second case can be found in the 1980 Education (Scotland) Act, Section 30. It states: "It should be the duty of the parent of every child of school age to provide efficient education for him suitable to his age, ability and aptitude either by causing him to attend a public school regularly or by other means." Apparently, among others, schooling is only one form of educational provision. Education for children does not necessarily proceed in school.

However, the distinction between education and schooling is not so clear-cut as these statements may suggest. The content of education in question is rather complicated. It is unlikely that parents themselves could provide their children with an education that can be reckoned as satisfactory without going through some form of institution. It can be proposed that various forms of knowledge, virtues (especially public virtues), industrial experience and the abilities to participate in social and political activities can only be effectively picked up through some institutions or one single institution. It is of course not necessary to hold children's learning activities only in one place. They can be dispersed in different institutions. For example, in order to get industrial experience children can go to factories run by non-educationalists. But it seems clumsy to do so. For the sake of convenience, it would be better to set up a place in which all kinds of learning activities can take place. And this place is commonly named a "school".

To recognize the difficulty in making a clear-cut distinction between

education and schooling in the present context is to admit that the issue of the justification for compulsory education is also, in most cases and for most practical purposes, the issue of the justification for compulsory schooling.

Nevertheless, it should be made clear that the issue of compulsory education (schooling) should not be equated with the issue of compulsory state education (schooling), although these two issues are related. To put it simply, "compulsory education" and "compulsory state education" are two things. The idea of compulsory education only prescribes that children can and should be compelled to attend educational institutions. It does not specify that the educational institutions concerned must be state-run institutions. By contrast, the idea of compulsory state education implies that children can and should be compelled to participate in educational activities, and the educational activities concerned must be those run by the state rather than by any other private institutions, churches or individuals. Given the difference between these two, we can therefore follow in Mill's footsteps and support compulsory education without necessarily endorsing compulsory state education.(5) In this chapter, it is only intended to tackle the issue of compulsory education. The question of whether compulsory state education can be justified can only be raised and answered after the justification of compulsory education.

Apart from the possible entanglement between compulsory education and compulsory state education, it should also be pointed out that the issue of the justification of compulsory education concerned here should not be taken as the issue of the justification of any specific form of compulsory education currently adopted in liberal democratic societies, like Britain. (6) The education outlined in Chapter Four shares similarities with many examples of currently adopted school education. But it also differs from them. Hence arguments that can be used to justify the compulsory education advocated do not necessarily justify any specific form of compulsory education currently adopted by liberal democratic societies, and vice versa.

It is also necessary to clarify the difference between the two senses of compulsory education, namely, compulsory education as an abstract idea and compulsory education as a specific educational measure. Compulsory education as an abstract idea only implies the notion that children can and should be compelled to participate in educational activities; it does not specify the substance of educational activities, for example, the duration and the actual content of educational activities. Compulsory education as a concrete educational measure not only indicates that children can and should be compelled to receive education but also covers some specific measures concerning educational activities. Given the distinction of these two, it can then be suggested that the justification of compulsory education as an abstract idea does not amount to the justification of compulsory education as a concrete educational measure.(7) For the sake of convenience, the term "compulsory education" hereafter refers to both idea and specific measure if it is not specified otherwise. The current discussion of compulsory education is concerned with not only whether compulsory education as an abstract idea can be justified but also whether compulsory education as a concrete educational measure for all children advocated in the last chapter can be justified. The specific questions concerning when compulsory education should start and how long compulsory education should endure are not under consideration in this chapter.

We now turn to the notion of compulsory education. The notion of compulsory education is generally associated with the idea that children can and should be compelled to receive education by using moral and legal sanctions. Or, to put it more briefly, children have no say over the matter of their education. This notion is, however, too simple to inform us that given the absence of sovereignty over their own education some children (or most children in some societies) actually are not unwilling, or are even willing, to participate in educational activities. In the terms of Katz, these children "voluntarily accept the standard built into the law and follow the law as they would a social rule of custom that they accept."(8) For these children, the device of compulsory education is actually

redundant. Its compulsory element does not affect these children's lives in any sense. The device of compulsory education is only significant under the circumstances in which children not only have no option in the matter of their education but have no intention of participating in educational activities. Given this context, the children concerned can be coerced by the law to participate in educational activities.

The reason for specifying the exact role that compulsory education plays is to point out the fact that the device of compulsory education in many cases does not *de facto* restrict children's liberty since it does not go against children's desire or intention. This point is particularly important if we endorse Mill's account that liberty consists in doing what one desires.(9) However, the idea of liberty is not logically associated with desire-satisfaction; it can also refer to the context in which the children concerned can have genuine alternatives open to them.(10) Conceivably, the fact that the device of compulsory education *de jure* compels children to go to educational institutions does interfere with their liberty to participate in other activities during a specific period of time. Given the analysis above, the notion of compulsory education concerned here refers to the fact that the device of compulsory education *de jure* limits children's liberty of choice so that they can have no real say over their own education irrespective of their intention or desire.

After fixing the discussion framework of this chapter we now can go on to consider whether compulsory education, as an abstract idea and a concrete educational measure, can be justified or not.

1. A JUSTIFICATION FOR COMPULSORY EDUCATION

In the following sections, it will firstly be shown, briefly, why compulsion can coexist with liberty and why compulsory measures can have a place in liberal democratic societies. Only after this exposition can we go on to tackle the issue of whether compulsory education can be justified. Secondly, it will be argued that paternalistic arguments - that is,

arguments which start from the view that it is for the good (or welfare, or interests) of children that the responsible agents for children's education can compel children to participate in educational activities - can justify compulsory education. But the justification of compulsory education as specific measures advocated in the last chapter should not be solely based on paternalistic arguments. They need to be supplemented by the argument that children have an obligation to receive education. Thirdly, it will be elaborated that compulsory education, as an abstract idea as well as the concrete educational measures advocated in Chapter Four, can be justified from the stance that it is because of the children's obligation to receive education that the responsible agents for children's education can compel or coerce children to participate in educational activities without paying attention to their wishes or intention. Finally, it will be demonstrated from a wider perspective that compulsory education can fit into liberal democratic societies, and the justification of compulsory education is based on the compatibility between compulsory education and society as a fair system of cooperation.

What should be added is that Mill's viewpoints disclosed in his work On Liberty will frequently be borrowed to develop or support the positions held here. The reason for taking Mill's viewpoints to develop our arguments is that his On Liberty is still the magnum opus as far as discussions of compulsory education in the liberal tradition are concerned.(11) In Mill's monumental work On Liberty, he whole-heartedly advocates the idea of compulsory education.(12) The main argument he empioys in justifying compulsory education for children is a liberal paternalistic argument. Apart from that, Mill's principle of liberty can shed light on the reasoning why compulsory education can be legitimately imposed on children, although he explicitly declares that the principle of liberty does not apply to children at all. Underlying Mill's liberal paternalism and the principle of liberty is his presumption, or observation, that different human activities can be guided by different principles, but different principles, even though they may clash with one other, should be subordinated under one single supreme principle - the principle of general utility. So far as compulsory

education is concerned, this assumption may not compel as much attention as his two main arguments concerning compulsory education, but it plays a pivotal role in Mill's discussions of liberty and compulsory education in general. Given this understanding, Mill's liberal paternalism, the principle of liberty, and the presumption underlying these two doctrines will be the reference framework to which we can turn in the attempt to develop the positions upheld in this chapter.

1.1 Compulsion, Liberty and Liberal Democratic Societies

The reason why compulsory education needs justification is the presumption that liberty (in all its forms) in liberal democratic societies is always taken as a good. Compulsion or coercion, by contrast, always constitutes, in the terms of Feinberg, "a definitive loss".(13) Following this, it is policies or measures involved with compulsion or coercion that need justification, rather than their lack. However it should be noted that the presumption in favour of liberty often conceals the fact that compulsion (or coercion, or restraint, or constraint) and liberty are, in many cases, two sides of a coin and hence are both needed in liberal democratic societies.(14) Bentham's statement makes this point quite clear. He says:

> As against the coercion applicable by individuals to individuals, no liberty can be given to one man but in proportion as it is taken away from another. All coercive laws, therefore, and in particular all laws creative of liberty, are as far as they go abrogative of liberty.(15)

Bentham was not the only writer who perceived the delicate relations between liberty and compulsion. Kant also made a point very similar to Bentham's. In explaining that "right" (justice) implies the title or authority to compel, Kant remarks that "the conception of right (justice) may be viewed as consisting immediately in the possibility of a universal reciprocal compulsion, in harmony with the freedom of all."(16)

Apart from Bentham and Kant, Austin advocates the idea that "laws" should be viewed as "orders backed by threats". In this sense, "laws" are actually reckoned by Austin as forms of coercion. What is implied in this view is that "coercion" or "compulsion" is always needed for a human society in which laws are used as regulatory instruments.(17)

Mill's ideas expressed in On Liberty can also be employed to support the view that compulsion and coercion are a necessary part of liberal democratic societies. In On Liberty, although Mill repeatedly emphasizes the importance of liberty for both society as well as the individual, and despite his rhetorical statement that "all restraint, *qua* restraint, is an evil"(18), Mill does not fail to see that compulsion, interference or restraint are necessities for human life. He makes it quite clear in saying that "All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed---by law in the first place, and by opinion on many things. . . ."(19) Given this, it should be understood that Mill's On Liberty is actually not an attack on compulsion, interference or restraint, but a work aimed at delimiting the boundary of these things. From this, it can be suggested that if compulsion is essential in making life valuable in human societies in general, it can also be valuable and acceptable in liberal democratic societies.

Taking these four writers' views together, it can be claimed that it is for the sake of liberty that we need compulsory measures in liberal democracies. Following this, it can be suggested that the issue concerning compulsion or coercion is not **whether** compulsory measures should have a place in liberal democratic societies but **where, when** and **how** compulsory measures should be applied.

1.2 Paternalistic Arguments and Compulsory Education

Paternalistic arguments are frequently used to justify compulsory education for children. Traces of this line of argument can be found in

Locke's Two Treatises of Government.(20) But its most explicit exposition is offered by Mill. And this kind of argument is still followed by some recent writers, notably, John White, Amy Gutmann and Graham Haydon.(21)

Paternalistic arguments for children's compulsory education are based on various forms of paternalism.(22) Paternalism, according to Gerald Dworkin, is "the doctrine that claims the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced."(23) In short, paternalism sanctions the legitimacy of interference with a person's liberty for his own good without paying attention to his intention or desires.

A valid paternalistic justification for practical measures has to fulfil at least three requirements. First, it has to show that the states of mind of the persons under paternalistic interventions are encumbered or impaired. Specifically, paternalistic interventions are justifiable given the condition that the persons concerned are hampered - due to ignorance, or emotional stress, or compulsion, or undue influence, or non-rationality - in making action-related decisions which may cause harm to themselves.(24) Having said this, it should be added here that paternalistic interventions are also justifiable in some special cases in which the persons concerned do not suffer from impaired states of mind but the prohibited actions are unreasonably risky.(25) Legislation enforcing occupants of automobiles to wear safety belts is an example of this. This sort of paternalistic intervention is based on a strong form of paternalism. It is a departure from Mill's position concerning paternalism; but it has become part of daily practice.(26)

Secondly, there should be a consensus over what is "the welfare, good, happiness, needs, interests or values" of the persons on whom paternalistic measures are imposed. And "the welfare, good, happiness, needs, interests or values" at stake should not be petty; they should constitute an essential good. This is important because in liberal democratic societies people have

different ideas about what is a good life; and this reflects the possibility that people may also have different ideas about the constituent elements of a good life. A valid paternalistic justification should therefore clearly demonstrate that the good for which paternalistic measures are imposed must be one that is normally recognized as an essential element for any form of good life. But it may be asked: is it possible to reach consensus over what an essential good is in a liberal pluralistic society? It then can be answered that the consensus is achievable by appealing to people who are rational, self-interested, just and benevolent under the condition that society is a fair system of cooperation between free and equal persons.

Thirdly, paternalistic measures should be the measures that can **effectively** promote the good or avoid the harm concerned. If they cannot effectively achieve the desired aim then they should not be imposed at all. It should be emphasized here that no paternalistic measure can **absolutely** deliver the good or avoid the harm concerned. Human conditions are too complicated to allow us to guarantee that paternalistic measures can absolutely achieve their designated aims. Rather, the sensible requirement is that they should effectively achieve their designated aims in most cases. A practical case can illuminate this point. The wearing of safety belts is a paternalistic measure imposed on drivers for the sake of drivers' safety. Under normal circumstances, the wearing of safety belts protects drivers from injuries when car accidents happen. However, the wearing of safety belts, in some special cases, may delay drivers' escape from their cars when their cars catch fire and hence endanger their lives. But how can the wearing of safety belts still be reckoned justified? It can only be reasoned that it is because this paternalistic measure can effectively, in most cases, achieve its desired aim. Apart from the requirement of the effectiveness of paternalistic measures, if some non-paternalistic measures can be found to achieve the desired aims then, other things being equal, paternalistic measures should be avoided.(27)

In the light of these three general requirements, we then can go further to see whether compulsory education can be justified on the grounds of

paternalism. It can be suggested that if a paternalistic argument is to justify compulsory education for children it has to show that the implementation of compulsory education fulfils the three requirements mentioned. To put it specifically:

1>. Children opon whom compulsory education is imposed are persons whose states of mind are encumbered or impaired. There should be reasons to assume that children do not have clear ideas about what is good for themselves and they are unable to make rational choices, and that children may do harm to themselves or fail to promote their own good if they are allowed to make decisions over whether they should participate in educational activities.

2>. The education concerned should be an essential good for children; and this must be accepted by members of society.

3>. Compulsory education should be able to achieve effectively the desired aim. The question, however, is: what is the desired aim of compulsory education? It can be aimed at equipping children with necessary capacities, knowledge, skills, experiences and virtues so that they may become "ideal" persons. Or, it can be aimed at cultivating (or realizing) "ideal" persons. The difference between these two aims is that the former aim is modest in the sense that it is about offering some specific measures by which children will be better equipped to become "ideal" persons. Whether children can **actually** become the ideal persons is dependent upon various conditions and an adequate education is only one of them. This aim of compulsory education, therefore, is to make sure that children can have necessary capacities, knowledge, skills, experiences and virtues needed for their development as "ideal" persons. The scenario is different, however, if compulsory education is directly aimed at cultivating children to become "ideal" persons. In this context, compulsory education is regarded as the sole determinant factor for the realization of "ideal" persons. It will be shown later if we adopt the former aim then compulsory education, as a specific form of education advocated in Chapter Four, is justifiable. However, if the latter aim is adopted then we can only justify compulsory education as an abstract idea. Apart from the requirement of the

effectiveness of compulsory education, it should be added that compulsory education can only be justified given the condition that there should be no other non-compulsory measures which can replace compulsory education for achieving the desired aim.

Given the analysis above, Mill's paternalism, as a typical paternalistic argument for compulsory education, can now be examined. This examination can be split into two parts. The first part is to reveal how Mill justifies compulsory education paternalistically; the second part is to check whether Mill's paternalistic argument for compulsory education can meet the three requirements mentioned.

Children, in Mill's view, are like savages in an uncivilized society. They are persons "below the age which the law may fix as that of manhood or womanhood"(28), which is the age of 21. But this is not the main point. The main point is that children need to be looked after by adults.(29) The reason why children need to be looked after by adults is that children are not mature in their faculties.(30) And this observation probably leads Mill to think that children do not know what they really desire(31); children are not capable of knowing their own well-being(32); children are incapable of acting by rational consideration of distant motives(33); children are least fitted to judge for themselves(34); and children are incapable of being improved by free and equal discussion.(35) On the whole, children, according to Mill, are not able to lead their own lives, they are not autonomous. They need help, even though they do not know this.

Mill's position concerning whether compulsory education is an essential good for children deserves attention here. Generally, Mill supports Humboldt's position that "the end of man, or that which is prescribed by the eternal or immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole."(36) Given this, it can be suggested that the criterion of the individual's happiness, interests or welfare is whether the individual can achieve the highest and most

harmonious development of his powers. However, things do not stop there. Mill is also aware of the fact that a member of a civilized society must be a social being. So, the individual's happiness is not entirely dependent upon his own development; there is something else. A rational being, or a person who is on the way to pursuing the end of man, must consider other people's happiness. For his happiness is closely related to other people's happiness. In other words, the attainment of the happiness of the individual is not only through his own development but also through the realization of the greatest amount of happiness of all other people.(37)

The question now is, how can children develop from persons who are not capable of pursuing their own happiness to persons who can pursue their own happiness and conduct their life plans and take account of other people's desire for happiness? Is this transition a natural and spontaneous one, and hence can it happen without external help or interference? For Mill, the answer to the latter question is a negative one. True, Mill in some places suggests that human nature is like a tree, "which requires to grow and develop on all sides, according to the tendency of the inward forces which make it a living thing."(38) But this analogy should not bring us to think that each individual can develop his inner forces without any help, or protection from without. Actually, the picture Mill has in mind is not a healthy tree on fertile soil in a fine environment. Rather, children are trees which need cultivation and care. There are two points for supporting this view. Firstly, as has been mentioned, children (small trees) are incapable of improving themselves; if they were left alone, they would not be fit to perform their part well as members of society, whether towards themselves or other people. Secondly, Mill is not as romantic as it may seem on the question of human nature. Although he suggests that "desires and impulses are as much a part of a perfect human being as beliefs and restraint"(39), he is also aware that human desires and impulses, as part of the inward forces of human beings, can either be directed to bad uses or good uses.(40) In order to avert the bad uses of human desires and impulses, which might lead to self-destruction or pose a threat to society as a whole, Mill claims that human faculties need cultivation at childhood.

In his view, the development of individuality can only be possible after the cultivation of various kinds of human faculties. How then? Mill's answer is: through compulsory education. Through the use of law and discipline over children, children's desires and impulses can then be cultivated; without these, children would never lead a rational life.(41)

So far, it does not matter whether we are entirely happy with Mill's account concerning children as heteronomous agents and compulsory education as an essential good for children's welfare. What matters is that Mill does give proper consideration to these two issues. We now can turn to what Mill says concerning whether compulsory education can achieve the desired aim and whether there are non-compulsory measures which could replace compulsory education.

We can first consider whether there are any non-compulsory measures which can achieve the same aim that compulsory education is supposed to realize in Mill's scheme. It seems Mill does not directly tackle this question. But considering the account Mill gives regarding human nature, of which desires and impulses are part, and the fact that desires and impulses can be misused if they are allowed to develop freely, it seems there would be no other alternative to compulsory measures which can lead human desires and impulses along desirable tracks. If this inference is correct we then can suggest that it would be impossible, in Mill's view, to substitute non-compulsory measures for compulsory education in terms of cultivating children's individuality and public virtues. What should also be noted here is that Mill not only advocates compulsory education but suggests that compulsory measures are a necessary means in pedagogical practice. For he says: "Much must be done and much must be learnt by children for which rigid discipline and known liability to punishment are indispensable as means."(42)

The question now is: If compulsory education is the only vehicle for the desired aim, can it actually achieve the desired aim? However, before this question can be answered we need to know what the desired aim of

compulsory education is in Mill's mind. Is it aimed at equipping children with necessary means so that they may develop their individuality or independence? Or, is it directly aimed at cultivating individuality or independence? From the statements made in On Liberty, it seems that Mill is quite modest in defining the desired aim of compulsory education. For example, when Mill argues that the state should be responsible for its citizens' education, he says: "Is it not almost a self-evident axiom that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen?"(43) Following this, he complains: "It still remains unrecognized that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind is a moral crime. . . ."(44) Elsewhere, Mill suggests that public examinations and schooling are two ideal measures for the implementation of compulsory education. He remarks: "Once in every year the examination should be renewed, with a gradually extending range of subjects, so as to make the universal acquisition and, what is more, retention of a certain minimum of general knowledge virtually compulsory."(45) Mill in these places does not explicitly spell out the desired aim of compulsory education, but it would be reasonable to suggest that the aim of education in his mind is to equip children with "a certain minimum of general knowledge" "up to a certain standard" so that they may develop their individuality and rationally conduct their life plans.

We now turn to the question of whether Mill's device of compulsory education can achieve its desired aim. It can be argued that given Mill's modest view of the role of compulsory education there is no reason why this aim cannot be achieved. However, Mill does not provide any empirical evidence to support this claim. He, therefore, cannot claim empirically that his device of compulsory education can effectively achieve its desired aim. Nevertheless, it should be pointed out that it is rather Mill's personal conviction - taking relevant social conditions, his own personal experiences and his assumptions about human nature into account - that leads him to **believe** that his scheme can effectively achieve its desired

aim. He says:

> But in general, if the country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able and willing to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense.(46)

This statement seems to suggest that Mill's device of compulsory education can achieve its aim if good teachers and adequate financial backing are available.

To sum up. Mill's argument for compulsory education is a paternalistic argument with a liberal basis. That is, in order to equip children, as non-rational and heteronomous beings, with necessary means so that they can develop their rationality as well as autonomy and hence can lead an independent or rational life, it is essential for children to be compelled to receive education at the expense of their personal freedom.

After the exposition of Mill's paternalistic argument for compulsory education, we now can question whether his paternalistic argument can fulfil the three requirements mentioned above. It is quite obvious that taking persons under the age of 21 as children is not accepted nowadays. But it seems quite reasonable to adapt Mill's normative standard of childhood and suggest that persons who fall into Mill's description can be treated paternalistically, in one way or another. Moreover, although it is extremely difficult to draw a clear-cut line between childhood and adulthood we can hardly deny that all adult human beings have to pass through the stage of childhood. And before they reach adulthood, no matter how it is defined, they must have had a period of time in which they had no clear idea about what was essential good for them, and consequently they were unable to make rational choices. For people under this stage paternalistic measures are not unjustifiable. Thus it is reasonable to suggest that Mill's normative account of childhood can fulfil the first

requirement of a valid paternalistic justification. However, the proposition, "Paternalistic measures are applicable to children", should not lead us to jump to the conclusion that compulsory education can be imposed on children. Whether compulsory education can be imposed on people in the stage of childhood is rather dependent upon whether compulsory education is an essential good for children, whether compulsory education is necessary, and whether the education concerned can effectively achieve the desired aim.

According to Mill's conception of education, education is a necessary means for the development of individuality or independence. Added to Mill's idea of education, his account of human nature provides ground for claiming that compulsion is necessary for educating children. If we are convinced by these two points we then should also accept that compulsory education is necessary and it is an essential good for children as well as society as a whole. So, there is no difficulty about suggesting that Mill's paternalistic argument for compulsory education can fulfil the second requirement and part of the third requirement mentioned above.

The key points are, however, whether Mill's device of compulsory education is the only option for achieving the desired aim and whether the compulsory education concerned can effectively realize its aim. It should be mentioned here that Mill does not empirically demonstrate that his device of compulsory education is either a sufficient condition or a necessary condition for the realization of the desired aim, even though the desired aim is relatively modest. We may therefore suspect whether Mill's device of compulsory education is the only option in achieving the desired aim. This suspicion can be deepened by the example set by Mill himself, namely, he himself was home-educated and did not pass through public examinations and schooling. With regard to this contention, it can be suggested that Mill does not intend to argue that his device of compulsory education is the only option for realizing the desired aim. It is rather the case that as far as a universal education for **all** children is concerned, compulsory education consisting of public examinations and schooling is

the most sensible and effective way of realizing the desired aim. There are of course other forms of compulsory education which can also achieve the desired aim, but they may not be as effective as Mill's device of compulsory education.

If the view offered above is correct, Mill's paternalistic argument for his specific form of compulsory education would not be invalidated by the fact that his device is not the only means for achieving the desired aim he has in mind. The same line of argument can also be used to tackle the question of whether compulsory education as perceived by Mill can effectively accomplish its aim. As far as the question whether compulsory education should be universally imposed is concerned, Mill would claim that the compulsory education he outlines would be the most effective way of achieving the desired aim. But it may be asked: what is the basis of this claim made on behalf of Mill? This question can be answered as follows. Firstly, the desired aim of compulsory education is not set unreasonably high; children can be properly equipped with the capacities and knowledge concerned if financial backing and good teachers are available. Secondly, children, under normal circumstances, will have no problem in acquiring the knowledge or capacities needed for the development of individuality if education is properly conducted.(47) Taking these two reasons together, it can be concluded that Mill's device of compulsory education can effectively achieve its desired aim owing to the fact that the level of knowledge and capacities needed for developing individuality or independence is not too high for normal children to achieve, and that it is within the capacity of a civilized society to offer an education such as the one Mill proposes.

Admittedly, Mill's paternalistic argument concerning the requirement of the effectiveness of compulsory education is not entirely satisfactory. His device of compulsory education cannot be shown to be as effective as the case of the wearing of safety belts. And it can only be suggested that it is merely Mill's conviction, albeit not completely unfounded, that his proposal of compulsory education can effectively achieve the desired aim. In support of Mill, it can be replied firstly that no large-scale educational

practice can be proved to be as effective as the case of the wearing of safety belts. It is especially so given the condition that the educational practice had not been put to the test at that time. It thus would not be awkward for Mill to refer to his own experiences as well as practical deliberations, taking practical factors into consideration, and suggest that his device of compulsory education would effectively achieve its aim. Secondly, it can also be suggested that the statement, "Compulsory education can effectively achieve its designated aim", for Mill is more like a rule of conduct by which human action is supposed to be governed rather than a firm prediction. Viewed from this angle, even if Mill's proposal of compulsory education does not achieve the aim it only means that the practical measures are not yet properly conducted. The practical measures concerned can always be improved to achieve the designated aim. In this sense, the failure of any practical measures for achieving the designated aims would not invalidate the rule of conduct in question.(48)

After the examination of Mill's paternalistic argument for compulsory education it now can be concluded that his argument can generally fulfil the three requirements of a valid paternalistic justification and hence can be regarded as a valid justification for compulsory education.

We are now in a better position to decide whether paternalism can be adopted in liberal democracies to justify compulsory education. It will be argued here that members of liberal democratic societies would justify compulsory education, as an idea as well as the specific form of practical measure specified in Chapter Four, paternalistically. But before they invoke paternalism to justify compulsory education they would try to confirm that the education under consideration is an essential good. Moreover, they would be aware that paternalism cannot be solely relied on to justify compulsory education as a specific educational measure. The position held here is a rejoinder to Kleinig's general idea that compulsory education (schooling) cannot be justified paternalistically.(49)

It should be firstly reiterated that children under consideration in this

thesis are persons who have only limited rationality. Thus members of liberal democracies will acknowledge without great difficulty that paternalistic measures can apply to children in one way or another.

Further, it should be explained why members of a liberal democracy would try to assure that the education under consideration is an essential good. It has been indicated that members of liberal democracies have different ideas about what is a good life. It is on this ground that people in liberal democracies can have and pursue their own life plans as long as they observe the rule of law. Following this, it can be argued that the different ideas people have concerning what is a good life may reflect the possibility that members of liberal democracies may also have different ideas about what are the constituent elements of any specific form of good life. In Rawls' liberal democratic framework, for example, although people have different conceptions of the good, the constituent elements of different conceptions of the good (in the terms of Rawls, primary goods) are, however, fixed.(50) But Rawls may neglect the possibility that people in liberal democratic societies may even have different ideas about what are the constituent elements of any specific form of good life. For example, health, one of the natural primary goods, is not necessarily an essential good for some religious cults in a liberal democratic society. If health as an essential good can be questioned, so can education. It is therefore not surprising that education, on the one hand, can be reckoned as an essential element of any form of good life by some liberal writers, such as Gutmann; and, on the other hand, "adequate education" is not recognized as an essential element for any form of good life by Rawls.(51) Moreover, members of liberal democracies would be aware that "education" is totally missed out in the American Constitution which is considered as one of the most important documents concerning basic human rights. All this may lead members of liberal democracies to doubt whether education is an essential good. It is always possible to imagine that education would not be taken as an essential good by some members of society. This possibility would then make members of liberal societies have second thoughts on whether it is legitimate to compel a person to pursue his own good given

the condition that the person compelled, or other fellow members, may not think the good for which compulsion is imposed is an essential good at all. It is in this context that members of liberal democracies should try to explain and justify their conviction that education is an essential good for all children in a liberal democracy. For they should always envisage the possibility that compulsory education is not regarded as an essential good by some of their fellow members.

It should, however, be recalled that if the arguments provided in Chapter Four are convincing then the possibility described above is very remote for people who are rational, just and benevolent in a fair system of cooperation between free and equal persons. That is, education in general or the specific education advocated would generally be accepted by members of liberal democracies - as rational, just and benevolent people - as an essential good. Moreover, it can be suggested that very young children do not have clear ideas about what is an essential good for them, especially whether education is an essential good for them or for their future life. The question of whether education is an essential good should therefore be settled by adult members of society who are rational, just and benevolent. In other words, that education is an essential good should be quite certain in liberal democracies. And this confirmation is an important step for justifying compulsory education paternalistically.

If it is the case that children are not capable of making important decisions for themselves and that education in general as well as the education advocated in this thesis is an essential good for children, it can then be reasoned that children should not be given the opportunity to decide whether they should receive education. After the establishment of the necessity of compulsory education we then can go on to enquire whether the compulsory education advocated in this thesis can achieve its designated aim. As has been mentioned earlier, the desired aim of compulsory education can be considered at two levels. In the context of this thesis, it can be suggested that the compulsory education specified in Chapter Four can be aimed at the realization of "ideal" persons, namely,

persons who are autonomous and able to to cooperate with other members of society in social, economic and political activities. Or, compulsory education can be aimed at equipping children with necessary means (capacities, knowledge, skills, experiences, and virtues) so that they may become "ideal" persons in a liberal democratic society. (The precise distinction of these two aims was made on p. 211.). It can be suggested here that if compulsory education is aimed at the realization of "ideal" persons then paternalistic arguments can at most justify compulsory education as an abstract idea. For, in so far as current societies are concerned, there is no specific form of universal compulsory education that can actually realize the ideal person held in societies, no matter how the ideal person is defined. Besides, it has also been mentioned in Chapter Four that the compulsory education advocated is neither a sufficient condition nor a necessary condition for the realization of the ideal person. This, however, should not lead to the conclusion that paternalism cannot justify compulsory education as a abstract idea. The fact that the compulsory education advocated (or any specific form of compulsory education) cannot achieve the realization of the ideal person only implies either that the practical measures advocated are not satisfactorily conducted or that there are other forms of compulsory education which can be used to accomplish the desired aims. Failing to prove that a specific form of compulsory education is unable to realize its designated aim does not mean compulsory education *simpliciter* cannot be justified paternalistically.

The story is different, however, if the compulsory education concerned is aimed at the more modest aim, namely, equipping children with relevant capacities, knowledge, skills, experiences and virtues so that they may become the ideal persons. If this is the aim that compulsory education is designed to achieve, then there should be no significant reason why the compulsory education advocated in this thesis cannot effectively achieve its aim given the condition that education can be sufficiently funded and properly conducted. More specifically, it can be argued , in line with Mill's ideas, that considering children are capable of acquiring the necessary capacities, knowledge, skills, experiences and virtues needed for their

development as "ideal" persons, and that modern affluent society is able to offer a setting in which the education advocated can be competently conducted, it would be reasonable to reach the conclusion that the education advocated in this thesis can, and should, effectively achieve its desired aim.

If the reasoning offered above can be reckoned as satisfactory, it then can be claimed that paternalism can be invoked in liberal democracies to justify compulsory education, either as a abstract idea or a specific educational measure. But it should be noted that a paternalistic justification for compulsory education could be undermined in the following context. That is, if children do not actually benefit from compulsory education we then should consider whether it is legitimate to compel the children concerned paternalistically. However, the question is: how can we know whether children actually benefit from compulsory education? Theoretically speaking, children ought to benefit from compulsory education in one way or another. But it may not be the case in educational practice. A plausible but crude way to judge whether children can actually benefit from education is to see whether children want to participate in educational activities. If some children consistently and vehemently oppose participating in educational activities we then can consider that the educational activities concerned are not a good for them. In this case, the educational activities concerned might be a good for them from a long-term viewpoint. But as far as children's short-term interests are concerned, the educational activities concerned cannot be a good for children. Following this, it can be claimed that if children consistently and vehemently oppose educational activities to the extent that compelling them to receive education will consequently affect their long-term interests, then there is no point in arguing that it is for the good of children that compulsory education should be implemented. Does it mean that these special children can exempt from compulsory education? The answer should be a negative one, for there are other arguments that can be used to justify compulsory education for these special children.

On the whole, the above demonstration is designed to show that members of liberal democracies would adopt paternalism to justify compulsory education for children. But they would also be aware that paternalism cannot justify compulsory education for those children who are strongly opposed to participating in educational activities and due to their strong opposition they would be unable to gain any benefit from education. It implies that paternalism is not a comprehensive justification for children's compulsory education. With a view to providing a comprehensive account for the implementation of compulsory education, we must now turn to another argument.(52)

1.3 Children's Obligation and Compulsory Education

The central issue of this section is whether children in liberal democratic societies have an obligation to receive the education advocated in the last chapter; and if they have, whether their obligation can be a ground on which they can be compelled to receive that education. It will be argued that children in liberal democracies do have an obligation to receive the education advocated, and their obligation provides the reason by which they can be compelled to receive the education. In arguing for the position upheld, Mill's On Liberty will be first invoked.

As has been mentioned, Mill's principle of liberty does not apply to children in his scheme. But it is still possible to get some inspiration from this principle on the issue of compulsory education for children. Mill's paternalistic argument starts from the conviction that compulsory education is in the interests of children. His principle of liberty may pave the way for the argument that compulsory education is a device of harm-prevention and hence justifiable. In other words, it is in the interests of other people that children should have an obligation to receive education and that education for children should be compulsorily implemented.

According to the principle of liberty:

> . . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others.(53)

Following this statement, Mill specifies some examples of the interference this principle would sanction. The most obvious case is acts that are hurtful to others: they should always *prima facie* be prohibited.(54) And not only that, it can be supposed, as suggested by Lyons, that Mill would accept the view that interference with liberty is also justifiable in relation to conduct that *may* cause harm to others, for example, reckless driving.(55)

In addition to the two categories of conduct above, Mill also proposes that "there are also many positive acts for the benefit of others" which members of society can be compelled to perform.(56) Two categories of positive acts are singled out by Mill. They are: good samaritan acts and cooperation acts.(57) Good samaritan acts are "acts of individual beneficence", such as "saving a fellow creature's life or interposing to protect the defenseless against ill-usage". Mill gives two examples of cooperation acts. One is "to give evidence in a court of justice"; the other is "to bear. . . a fair share in the common defence or in any other joint work necessary to the interest of society. . . ."(58)

Considering the reasons that may be employed to interfere with a person's liberty, it is problematic to assume that failing to receive education would directly cause harm to others, like bodily assault; or failing to receive education may pose a direct threat to others' interests, like reckless driving. It is therefore not appropriate to propose that compulsory education can be justified on the grounds that failing to receive education is harmful, or a direct threat, to other people. It is also evident that failing to receive education is by no means like failing to give a hand to a drowning person, hence it would be unacceptable to advocate compulsory education on the grounds that receiving education is a samaritan act.

Generally, the plausible argument for compulsory education advocated here in the light of Mill's views, however, can be developed in two directions. First, it can be argued that although failing to receive education would neither directly harm other people nor pose a direct threat to other people's interests, it nevertheless would pose an indirect threat to other people's interests, especially long-term interests. Thus it can be suggested that children's obligation to receive education is based on the prevention of harm. Secondly, following Mill's cooperation argument, it can be suggested that as children are also members of liberal democratic society they then should have some obligation to bear a fair share in the responsibility that is necessary to the interests of society, by which children are protected. In practical terms, the fair share that children should bear is to receive the education advocated.

To base the justification of compulsory education on the grounds that failing to receive education is an indirect threat to other people's interests would immediately incur one main objection. That is, it can be suggested that in a highly dynamic and inter-dependent society many human actions pose an indirect threat to other people's interests. For example, someone who fails to keep a promise, or a car-driver who only holds a provisional licence may pose an indirect threat to other people's interests. But it is dubious to suggest that conduct which indirectly threatens others' interests should always be interfered with; for in that case the individual's liberty would then be substantially curtailed and eventually the idea of liberty would be empty.

This objection against the idea that compulsory education can be based on harm-prevention, however, ignores the point that although children's education may only be related remotely to other people's interests, the interests concerned here are essential and far-reaching for other people and society as a whole. It can be argued that because of the essential interests for other people and society as a whole compulsory education can be justifiably imposed on children. The argument can be put in two ways; one positively, the other negatively.

Just imagine a society with two generations, young adults and children. Education can firstly be thought of as an instrument for preserving the cherished ideas young adults have and the social systems adults value; moreover, education can also be thought of as an instrument that adults are obligated to provide for the sake of children's interests. Apart from these two points, education can have another function. That is, education can protect adults' self-interest. The reasoning is roughly like this. One day, these adults will become old, ill, weak and incapable of supporting themselves. They have to have some insurance policy to protect themselves when they are old. Education then is one of the best policies they can think of. It can be reckoned that the education at issue here is mainly aimed at equipping children with some necessary knowledge, skills, virtues, and attitudes so that children can eventually play a full part independently and equally in the society as a fair system of cooperation between free and equal persons. It is quite plausible to think that if the aim of education can be achieved, then the attitude that the newly educated people would have towards their older generation - who shape and maintain the society as a fair system of cooperation - would be very similar to the attitude that the current young adults adopt towards their children. The attitude concerned here is: respect for other people's status as free and equal persons, no matter whether these people are children, the elderly, or the handicapped. One thing would naturally follow from this attitude. That is, the newly educated persons would impose on themselves a duty similar to that which the current young adults have imposed on themselves. It is in this context that the newly educated persons would undertake some substantial measures to guarantee the status of the older generation as free and equal persons. Thus, for the sake of protecting adults' future interests as free and equal persons it is necessary to make education compulsory. To put this argument briefly. Although education seems remotely related to other people's interests, the interests concerned are very essential indeed. In order to guarantee that adults' future interests as free and equal persons would not be threatened or undermined, it would then be sensible to compel children to receive the education advocated

The point that the education advocated is indirectly related to others' interests and hence should be made compulsory for children can also be demonstrated in a negative way. That is, if compulsory education is not implemented, at least some children would not be properly educated. The consequence of this is either that the uneducated persons would suffer from the deprivation of education or the uneducated persons would endanger other people's interests. An uneducated person is a person who cannot properly devise his life plan and a person who can be easily manipulated by external forces or affected by internal irrational forces. And not only that, he can be a person without clear ideas about liberty, equality, fairness and the importance of cooperation. To the extent that he fails to achieve the status of being a free and equal person he can easily fail to reckon other people as free and equal persons, and hence would consciously or unconsciously treat other people as means rather than ends. Moreover, as he would not be aware of the importance of cooperation and would not be properly equipped to cooperate with other people, some interests that must be developed by joint activities would not be possible, and some dangers that can only be avoided via joint activities would become unavoidable. In short, the point of this argument is that children who fail to receive the education advocated cannot take proper actions in relation to other people, and therefore other people's interests would always be under threat. Based on this, education for children should then be compulsorily enacted.

Taking these points together, it can be suggested that children's obligation to receive education is based on the fact that if the education advocated is not implemented some members of society and society as a whole would be put in danger. But, why compulsory education? It can be replied: it is because compulsory education is an insurance device for the interests of all members of society and society as a whole.

Let us now consider the point that compulsory education can be based on children's responsibility or obligation towards the society in which they live. One of the difficulties of this line of argument is that some writers

have suggested only rational beings can have obligations; persons who can have a duty must be those who are capable of recognizing their obligation. Given this suggestion, children cannot even have obligations in general, let alone a particular obligation to receive education.(59) Even if children can have obligations or responsibilities towards society or other people it must be those imposed by other people or the state without their full-awareness or consent. If a person can have obligations without his own consent, it can be inferred, then, that it would be quite easy for a tyranny, which can conceal itself in various forms, to cultivate some sort of moral atmosphere or moral principle encompassed in the language of obligations, and based on this moral atmosphere or moral principle the tyranny can then legitimately coerce other people to do something against their own will, conscience, or interests.

The argument against these objections is this. The reason why children can have obligations and why their obligation to receive education can be imposed by adults or the state is grounded on the reciprocal relationships children have with their parents, adults, and the state. In Chapter Three, it has been suggested that in society as a fair system of cooperation each member is supposed to have a reciprocal relationship with the state and his fellow members. This reciprocal relationship mainly consists in two sets of language, the language of duties and the language of rights. What specific duties or rights adult members have in relation to the state or other fellow members is not the main concern here, but it can be suggested that as adults can be supposed to be rational they can normally strike deals with the state or other members over their rights or duties. Hence the basic idea underlying their deals is "consent" or "commitment". It implies that if any party is not satisfied with the reciprocal relationships he has with other parties, he is able to call off the links with other parties.

It is, however, another matter with regard to children. Whether children should have obligations in general or an obligation to receive education in particular is mainly decided by the state and adult members.(60) The reasoning that children should have obligations in general and a particular

obligation to receive education proceeds as follows. As members of society, children should take, in one way or another, some responsibility for other fellow members and the state. Why then is a member of a society bound to take some specific kind of responsibility for other people, the state and society as a whole? The main reason is: in order to maintain the existence and continuity of society, no one should be exempted from some obligation towards other people and society. To take an analogy. In order to keep a game going, all participants of that game should observe the rules of the game. In some respects, to maintain a society is like playing a game. The maintenance of society is also through the function of rules. Some rules are too essential to be encroached; if they are encroached, the person who encroaches should be blamed or punished for the sake of society as a whole. If this reasoning is accepted, children, as members of society, should also be under the governance of these basic rules; children hence naturally should have an obligation to observe these basic rules irrespective of their intention.

Why then should children have a specific obligation to receive education? It can be answered that education is such an essential interest both for children themselves and other people. It is principally on the grounds that education is concerned with other people's interests that other people can legitimately expect, and compel, children to receive education. The idea underlying this point is that children's obligation to receive education is not a consequence of a contract or commitment between children and other parties. It is rather a consequence of a deliberation undertaken by adults and the state. This deliberation is concerned with what children should do, taking all possible considerations into account. This deliberation would by no means be arbitrary or reckless, hence children's obligation to receive education would not be employed as a manipulative or controlling instrument. Though it might be perceived as such by children themselves.

Taking these arguments together, it can be suggested that children, as members of liberal democracies, should accept the obligations imposed upon them. They have an obligation to prevent harm to other members of

society; they also have an obligation to maintain the existence of society as a fair system of cooperation. And these two obligations are strong enough to persuade members of society to implement education compulsorily, not only as an abstract idea but also the specific measures advocated in this thesis. But if it is asked, "Why the specific educational measures advocated rather than others?" it can only be answered that the education advocated here appeals to members of liberal democracies as rational, just and benevolent persons.

1.4 Forms of Activity and Compulsory Education

In the previous discussions, the emphasis was mainly put on the relationships of children and other parties, such as parents, the state as well as society as a whole. The issue of the justification of compulsory education, as an idea and a specific measure, was put in the context of human relationships in liberal democratic societies. At this point, a different angle of approach will be taken to examine the same issue. The argument offered for compulsory education here will start from the view that compulsory education is compatible with society as a fair system of cooperation between free and equal persons.

Educational activity involved with children is a unique form of activity; because of its uniqueness, it needs to be regulated by guiding principles which are different from other guiding principles regulating other forms of activity. Its uniqueness is mainly manifested by two features. First, children stand on a different footing from their counterparts, namely, adults and the state. Educational activity is not like other kinds of human activity, say, political activity, in which participants' physical and psychological capacities are similar and most people are aware of the role they play as well as what the whole activity is about. Secondly, educational activity is mainly concerned with long-term interests. These long-term interests are not only remote but strange to children. They imply that educational activity involved with children, if it is possible, can hardly proceed on an entirely voluntary basis. It is the educator who knows

the whole picture and understands the aims he is trying to achieve. For the educatee, he is rather like the blind. He needs to be guided until he can gain his eye-sight. Given the uniqueness of educational activity, one of its guiding principles can then be characterized by an element which is different from the principle of liberty. This element is: compulsion. The argument needs further elaboration in the light of Mill's theory.

What should be pointed out is that Mill in fact holds a view that the principle of general utility is the ultimate principle for all human activities. "Utility", in Mill's eye, "is the ultimate appeal on all ethical questions".(61) But it does not follow that the principle of general utility in the "only" principle that should be abided by. There are other operating principles that can also be the criteria for the proceedings of various kinds of human activity. In short, the principle of general utility is always the ultimate criterion by which human actions are guided.. But the principle of general utility is not in itself sufficient in some areas of human activity. Other general, but secondary, principles are also needed in supplementing the principle of general utility. Mill's principle of liberty should be reckoned exactly as such a second-order and supplementary principle. This point can be supported by the fact that Mill does not put the value of liberty ahead of utility. Liberty can actually be sacrificed for the sake of utility. In discussing the application of the principle of liberty, Mill is quite clear in pointing out that: "In the first place, it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference." In some cases, such as a competitive situation, Mill argues that the individual's pursuit of a legitimate object might cause pain or loss to others, but it should not be interfered with, on the grounds of the principle of liberty. For, it is "better for the general interest of mankind that persons should pursue their objects undeterred by this sort of consequences."(62) The message is quite clear; the principle of liberty must be subordinated to the principle of general utility.

Apart from the principle of liberty, there are at least three other second-

order principles directly and indirectly singled out by Mill. They are: the principle of legitimate paternalism(63), the principle of individual development(64), and the doctrine of free trade.(65) In Mill's scheme, as far as education is concerned, it is mainly the first two principles that regulate educational activity. The principle of legitimate paternalism, as described earlier, sanctions the implementation of compulsory education for children. The principle of development, given the framework of compulsory education, is to ensure that the child in a civilized community can not only benefit from the ascertained results of human experience but can develop his human faculties so that he can "perform his part well in life towards others and towards himself".

On the whole, in Mill's scheme different guiding principles are needed for different human activities.(66) It would be wrong, in Mill's view, to adopt the principle of liberty to regulate the undertakings of free trade, for free trade as a unique form of human activity should be regulated by the doctrine of free trade. It would be also wrong to say that compulsory education is unjustifiable for the reason that it is goes against the principle of liberty; because educational activity concerning children is a unique form of activity, it should be regulated by principles different from the principle of liberty which is especially formulated for the social interaction between mature individuals and the state. If the principle of liberty is adopted in regulating the activity of free trade or educational activity concerning children, it would then result in the decrease of human happiness, and this is against the principle of general utility. Moreover, one point should be emphasized here. Although different principles at face value clash with one other, they are all validated by the principle of general utility; it is therefore wrong to take a second-order principle as the yardstick to nullify another second-order principle. It is rather the compatibility between the ultimate first-order principle and second-order principles that makes the second-order principles justified. Whether any second-order principle can be justified should be assessed by the ultimate first-order principle, not another second-order principle. Given this understanding, it can be claimed that compulsory education and its

supporting principle "the principle of legitimate paternalism" in Mill's theory are justified by the fact that they are aimed at achieving the greatest happiness of greatest numbers; whether they can be justified is not contingent upon the notion of civil liberty or personal freedom.

In the light of Mill's theory, it can then be suggested that whether compulsory education can be justified depends on whether it can be sanctioned by, or is compatible with, the idea that society is a fair system of cooperation between free and equal persons and the idea that an ideal person is a person who can rationally devise, revise, and pursue his life plan and can cooperate with other members of society. It can be suggested that although compulsory education interferes with children's personal freedom, this interference in fact can be sanctioned by the ideas of "society" and "ideal person" advocated here. Given the idea that society is a fair system of cooperation between free and equal persons, and an ideal person is an autonomous person, children's personal liberty need not, and should not, be put in the first place. It is rather whether children can have opportunities to become autonomous, whether they can develop their individuality, whether they can take up a job in the real world, and whether they are capable of participating in social and political activity that should be the main concern. If these aims can only be achieved at the expense of children's personal liberty, why not? Besides, it should be pointed out that children' freedom in a system of compulsory education is not totally curtailed. Given the framework of compulsory education, children can still exercise their choice in various kinds of activity; for example, children can still have freedom to choose their extra-curricular activities.

Following Mill's doctrine, it can be claimed that there are various forms of human activity. Each form of activity has its own unique aim, character and function. The character and function of educational activity is different from, say, political activity or commercial activity. Each form of activity reflects, or is manifested by, its own special human relationships among participants. This in turn leads to the suggestion that different guiding principles should be employed in different forms of activity as long

as they are compatible with the ideal structure of society and what the ideal person ought to be. Moreover, even though they are different, they complement each other. The existence and harmony of society as a whole is constituted by the full operation of various forms of activities. Compulsion qua compulsion is an interference against a free agent. In political activity or an activity only concerning adults, it is *prima facie* unjustified, but it is not the case as far as compulsory education is concerned. In terms of cultivating the ideal person and supporting the continuity of society, compulsory education is rather a necessary device for achieving the desired aim. It is wrong to assume that the personal liberty of children is sacrosanct. For the sake of achieving the ideal society and cultivating the ideal person, compulsory education is necessary during childhood.

2. THE CASE AGAINST COMPULSORY EDUCATION

The justification for compulsory education illustrated above is partly a response to the libertarian doctrine that compulsory education is an interference against children's personal freedom and hence unjustifiable. Apart from the libertarian argument, some other kinds of argument can be, and have been, invoked to oppose compulsory education. In order to consolidate the idea that compulsory education is justifiable, it is therefore necessary to grapple with those arguments against it. Two doctrines against compulsory education will be tackled in turn. One is cultural conservatism; the other, the deschooling argument.(67)

2.1 Cultural Conservatism and Compulsory Education

One of the notable arguments against compulsory education is based on cultural conservatism advocated by Eliot and Bantock. It should be noted that Eliot and Bantock actually hold different views on the notion of "culture", and hence sketch different pictures of the relationship between culture and education.(68) Despite their differences on these key points, they nevertheless share a very similar attitude against compulsory education. Both of them can be assumed to hold the view that compulsory

education as a form of universalized planning for some social or political ends is doomed to fail; besides, compulsory education may bring about some unexpected misfortune for society as a whole. Apart from that, Eliot also suggests that the utility of a non-compulsory education is greater than that of a compulsory education. These points need elaboration.

Although Eliot does not systematically deal with the issue of compulsory education, his opposition to it can be derived from his strong antagonistic attitude towards "universalized planning". Without doubt, this attitude is closely related to his general position about "culture", "education", "politics", and "modern political theory". It can be suggested that if culture is "a whole way of life" - as Eliot has proposed - and it cannot be wholly conscious, then any universalized plan enacted by deliberate organization and aimed at realizing social or political ends will simply not work. For, if universalized social or political planning is by implication an undertaking by planners to achieve some specific aims through a specific procedure, it would naturally ignore, both intentionally and unintentionally, some factors that constitute culture. The consequence of this inevitable weakness would then make any universalized planning impossible in achieving its designated aims. Furthermore, it will often go astray; since universalized planning is unable to grasp the whole of the real world its implementation would distort the reality and would coerce people into a rigid mould. Given this understanding, it can be concluded that compulsory education as advocated in the last section as a form of universalized planning cannot avoid the fate Eliot has in mind. In Eliot's own words: "Any education system aiming at a complete adjustment between education and society will tend both to restrict education to what will lead to success in the world, and to restrict success in the world to those persons who have been good pupils of the system."(69) As far as a universalized basic education is concerned, Eliot suggests that ". . . in our headlong rush to educate everybody, we are lowering our standards, and more and more abandoning the study of those subjects by which the essentials of our culture . . . are transmitted."(70) Based on this, it can be supposed that Eliot would actually assume that a compulsory education as advocated here would not

achieve its aims.; on the contrary, it would only adulterate and degrade "culture".(71)

As a supporter of Eliot, it seems Bantock does not explicitly try to demolish the idea of compulsory education. His point is rather that since a universalized compulsory education is not successful we should then try to devise different kinds of curriculum for children from different backgrounds.(72) However, from his view of the general notion of "planning", we gain the impression that Bantock is opposed to the implementation of compulsory education. In Freedom and Authority in Education, Bantock takes issue with Karl Mannheim on the question of social planning. "A plan", Bantock suggests, "is always the work of the conscious intellect abstracting from the totality of existence certain of its characteristics, and seeking on a basis of this abstract conception of reality to realize certain ends. These ends can only be achieved by imposition of means of varying degrees of incompatibility with the living organism. . . ."(73) As far as social planning is concerned, Bantock indicates that it involves "a very high degree of abstraction"; most seriously, social planning based on a high degree of abstraction with a view to realizing certain social ends would always be a catastrophe for the higher human values.(74)

Bantock's position is based on several arguments. Three of them are especially notable. Firstly, in his view, the totality of human society is too complicated to be understood by any human mind, or any set of human minds, and hence any social planning may eventually go wrong. Secondly, as a plan involves "thinking of people in accordance with those abstract qualities" rather than people possessing "other vital characteristics", it implies the imposition of something dead on the living organism, and therefore is bound to fail. Thirdly, Bantock suggests that any plan will "bear witness ultimately to just those values that the planners think desirable". And, it seems there is no objective criterion by which the planner's desirable ideas can be put to test. It implies that any social planning might eventually be transformed into some sort of tyranny.(75)

Given Bantock's criticisms of social planning, it would be quite reasonable to infer that since the compulsory education concerned here is mainly reckoned as a social or political instrument - which is directed at substantiating and actualizing the idea that society is a fair system of cooperation between free and equal persons - it should also be the object of Bantock's criticism; unless compulsory education is not an instrument of social planning, or compulsory education is not that kind of social planning that Bantock has in mind. However, judging from the fact that the compulsory education advocated here is a social instrument jointly used by the state, parents and other adults and directed for all children of certain ages, it would be proper to count it as social planning and hence, in Bantock's view, it should be avoided.

Apart from saying that compulsory education as a form of universalized social planning is undesirable and unpalatable, Eliot also implies that the utility of non-compulsory education is much greater than compulsory education. Compulsory education is to provide necessary educational provision for children, whether the children concerned want to receive it or not. On this, Eliot clearly points out that "facility of education will lead to indifference to it; and that the unnatural imposition of education up to the years of maturity will lead to hostility towards it."(76) In other words, compulsory education would bring about some side-effects that cannot be taken lightly. Apart from the possible side-effects of compulsory education, a non-compulsory education may have other advantages. Eliot indicates that "the desire for education is greater where there are difficulties in the way of obtaining it."(77) Thus, from a long-term point of view, a universally compulsory education is less beneficial than a non-compulsory education that especially aims at both the pursuit of wisdom and the acquisition of high culture. Based on these reasons, Eliot concludes: "A high average of general education is perhaps less necessary for a civil society than is a respect for learning."(78)

Of the arguments grounded on cultural conservatism against compulsory education, many things can be said.

Eliot and Bantock are right in pointing out respectively that culture is something which cannot be fully conscious and that human society is too complicated to be fully grasped by any human mind. But it can be argued that compulsory education as universalized planning with a view to actualizing social or political ends is necessary in regulating a complicated society and in enriching the conscious part of culture.

In Eliot's essay Notes Towards the Definition of Culture, his main interest is, as pointed out by Bantock, not concerned with proposing prescriptions regarding the preservation and development of culture; his main concern is rather to illustrate the desirable conditions under which culture is most likely to be developed and preserved.(79) For Eliot, the most desirable social condition for the preservation and development of culture is a condition under which people belonging to different classes, regions and groups can not only preserve their own identity but also communicate with each other. But how can diversity and unity be possible at the same time? Eliot does not say much about this. What he suggests, at the end of his essay, is that "everyone" should pause to examine what the word "culture" means to him, and "what it means to him in each particular context before using it."(80) Eliot optimistically suggests, "Even this modest aspiration might, if realized, have consequences in the policy and conduct of our 'cultural' enterprises."(81) How, then, can "everyone" have the capacity of knowing the meaning of "culture" and what it means to him in each particular case before using the word? Eliot says little in his essay on this question. Eliot might think that it would be a naturally-developed capacity owned by all rational beings, or men of maturity. But it can be suggested that a capacity for reflecting on oneself in relation to other people, of communicating with other people, and of preserving one's own identity are not by any means delivered by "Nature"; it is rather a result of "culture". This observation can be supported by the fact that not all adults in an existing highly-developed society are capable of reflecting on their position in relation to other people and institutions, or of reflecting on the meaning of the word "culture" unless they are educated in one way or another. For this reason, it can be suggested that it is self-contradictory

for Eliot to advocate, on the one hand, that a communicating and reflecting capacity is an essential requirement in maintaining a culturally integrated society, and on the other hand, that universalized planning should be avoided in society. How can a mind with the capacity of reflecting and communicating be possessed by "everyone" in a highly-complicated society without some sort of universalized social planning?

Against this, it might be argued that a capable mind possessed by every member of society can still be possible without universalized compulsory education, for it can be achieved through various kinds of unplanned voluntary educational activities, which would eventually make everyone sufficiently capable. This argument is, however, romantic. It ignores the fact that in earlier "unplanned" societies some people, say, peasants, had no opportunity whatever to be cultivated as persons with a reflecting capacity or with a capacity that can enable them to contemplate the meaning of culture. Moreover, what has been suggested is that a person with reflecting and communicating capacity is a cultured result, not a natural outcome. But how can we have a society in which "everyone" can be aware of the meaning of "culture" and hence can contribute to maintaining a dynamic development of culture? It seems that Eliot, despite what he says, would not have any alternative but a universalized compulsory education.

The universalized compulsory education advocated here is devised with an eye to cultivating children's capacity to communicate with other people, and to reflect on their position in relation to other people and institutions. The possible result of this, ideally speaking, is to shape a proper environment in which diversity and unity can go hand in hand. Thus, from a long term point of view, the utility of a compulsory education is greater than the utility of a non-compulsory education.

With regard to Bantock's objection that social planning should have no place in a highly complicated society, it can be pointed out that the notion of social planning in Bantock's mind is a rigid one. True, any social planning

will be some sort of abstraction from the totality of society and will be put in the form of an imposition over members of society. But it does not follow that due to the abstraction and imposition, any social planning is bound to fail or bound to be undesirable.

The key point rests on this question: how is social planning constructed and regulated? If it is designed and run by an elite group , it may lead to the consequences described by Bantock. But if it emerges through a process of deliberation in the framework of a fair system of cooperation between free and equal persons, it would not be bound to fail or become an imposition. On the contrary, social planning constructed in this ideal way is like a vitamin pill extracted from foodstuffs or produced synthetically, which of course does not include all nutrient materials but the effect it may have on human organisms is generally beneficial and by no means oppressive. Moreover, Bantock neglects two points. One is the possibility that an unplanned complicated society is not necessarily better than a planned society; the other, that to maintain a complicated unplanned society will inevitably involve some sort of invisible planning, even if only of a negative sort. The forces which can prevent any sort of social planning in a highly complicated society are inevitably and paradoxically planned. These two points can also be invoked to attack Eliot.

But it can still be asked: can universalized compulsory education achieve the designated aim? Or, will it not go astray and bring about some disasters? Or, will it not fall into the hands of a few and hence become an instrument of tyranny? What can be said here is that these questions are all empirical ones. It cannot be claimed that the compulsory education advocated here can invariably realize the designated aim; or that it will never go astray or become an instrument of tyranny. But what should be emphasized is that compulsory education as a notion or an instrument is mainly devised to counteract the possible forces which may lead to a society in which the ideas of equality and liberty are deliberately devalued and the individual is unable to lead an independent life. On this view, even though compulsory education might bring about some unexpected results,

they cannot be disasters. What is more, as it is derived from the view that society is a fair system of cooperation between free and equal persons, autocratic tyranny is intentionally excluded. Even if compulsory education goes astray, it is the strategy of the implementation of compulsory education that should be blamed, not the idea.(82)

2.2 The Deschooling Doctrine and Compulsory Education

The starting point of the deschoolers' doctrine is dissatisfaction with the present form of schooling which implies the use of legal sanctions to ensure children's attendance in school for several years so that they can receive a prescribed and standardized curriculum.(83)

For deschoolers, like Illich, Goodman, and Krimerman, the present form of schooling characterized by institutional activities is not just morally unjustifiable but can lead to some undesirable consequences that schooling is supposed to overcome. Illich's criticisms of the present form of schooling can be summarized in three points. First, the school is an oppressive and monopolistic instrument in both capitalist and socialist societies. Second, the school in today's specialized and consumer-oriented society only serves to manipulate people. Third, the school, particularly in the Third World, is serving only the elite and reinforcing the meritocratic element in society.(84) In Goodman's view, schooling only serves "for policing and for taking up the slack in youth unemployment." It has no correlation with life achievement in any of the professions; and no advantages can be gained by schooling in the field of clerical, technological, or semi-skilled factory jobs.(85) For Krimerman, the present form of schooling is morally disgraceful; it is simply a form of slavery.(86)

In order to avoid the undesirable consequences resulting from the present form of schooling and to search for morally sustainable educational alternatives, the three deschoolers respectively provide some prescriptions. In Illich's scheme, he advocates a system of educational

networks to replace schooling; some specific measures, such as a system of educational passport, an edu-credit card, are also recommended.(87) In Goodman's plan, education should not take place in school but in various places or through activities such as the real city, farm schools, guided travel, work camps, and so on.(88) For Krimerman, a facilitating, rather than compelling, education is the recipe. In this voluntary education, a voucher system will prevail and the occupation of teacher will disappear; moreover, educational activities will proceed in apprenticeships, and educational facilities will be abundantly provided but on an entirely voluntary basis.(89)

A closer look at the deschoolers' criticisms of the present form of schooling suggests that it is not only structural defects and functional deficiencies that are blamed for the failures. The "compulsory element" involved in the present form of schooling is also a contributing factor that leads to the unsuccessful outcomes. Moreover, compulsion constitutes the immorality of the present form of schooling. The alternative proposals to the present form of schooling therefore are manifested by emphasizing the idea of "learner's voluntariness". A further elaboration is needed here.

Based on the deschoolers' ideas, several reasons against compulsory schooling can be given. Firstly, it is suggested that even though children are immature, and therefore need help from adults, the help that children ought to have should not be put in the form of compulsory education. Voluntary educational provision is always more desirable and sensible. Secondly, deschoolers assume that nothing can be effectively learned, or learned at all, unless education is based on the learner's need, desire, and curiosity. For deschoolers, learning is just like picking up the mother-tongue; compulsion has no place in the process of learning. On this view, compulsory education involving a standardized and prescribed curriculum evidently does not meet this requirement at all and can in no way lead to "true learning". Thirdly, it is the deschoolers' assumption that freedom (more accurately, personal freedom, or negative freedom) is the precondition of cultivating an autonomous and independent person.

According to this view, a compulsory education curtailing personal freedom is bound to fail in achieving autonomy and independence. More specifically, they indicate that children's freedom in exercising full educational choice can make them grow into competent choice-makers; and through the frequent practice of choice-making, children's independent rational judgement will be strengthened. Finally, it is claimed that even for those who are not fully rational like children, self-determination still has intrinsic moral value. To deny children's opportunity for self-determination in deciding whether they should learn or be educated is to deny their fundamental good or right. The implementation of compulsory education is to treat children as means rather than as ends.

Given the deschoolers' arguments against compulsory education, some rejoinders can be made.

It is quite true that there is no logical connection between children's immaturity and compulsory education. The connection between the two is rather based on the practical consideration that without proper education children may endanger their own and other people's interests as well as society as a whole. In this respect, compulsory education is like an insurance policy. More specifically, the idea of compulsory education is similar to the idea of car-insurance. In the latter case, car drivers are compelled to have car-insurance. It is not the case that car-drivers will inevitably cause trouble, it is rather the view that some unpredictable accidents might happen and hence might cause damages or injuries. By parity of reasoning, to compel children to receive education is only to make sure that all members of society as well as society as a whole are properly protected.

Concerning the deschoolers' assumption that learning must be based on the learners' desire, curiosity, and so on, it can be suggested that this view of learning is quite "romantic". It is a common feature in highly complicated modern societies that some knowledge essential to the members of society as well as the society as a whole may be so abstract that it has gone

beyond the learner's imagination and curiosity. The knowledge concerning the relationship between the individual and the state is a case of this. The idea and the entity of the state can hardly be easily grasped; but to be aware of the existence of this entity and its function, and to establish a dialogue relationship with the state is extremely important for the maintenance and development of the ideal society concerned here. However, knowledge of this kind is so remote for most children that they just have little desire or curiosity to pursue it. Given this condition, it seems there is no alternative but to implement compulsory education so as to make sure that children in society possess proper knowledge. Grounded on this case, it can be inferred that some learning is not necessarily based on the learner's desire, curiosity, and so on. There are some kinds of learning which can only be placed in a compulsory framework.

With regard to the deschoolers' idea that children's freedom (negative freedom) is a precondition of children's autonomy and independence, Dearden's view on the relationship between freedom and autonomy can provide some inspiration. In Dearden's view, freedoms are indeed a necessary condition for autonomy; but he is not sure that freedoms are a necessary condition for the *development* of autonomy. He suggests that which conditions are the best conditions for the development of autonomy is an empirical question.(90) Following Dearden, it can be argued that the deschoolers' claim that children's freedom is necessary for their development of autonomy and independence is at best an assertion which does not have the backing of empirical evidence. Moreover, it can be asked: is it necessarily a good thing for children to make educational decisions for themselves? Kleinig offers a negative answer. He suggests that children are generally more vulnerable to exploitation than adults, so it would not be a good thing for them to bear the whole weight of a decision concerning school attendance.(91)

As to the deschoolers' claim that compelling children to learn or to receive education is to treat them as means rather than as ends, it can be replied that this accusation is not well-founded. The whole device of compulsory

education is aimed at equipping children with the necessary means so that they can become independent and autonomous and play a proper role in society. It has also been argued that without receiving a proper education children would be put in an extremely disadvantageous position in relation to other people and institutions, like the state. From this angle, compulsory education is rather aimed at treating children as ends, not as means.

NOTES:

1. See, I. Illich, Deschooling Society, Harmondsworth: Penguin, 1973; E. Callan, Freedom and Schooling, Journal of Philosophy of Education, vol. 17, no. 1, 1983, pp. 45-46.
2. M. Aurelius, Meditations, translated by M. Staniforth, Harmondsworth: Penguin, 1964, p. 35.
3. J.S. Mill, On Liberty, Harmondsworth: Penguin, 1985, pp. 177-179. I am indebted to Kleinig for pointing this out. See J. Kleinig, Compulsory Schooling, Journal of Philosophy of Education, vol. 15, no. 2, 1981, pp. 192-193.
4. I. Illich, op. cit.
5. J.S. Mill, op. cit., pp. 175-177.
6. The point that the justification of compulsory education is different from the justification of any specific form of compulsory education currently implemented is made, or implied, by the following writers: A. Aviram, The Justification of Compulsory Education, Journal of Philosophy of Education, vol. 20, no. 1, 1986, pp. 51-58; E. Callan, op. cit., pp. 45-56; G. Graham, Contemporary Social Philosophy, Oxford: Basil Blackwell, 1988, pp. 154-160; J. Kleinig, op. cit.
7. I owe this point to A. Aviram. See Aviram, op. cit., p. 55. The reason for making a distinction between compulsory education as an abstract idea and compulsory education as a specific educational measure can also be understood in the light of the distinction between education as a general concept and education as a specific concept. See Chapter Four, pp. 151-159.
8. M.S. Katz, Compulsion and the Discourse on Compulsory School Attendance, Educational Theory, vol. 27, no. 3, pp. 179-185.
9. J.S. Mill, op. cit., p. 166.
10. J. Feinberg, Social Philosophy, Englewood Cliffs, New Jersey: Prentice-Hall, 1973, pp. 5-9.
11. I borrow Aviram's expression here. Aviram indicates that Mill's On Liberty is still "the *magnum opus* as far as discussions of paternalism

in the liberal tradition are concerned." See Aviram, op. cit., p. 52.

12. J.S. Mill, op. cit., pp. 176-178.
13. J. Feinberg, op. cit., p. 21.
14. For the detail of the relations between liberty and coercion, see J. R. Pennock, Coercion: An Overview, NOMOS, vol. XIV, pp. 1-15.
15. It is quoted in Feinberg, op. cit., p. 23.
16. I. Kant, The Science of Right, translated by W. Hastie, in R.M. Hutchins (ed.), Kant, London: Encyclopaedia Britannica, p. 308.
17. See H. L. A. Hart, The Concept of Law, Oxford: Oxford University Press, 1961, pp. 6, 18-25.
18. J.S. Mill, op. cit., p. 164.
19. Ibid., pp. 63-64. Another similar expression can be found on p. 141.
20. Locke does not intend to justify compulsory education, but his account concerning children can be developed as a paternalistic justification for children's compulsory education. For further detail, see Two Treatises of Government.
21. See J. White, Towards a Compulsory Curriculum, London: Routledge & Kegan Paul, 1973; A. Gutmann, Children, Paternalism, and Education, Philosophy of Public Affairs, vol. 9, no. 4, 1980, pp. 338-358; G. Haydon, The 'Right to Education' and Compulsory Education, Educational Philosophy and Theory, vol. 9, no. 1, 1977, pp. 1-15. It should be noted that as the paternalistic arguments developed by Gutmann and Haydon are mediated through the language of rights, they deserve special attention. Their arguments will be discussed later in the concluding chapter of this thesis.
22. There are various forms of paternalism. Some paternalism is founded on the concept of consent. However, the standard form of paternalism is based upon the recognition of the practical necessity of welfare or interests concerned. But there are also different accounts concerning how the interests or welfare should be decided in the standard form of paternalism. It is not intended in this place to go into the detail of the differences among various forms of paternalism. See R. Carter, Justifying Paternalism, Canadian Journal of Philosophy, vol. VII, no. 1, 1977, pp. 133-145; G. Dworkin, Paternalism, in R.A. Wasserstrom (ed.),

Morality and the Law, California: Wadsworth, 1971, p. 108; Feinberg, op. cit., pp. 45-52; P. Gardner, Paternalism and Consent in Education, Journal of Philosophy of Education, vol. 17, no. 1, 1983, pp. 57-72.

23. G. Dworkin, op. cit., p. 108.

24. See J.D. Hodson, The Principle of Paternalism, American Philosophical Quarterly, vol. 14, no. 1, 1977, pp. 61-62.

25. See J. Feinberg, Legal Paternalism, in J. Feinberg, Rights, Justice, and the Bounds of Liberty, New Jersey: Princeton University Press, 1980, p. 115.

26. D. Lyons, Ethics and the Rule of Law, Cambridge: Cambridge University Press, 1984, p. 171.

27. See A. Aviram, op. cit., p. 53; E. Callan, op. cit., pp. 45-56; P. Gardner, Liberty and Compulsory Education, in A. P. Griffiths (ed.), Of Liberty, Cambridge: Cambridge University Press, 1983, pp. 109-129.

28. J.S. Mill, On Liberty, p. 69.

29. Ibid., p. 69.

30. Ibid., p. 69.

31. Ibid., p. 166.

32. Ibid., pp. 142-143.

33. Ibid., p. 150.

34. Ibid., p. 150.

35. Ibid., p. 69.

36. Ibid., p. 121.

37. See J.S. Mill, Utilitarianism, chapter 2, in M. Warnock (ed.), J.S. Mill: Utilitarianism, Glasgow: Collins, 1979.

38. J.S. Mill, On Liberty, p. 123. Also see p. 126.

39. Ibid., p. 124.

40. Ibid., p. 124.

41. J.S. Mill's view is in line with Locke's, see J. Locke, Two Treatises of Government.

42. J.S. Mill, Autobiography, in F.W. Garforth (ed.), John Stuart Mill on Education, New York: Teachers College Press, 1971, p. 83.

43. J.S. Mill, On Liberty, p. 176.

44. Ibid., p. 176.

45. Ibid., pp. 177-178.

46. Ibid., p. 177.

47. I owe this point to C.L. Ten, See Ten, Mill on Liberty, Oxford: Clarendon Press, 1980, p. 3. Also see Mill's "Autobiography", chapter 1.

48. This point is suggested by Mill. See J.S. Mill A System of Logic, 1904, London: Longmans, Book V1, ch. XII.

49. See J. Kleinig, Paternalism, Manchester: Manchester University Press, 1983, pp. 151-152.

50. J. Rawls, A Theory of Justice, Oxford: Oxford University Press, 1972, pp. 90-95.

51. See A. Gutmann, op. cit., pp. 340-342; W.M. Humes, Rights and Choice in Education, Parental Choice Project, Glasgow University, 1984, unpublished.

52. I have to thank Mr A. Lockyer and Mr A. Duff for helping me to clarify the relations between paternalism and the justification of compulsory education. Responsibility for errors lies, however, exclusively with the author.

53. J.S. Mill, On Liberty, p. 68.

54. Ibid., p. 70. For Mill, not all conduct harmful to others should be prohibited; some acts hurtful to others would not be prohibited on the grounds that "the attempt to exercise control would produce other evils, greater than those which it would prevent".

55. See D. Lyons, Liberty and Harm to Others, in W.E. Cooper, K. Nielson and S.C. Patten (eds.), New Essays on John Stuart Mill and Utilitarialism, Ontario: Canadian Association for Publishing in Philosophy, 1979, pp. 2-3.

56. J. S. Mill, On Liberty, p. 70.

57. These are D. Lyons' terms.

58. J.S. Mill, On Liberty, p. 70.

59. C.H. Whiteley, On Duties, in J. Feinberg (ed.), Moral Concepts, Oxford: Oxford University Press, 1969, pp. 53-59.

60. Strictly speaking, the role of tradition and convention should also be counted as contributing factors.

61. J.S. Mill, On Liberty, p. 70. There are thorny issues concerning the

characteristic of "utility" and its relations with the principle of liberty in Mill's theory. It is not intended to go deeply into these issues here. However, it should be noted that the position held here is that the principle of liberty in Mill's scheme is subordinate to the principle of utility. For the detail, see J. Gray, John Stuart Mill on Liberty, Utility and Rights, NOMOS, XXIII, 1981, pp. 80-116; C.L. Ten, Mill's Defence of Liberty, in K. Haakonssen (ed.), Traditions of Liberalism, The Centre of Independent Studies, 1988, pp. 145-168.

62. J.S. Mill, On Liberty, pp. 163-164.
63. This is Aviram's term. See Aviram, op. cit., pp. 52-53.
64. J.S. Mill, On Liberty, pp. 180-181.
65. Ibid., p. 164.
66. Actually, Mill sides with Humboldt. See, W. von Humboldt, The Limits of State Action, edited and translated by J.W. Burrow, Cambridge: Cambridge University Press, 1969.
67. There are some other arguments against compulsory education. For example, it has been argued that compulsory education interferes with parents' power or right over their children; or, compulsory education may cause considerable hardship to parents for they might lose a significant supplement to the family income. But given the present framework of modern society, these two arguments can hardly pose a serious challenge to the idea of compulsory education. A historical analysis of the introduction of compulsory education in England and Wales can be helpful in exemplifying these two arguments. See J.S. Hurt, Elementary Schooling and the Working Classes 1860-1918, London: Routledge & Kegan Paul, 1979. Some Marxists, like Michael Young, may oppose the present form of compulsory education. But, generally speaking, Marxist theory of education is a theory of compulsory state schooling, so it can be claimed that Marxists in one way or the other support the idea of compulsory education. See M.R. Matthews, The Marxist Theory of Schooling, Sussex: Harvester Press, 1980, p. 175.
68. To be more specific. For Eliot, culture is "a whole way of life". It includes "all the characteristic activities and interests of a people." It cannot be identified with education, politics, and so on. It embraces

them all. Most importantly, culture in Eliot's views is mysterious and "cannot altogether be brought to consciousness; and the culture of which we are wholly conscious is never the whole of culture." Given this understanding, if education is aimed at transmitting or preserving culture, it can only transmit or preserve part of the culture; and education is only one instrument, among others, in doing this. See T.S. Eliot, Notes Towards the Definition of Culture, London: Faber & Faber, 1948, pp. 31, 107. In comparison with Eliot, Bantock uses the world "culture" in a more self-conscious sense. It refers to "those valuable aspects of other men's minds, records of which have been left in various media, and an understanding of which is transmissible through conscious educational processes." According to this, it can be suggested that education in Bantock's usage is an essential instrument for preserving and transmitting culture. See G.H. Bantock, Freedom and Authority in Education, London: Faber & Faber, 1970, p. 51, note 1.

69. Eliot, op. cit., p. 101.
70. Ibid., p. 108.
71. Ibid., p. 108.
72. See G.H. Bantock, Towards a Theory of Popular Education, in R. Hooper (ed.), The Curriculum, Edinburgh: Oliver & Boyd, 1972, pp. 251-264.
73. G.H. Bantock, Freedom and Authority in Education, p. 31.
74. Ibid., p. 31.
75. Ibid., pp. 31-33.
76. Eliot, op. cit., p. 100.
77. Ibid., p. 100.
78. Ibid., p. 100.
79. See G.H. Bantock, Freedom and Authority in Education, p. 45.
80. Eliot, op. cit., p. 109.
81. Ibid., p. 109.
82. See J.S. Mill, A System of Logic, Book VI, ch. XII.
83. L.I. Krimerman, Compulsory Education: A Moral Critique, in K.A. Strike & K. Egan (eds.), Ethics and Educational Policy, London; Routledge & Kegan Paul, 1978, p. 80.
84. T. Husén, The School in Question, Oxford: Oxford University Press,

1980, p. 25.

85. P. Goodman, Freedom and Learning, in R. Hooper, op. cit., pp. 107-108.
86. L.I. Krimerman, op. cit., p. 80.
87. See I. Illich, Deschooling Society.
88. See P. Goodman, Compulsory Miseducation, Harmondsworth: Penguin, 1964, p. 117.
89. L.I. Krimerman, op. cit., pp. 93-94.
90. R.F Dearden, Autonomy and Education, in Dearden, P. Hirst & R.S. Peters (eds.), Education and the Development of Reason, London: Routledge & Kegan Paul, 1972, pp. 450-452.
91. J. Kleinig, Compulsory Schooling, pp. 200-201.

CONCLUSION

CHILDREN'S RIGHT TO EDUCATION AND

COMPULSORY EDUCATION*

It was argued in Chapter Four that children have a right to education (education in its specific sense). In Chapter Five, it was suggested that children should be compelled to receive the education advocated principally on the grounds of paternalism and children's obligation to receive education. The focal point of this final chapter will be the relations between children's right to education and compulsory education. The reason for paying attention to this issue is that children's right to education has been used by some writers to justify the imposition of compulsory education on children. This is different from the claim made in Chapter Five that the foundation of compulsory education should principally be grounded on paternalism and children's obligation to receive education. Given this background, this chapter is aimed at clarifying the relations of children's rights in general, and children's right to education in particular, to the justification of compulsory education. Specifically, it will firstly present arguments that can be, and have been, used to justify compulsory education in terms of children's right to education. Secondly, it will expose possible shortcomings and weaknesses of the arguments mentioned. Thirdly, based on one of the criticisms of the arguments mentioned, it will demonstrate a plausible way of justifying compulsory education from the view that children have a right to education. Finally, some remarks will be made concerning the implications of the recommended argument on theories of rights and the characteristics of rights-talk.

It is not uncommon for writers to invoke children's right to education to

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* "Compulsory education" can also be understood as "compulsory schooling".

justify compulsory education for children. Bandman, for example, suggests that "The right to an education implies that everyone has to go to school."(1) Raz proposes that children's right to education can be compulsorily enforced not only over the duty-bearer(s) but also over the right-holders themselves. For he says: "A right to education grounds a duty to provide educational opportunities to each individual, whether he wishes it or not."(2) But why should children's right to education be the justifying ground for compulsory education? Is it not a paradox that "someone should be compelled to have something because he has a right to it?"(3) Haydon admits that this does appear to be paradoxical. But he argues that "If the attempted justification is . . . a fairly standard case of a paternalistic argument, the appearance of paradox *in itself* need not be troubling."(4) To be more specific, he suggests:

> If a case can anywhere be made out that a person should be compelled to have something because he has a right to it, it will be in instances in which the person has a right to the thing in virtue of its being a vital interest or necessity for him.(5)

From Haydon's statements, a clear picture can be obtained. That is: children's right to education supported by paternalism (or "a standard case of a paternalistic argument") can justify the enforcement of compulsory education.

Gutmann takes a similar line to that of Haydon.(6) Their reasoning can be construed as follows:

1>. Education is "a vital interest or necessity" for children. It is conducive to their future freedoms and welfare.
2>. Children have a right to education on account of the importance of education.
3>. Since children do not have the necessary capacity to exercise their right, or to waive it ("so that this right must be assumed as not waived"), hence adults are entitled to exercise the right for children even though they may interfere with children's liberty. After all, education is of supreme importance to children.

4>. As children's right to education is so essential to children this right cannot be denied. To deny children's right to education would contradict our received moral or political convictions.
5>. The inalienability of children's right to education implies not only that adults cannot deny this right but that children, the right-holders, are not entitled to waive or relinquish their own right. The right to education is so important that we cannot take the risk of letting children decide whether or not to exercise it for themselves.
6>. Given the above reasoning, children's right to education should be regarded as a mandatory right or a compulsory right. As such, it implies that children can be compelled to exercise their right and receive education. Thus, children's right to education can legitimately be rephrased as "children's right to compulsory education", or "children's mandatory right to education".

In addition to Haydon and Gutmann, Golding also holds the view that children's right to education is a mandatory right (in Golding's term, "welfare right"), by which compulsory education can be justified.(7) For him, the reason why children's right to education is mandatory is not just based on the conviction that this right is too essential for children to decide whether to exercise it. It is also, as rephrased by Feinberg, that children's right to education coincides with children's duty to receive education so that "there is no free play for 'discretion'".(8) This argument will be discussed in more detail later in the chapter.

There is another line of argument, indirectly suggested by Joel Feinberg(9), that can be used to justify compulsory education from children's right to education. In his essay Voluntary Euthanasia and the Inalienable Right to Life, Feinberg says:

> A mandatory right, after all, is a kind of duty looked at in a certain positive way. . . . Every duty trivially entails a liberty to do what duty requires. When it is vitally important and essentially advantageous not only to the community in general but to the moral agent himself that his duty be discharged, we are likely to guarantee

him, by the imposition of duties of noninterference on others, the opportunity to do his duty. Then the liberty trivially entailed by duty takes on the appearance of a claim-right against others. If the personal and social interest in the successful performance of the duty is great enough, opportunity to perform is guaranteed, opportunity to fail to perform is totally withdrawn, and, at this point, enforcible duty, treasured opportunity, and claim-right all coalesce into mandatory right.(10)

Following the line of reasoning suggested by Feinberg, an argument for compulsory education can be advanced as follows:

1>. It should firstly be confirmed that children have a welfare-right to education and that children's right to education is correlated with the duties of parents, adults without children and the state. (Arguments for these claims have been offered in Chapter Four). Parents, adults without children and the state have obligations concerning children's education.
2>. The obligations of parents, adults without children and the state in relation to children's right to education are essential not only for children but also for themselves and society as a whole. This can lead to the claim that the agents responsible for children's education should not have discretion on the question of whether they should fulfil their duties.
3>. As the duties concerned are so essential, parents, adults without children and the state should be given opportunities (or liberties) to fulfil their duties.
4>. The granted opportunities (or liberties) to fulfil the duties mentioned may give rise to the recognition that parents, adults without children and the state have claim-rights against others (or against one other). The claim-rights they have imply either that other people (or institutions) should not interfere with their rights to fulfil their duties or that other people (or institutions) should provide some services in helping them to fulfil their duties.
5>. Children have a duty corresponding to the claim-rights of parents, adults without children and the state in fulfilling their duties concerning children's education, and this duty is a duty to receive education. For if children do not have this duty, the responsible agents for children's

education may not be able to fulfil their duties concerning education.
6>. Children should be compelled to receive education, or children should be compelled to exercise their right to education, based on the fact that they have a duty to receive education.

If the line of reasoning above is correctly conducted then we can claim that the justification of compulsory education can be generated from children's right to education. In other words, compulsory education is justified on the basis of children's right to education.

Given the above account, it can be said that there are three lines of reasoning for suggesting that children's right to education implies compulsory education for the right-holders, that is for children. First, the requirement that children should be compelled to receive education is justified from the view that the duty-bearers of children's right to education have claim-rights against children in enforcing them to receive education. Secondly, as children's right to education goes hand in hand with children's obligation to receive education this right becomes mandatory, which indicates that the right-holders can be forced to exercise their right. Thirdly, it is for the sake of children's future freedoms and welfare that children's right to education must be enforced. These three lines of reasoning sound reasonable, but they are problematic in one way or another. The reasoning inspired by Feinberg's statement can be tackled first.

The argument based on Feinberg's idea can proceed acceptably without qualms from stages 1 to 4. It is quite reasonable to say that the agents responsible for children's education should be granted claim-rights (or liberties, or opportunities) to fulfil their duties concerning children's education. But the problem is on the question of whether their claim-rights to fulfil their duties concerning children's education can extend to insisting that they are entitled to children's positive cooperation, namely, receiving education. It can be suggested that children should not have an obligation to receive education corresponding to the responsible agents' claim-rights to fulfil their duties concerning children's education. The fact that the

responsible agents have claim-rights to fulfil their duties concerning children's education only suggests that the responsible agents are entitled to ask help (or forbearance) from others, or from each other, so that they can provide a satisfactory education for children. For example, the state is entitled to tax its citizens so that there will be revenues for funding education; or parents are entitled to ask the state's help in providing necessary facilities for children's education. The claim-rights concerned, however, should not go so far as to include a claim-right to compel children to receive education. The duties of the responsible agents corresponding to children's right to education should be duties of providing a satisfactory and competent education for children. Children should be compelled to receive education but the reason for it should be based on either paternalism or children's duty to prevent harm to others, rather than on children's duty in relation to the claim-rights of parents, adults without children and the state to fulfil their duties concerning children's education.

A parallel argument can be given here to make the point clearer.

1›. In a modern democratic society, given normal circumstances, people who have reached adulthood can, and should, have a right to vote.
2›. In relation to adults' right to vote the state has a duty to realize adults' right to vote, for example, the state is obligated to make some provision so that adults can exercise their right to vote.
3›. The state's duty concerning adults' right to vote is essential for adults, society as a whole, and the state itself. As it is so essential, the state should be given claim-rights (or liberties, or opportunities) to fulfil its duty concerning adults' right to vote.
4›. The state's claim-rights imply the state's entitlement in enforcing adults to vote. Corresponding to the state's right, adults have a duty to vote. If this is not the case, the state's duty concerning adults' right to vote will not be fulfilled.
5›. Adults should be compelled to vote on the grounds that they have a duty in relation to the state's claim-rights to fulfil its duty concerning adults' right to vote.

Presumably, the reasoning above is similarly structured to the previous argument. But it is easier to spot possible flaws embedded in the present case. Notably, the state's claim-rights to fulfil its duty in realizing adults' right to vote only imply that the state is entitled to make necessary provision so that adults can exercise their right to vote, or that the state has the right to tax it citizens so that the state is able to set up and maintain the whole voting mechanism, or that the state can ask adults to register so that it can conduct general or local election. It is, however, dubious to suggest that the state's claim-rights to fulfil its duty concerning adults' right to vote should give it the power to compel adults to vote. In some democratic societies adults can indeed be compelled to vote by the state, and the reason for it, presumably, is based on adults' duty to vote. But it can be suggested that adults' duty to vote is grounded on their membership of society or their duty to prevent harm, rather than their duty correlated with the state's claim-rights to fulfil its duty concerning adults' right to vote.

Against the account given above, it can be contended that the two cases mentioned are actually not parallel. The subjects concerned in the latter case are adults; in the former case, children. It may be true that adults' right to vote does not lead to adults' duty to vote, but there is no reason why children's right to education cannot lead to children's duty to receive education and, hence, the imposition of compulsory education. This contention has a point. It might be the case that the claim-rights of parents, adults without children and the state to fulfil their duties concerning children's education include the right to compel children to receive education. But if we bear the case of adults' right to vote in mind then we can see that it is not **logically** so. The claim-rights of the responsible agents concerned do´not **necessarily** include the right to compel children to receive education. This implies that the enforcement of compulsory education does not have to, in this context, be justified by the fact that children have a welfare-right to education. In response to this rejoinder, it can, however, be argued that the fact that the claim-rights concerned do not necessarily contain the right to compel children to receive

education does not imply that the claim-rights concerned **cannot** include the right to compel children to receive education. Whether the right to compel children to receive education is included in the claim-rights concerned is contingent upon deliberations of the agents responsible for children's education, taking all relevant conditions into consideration. It has to be admitted that this point is reasonable. Whether the claim-rights concerned should include the right to compel children to receive education should be an issue open to contest. It can, nevertheless, be suggested that even if parents, adults without children and the state do have claim-rights - based on their duties concerning children's right to education - to compel children to receive education, this reason for compelling children to receive education is fairly weak. The justification of compulsory education is better served by arguing that it is on the ground of paternalistic consideration and children's obligation to prevent harm to others. Is it not awkward to say that compulsory education is justified by the fact that children have duty to receive education, which is correlated with the responsible agents' claim-rights to fulfil their duties concerning children's education? The argument developed from Feinberg's statement may constitute a justification for the imposition of compulsory education, but it is not a good justification. It is contentious and weak.

We now turn to the argument suggested by Golding. For Golding - at least as interpreted by Feinberg - one of the reasons for the imposition of compulsory education is that children have a mandatory right to receive education, and children's mandatory right to education results from the coincidence, or combination, of children's right to education and children's duty to receive education. Each of them plays an equal part in the shaping of children's mandatory right to education. This line of reasoning is problematic in its account of the formation of a mandatory right or compulsory right. What we can learn from Feinberg's statement quoted above is that the idea of a mandatory (compulsory) right can actually be based on duty. Following Feinberg's reasoning, it can be suggested that the reason why children have a mandatory (compulsory) right to education is because they have a duty to receive education. Children's duty to receive

education is so essential to the extent that they must have a claim-right to fulfil their duty. And this claim-right and children's duty to receive education eventually coalesce into children's mandatory (compulsory) right to education. Therefore, strictly speaking, a mandatory (compulsory) right in Feinberg's scheme is duties-based.

The argument developed from Feinberg's statement (pp. 257-258), although problematic, can nevertheless be used to indicate another possible source of a mandatory (compulsory) right. In that argument, children have a duty to receive education, which results from its correlation with the claim-rights of other agents. However, other agents' claim-rights correlated with children's duty to receive education are generated from their duties concerning children's education, which are based on children's right to education. Given this account, children's mandatory (compulsory) right to education is also a coalescence of children's right to education and children's duty to receive education. But the formation of a mandatory (compulsory) right in this argument is different from the one in Feinberg's scheme. Children's mandatory (compulsory) right to education in this context is rights-based.

Apart from the two possible sources of the formation of a mandatory (compulsory) right mentioned above, the reasoning of Gutmann and Haydon also suggests a possible source of a mandatory (compulsory) right. To put it simply, the formation of children's mandatory (compulsory) right to education is simply based on the fact that it is in the interests of children that they must exercise their right to education. In this context, the source of children's mandatory (compulsory) right is based on paternalistic considerations; it is nether duties-based nor rights-based.

The point being made concerning Golding's account of the formation of children's mandatory (compulsory) right to education is that their mandatory (compulsory) right to education can be duties-based, rights-based, or paternalism-based. It is hardly convincing to argue that the basis of children's mandatory (compulsory) right to education is the coincidence,

or combination, of children's duty to receive education and children's right to education. Children's mandatory (compulsory) right to education can, arguably, be formed separately from children's right to education and children's duty to receive education, not the coincidence or combination of both. The basis of the combination of children's duty to receive education and children's right to education is either rights-based or duties-based.

We now can tackle the paternalism argument suggested by Gutmann and Haydon. It will be recalled that this line of argument suggests that the imposition of compulsory education can be developed from children's right to education which in turn is based on paternalism. In comparison with the arguments suggested by Feinberg and Golding, the reasoning of Gutmann and Haydon is much more plausible. But it is not entirely free from problems. Specifically, it can be argued that they do not make clear what the foundation of paternalism is. Generally, it can be assumed that paternalism is a natural manifestation of human benevolence.(11) That is to say, the reason why we consider education as an essential good for children is that we are sympathetic towards children. We are concerned about their needs and well-being because we know if we were put in their position we would hope our needs and well-being would also be looked after properly. If this account concerning paternalism is sound then the proposition that education is an essential good for children can develop into two separate but compatible types of claim. First, it can be claimed that since education is so essential for children it is then necessary to establish the idea of children's right to education, so that we can be sure that children's education will be taken seriously and that education will be properly provided for them. This claim obviously places the ground of children's right to education on the proposition that education is an essential good for children. The purpose of this claim, however, is to prescribe that duty-bearers of children's right to education have responsibilities to make educational provision for children; if they fail to fulfil their duties they can be subject to sanctions. In short, this claim demands that children's education should be guaranteed. It will be recalled that part two of Chapter Four was principally aimed at demonstrating the acceptability and

necessity of this claim.

The proposition that education is an essential good for children, however, can develop into another type of claim. It can be claimed that, considering the importance of education for children's future freedoms and welfare and the fact that children are not capable of deciding whether to receive education or not, it is acceptable and sensible, in the interests of children, to compel them to receive education as long as the education concerned can effectively achieve its aim. In this claim, the justification of compulsory education is also based upon the proposition that education is an essential good for children, but the purpose of this claim is rather different from the previous one. This claim is aimed at regulating what children should do given the consideration that education is essential for them. And, most significantly, rights-talk does not have to play a role in this claim. We can bypass the ideas of children's right as well as children's right to education and argue that compulsory education is acceptable given paternalistic considerations. (We can imagine that compulsory education is justifiable on the ground of paternalism given a society in which children do not have rights.). It should also be noted that part of Chapter Five has demonstrated the plausibility of this type of claim.

The reason why the proposition, "Education is an essential good for children", can develop separately into two types of claim - one of which involves rights-talk and the other not - is mainly that these two types of claim have different considerations. The first claim is concerned with what **duty-bearers** should do in respect of children's right to education which is grounded on the importance of education for children. The second claim concerns what **children** should do given the premise that education is an essential good for them. These two types of claim refer to different undertakings, and the reasoning involved is also different. In short, what has been demonstrated about the argument of Gutmann and Haydon is that the justification of compulsory education is not **necessarily** grounded on children's right to education or children's rights in general.

Responding to this criticism, Gutmann and Haydon might argue that there is no significant reason why the two types of claim advanced separately from the premise, "Education is an essential good for children", cannot be fused into one single line of argument. The line of argument rephrased on pp. 255-256 has clearly shown both that children should be compelled to receive education and that the responsible agents for children's education should fulfil their duties towards children can be reasoned from the statement, "Children's right to education is inalienable", or "Children's right to education should not be denied". And the statement, "Children's right to education is inalienable", can in turn be based upon the premise "Education is an essential good for children."

It seems difficult to arbitrate in the dispute concerning which line of reasoning is more persuasive. Both of them have some merits. However, instead of taking sides between these two lines of arguments it is possible to advance an argument that can synthesize the two. What we can do is to modify Gutmann and Haydon's argument in the light of the criticisms of it. Most importantly, it can be argued that the foundation of paternalism does not have to be benevolence-based, it can be rights-based. It was argued in Chapter Three that children should have rights. What goes with this recognition is that children should be treated as independent individuals and their interests should be considered in their own right with a view to maintaining satisfactory relationships between children and other parties, such as parents and the state. Given the acceptance of the idea of children's rights and its possible implications, the reason why we regard education as an essential good for children and earnestly impose it on them, therefore, is not because we are driven by our benevolent sentiments but because we are constrained to recognize children's rights. It is not intended here to exclude the important role benevolence plays in the justification of children's rights, and hence its connection with paternalism. What should be emphasized is that given the acceptance of children's rights the connection between benevolence and paternalistic considerations concerning children's education can now be intermediated through rights-talk. So if it is asked: why should, or do, we consider

education as an essential good for children? We then can answer: it is because we accept that children have rights and their rights require us to respect them as independent individuals as well as their well-being; and because education, in the context of modern world, is essential for children for understanding and devising their life-plans, and acquiring necessary means to realize those life-plans, so we will naturally reckon education as an essential good for children. Generally, this answer is formulated from the arguments developed in Chapters Three and Four.

The proposition "Education is a vital interest or necessity for children" in Gutmann and Haydon's line of reasoning can now be preceded by the statement "Children have rights". Given this addition, the paternalistic argument for compulsory education, which originally can be developed from the idea that education is an essential good for children bypassing rights-talk (as shown on p. 264), can now be taken as rights-based. We are now in a better position to suggest that the idea of children's right can provide solid ground on which a justification of the imposition of compulsory education can be advanced. But, how about the idea of children's right to education? Is it redundant in the transition from the idea of children's rights to the justification of compulsory education? It seems not. For the idea of children's right to education is a natural development from the recognition that education is an essential good for children. This is the case at least for a society in which rights-talk is closely, but not exclusively, associated with individual interests. It is in this context that the idea of children's right to education can have a place in the undertaking of justifying compulsory education from the idea of children's rights.

We now can arrange an argument for compulsory education in terms of children's rights as follows:

1>. Children have rights. Children's rights require other agents to respect children as independent individuals like adults. The idea of children's rights implies that reciprocally satisfactory relationships between children and other agents should be maintained.

2›. Education is a vital interest for children. Without proper education, children will be harmed. Education is a constituent element of satisfactory relations between children and other agents.

3›. Children have a right to education because education is essential for them and for satisfactory relations between children and others.

4›. In relation to children's right to education, adults and the state have obligations to provide education for children.

5›. Most children are incapable of exercising their right to education, hence their right to education is exercised on their behalf by their representatives. It can be imagined that some children are unaware of the importance of education and they might demand that they themselves should decide whether they should receive education. However, considering children's states of mind and the fact that education is too important for them to decide whether they should receive it or not, their representatives are entitled to exercise their right to education against their desires or wishes.

6›. As children must exercise their right to education, they have no alternative but to receive education.

Roughly, the line of argument above is an argument synthesizing the language of rights and the paternalistic justification for compulsory education (as demonstrated in Chapter Five). It can be counted as another argument, albeit closely related to the paternalistic argument, for the enforcement of compulsory education.

There are some important implications for theories of rights if this line of reasoning, a modified version of Gutmann and Haydon's reasoning, is accepted. Two points are worth mentioning.

The first concerns the characteristic of rights-talk. If we accept the reasoning that we should compel children to receive education because children have a right to education then we should refute the claim that rights-talk does not prescribe what the right-holder should do. For some writers, rights-talk only regulates the undertaking of the duty-bearer(s), it

does not prescribe the undertaking of the right-holder. In other words, for those writers, rights-talk is not self-addressed or self-referring.(12) If the point that rights-talk is not self-referring is accepted, then the claim, "Children should be compelled to receive education", cannot be grounded on children's rights or children's right to education. For the claims of children's rights and children's right to education only prescribe or proscribe what duty-bearers should do or omit; they do not regulate what the right-holders should do. However, as we have already accepted the argument that children's right to education is a justifying ground for the imposition of compulsory education, we have to reject the claim that rights-talk is not self-referring.

The second point concerns theories of rights. It was pointed out in Chapter One that there are two traditions interpreting the concept of rights in two different ways. One is the option-rights tradition in which the right-holder has choice over his own and the duty-bearer's actions. The other is the welfare-rights tradition in which the right-holder can have entitlement to goods even though he has no control.(13) It should be recalled that the initial stance of this thesis was neutral on the contest between these two traditions of the theories of rights.(14) However, if we advocate the modified version of Gutmann and Haydon's argument then the initial neutral stance over the theories of rights can hardly be maintained. For the view that children can and should be compelled to receive education to which they have a right can only be made and advocated in the welfare-rights tradition. Thus, given the fact that we have accepted the view that children can have no say over their right to education the option-rights tradition should then be rejected.

NOTES:

1. B. Bandman, Some Legal, Moral and Intellectual Rights of Children, Educational Theory, vol. 27, no. 3, 1977, pp. 175-176.
2. J. Raz, On the Nature of Rights, Mind, XCIII, 1984, p.199.
3. G. Haydon,The 'Right to Education' and Compulsory Schooling, Educational Philosophy and Theory, vol. 9, no. 1, p. 1.
4. Ibid., p. 2.
5. Ibid., pp. 2-3.
6. See A. Gutmann, Children, Paternalism, and Education: A Liberal Argument, Philosophy and Public Affairs, vol. 9, no. 4, 1980, pp. 338-358.
7. See M.P. Golding, Towards a Theory of Human Rights, The Monist, vol. 52, 1968, pp. 521-549.
8. See J. Feinberg, Voluntary Euthanasia and the Inalienable Right to Life, in J. Feinberg, Rights, Justice, and The Bounds of Liberty, Princeton: Princeton University Press, 1980, p. 233.
9. I have to thank Mr A. Lockyer for giving me the idea that it is possible to develop Feinberg's position into a justification of compulsory education based on children's right to education.
10. J. Feinberg, op. cit., p. 235.
11. D. Lyons, Ethics and the Rule of Law, Cambridge: Cambridge University Press,1984, p.172.
12. The point that rights-talk is not self-addressed can be supported by Miller's and Lamont's statements. Miller suggests: "Plainly, the paradigm case of a right being used is where the individual who has the right knows that he has it and acts upon it, while other people recognize his right and adjust their behaviour accordingly (by performing their obligation, not imposing obligations on the right-holder, etc., according to the nature of the right)." See D. Miller, Social Justice, Oxford: Clarendon Press, 1976, p. 71. In the discussion of "legal rights", Lamont states, "The existence of a right belonging to A involves no legal demands upon A. The demands all fall upon B, C, D, E, &c. If A wishes to

do something falling within the bounds of his right, then he may do so; and B, C, D, and E, &c., are commanded to refrain from interference, or perhaps positively to render assistance." See W.D. Lamont, Principles of Moral Judgement, Oxford: Clarendon Press, 1946, p. 71.

13. See Chapter One, pp. 9-10.
14. See Chapter One, p. 43.

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