

Who has the power to claim children's rights?

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It is generally accepted that children do have rights. The International Community has long accepted this concept, as affirmed by the unanimous adoption of the United Nations Convention on the Rights of the Child in 1989. Despite this official recognition of children's rights, problems arise with the claim of these rights. A two-year-old child cannot claim any right. The problem here is, who is going to exercise/claim these rights: the parents, the state or the child him/herself? Before discussing the claiming of children's rights, I shall explain in brief, why children are denied the status of right holder.

For a long time, children have been considered biologically incapable of protecting themselves and mentally too immature to make decisions for themselves. It is noted in the late nineteenth century that 'children before years of discretion were classified with the adjudged lunatic because they do not possess the faculty of forming a judgement on their own interests'. Therefore, presumed by law to lack the capacity of adults, children are denied full participation in the political, legal and social processes. The incapacity, relative helplessness and lack of autonomy of children renders them in need of special protection from the larger community. 'The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws ...'. This immediate authority is on the parents of the child, therefore, the responsibility for protection was given to the parents.

• Almost all legal systems give power to control the lives of children to their parents and other legal adults, though the extent of the power differs from time to time and place to place. Children are placed under the authority of the parents on the basis that as Aristotle said: 'Parental rule is superior because it is based on the personal wisdom of the parents and because it is guided by love.' Unfortunately, that is not always the case. In ancient Roman law, the father had absolute power over his child's life and death, on the principle that 'he who gave has also the power of taking away'. The extent of paternal authority was somewhat similar until the beginning of this century, when Washington State Supreme Court threw out a suit by a girl against her father, who had raped her. The court's ground: 'The rule of law prohibiting suits between the parent and child' is based on the interest that society has in preserving harmony in the domestic relations.

tal authority may be abused. Therefore, law has to protect the child, not only from other dangers, but also from parental exploitation, while having regard to the family privacy. In such cases, law has to protect the best interest of the child.

Parental power is thought to be plenary, prevailing over the claims of the state, other outsiders and the children themselves, unless there is some compelling justification for interference. Such compelling justification is neglect or abuse of their children. In such cases, it is very clear that the state has to interfere and protect the child from his parents or any other legal guardian. One cannot allow the parents to treat children merely as their property. Children may be too young to say anything, and even if they are not, their opinions may be coloured by ignorance or parental influence.

The problem arises, when a child may directly or through the concept of 'best interest', oppose a parental viewpoint. It is possible that the parents oppose the participation of their child in a certain type of activity for some reason, whereas the child, out of curiosity, wants to participate.

In the field of education, it is held that the child is taught in accordance with the wishes of its parents. Whereas the state has a duty in the wider public interest and in the process of aiding social reproduction to ensure that education is provided to all children, it is generally considered that the parents have the right to determine the course of their children's education. This view is also asserted by the international community in various documents. International documents and courts have given the right of children's education to their parents or legal guardian.

Article 18(4) of the International Covenant on Civil and Political Rights states that, 'The States Parties to the present Covenant undertake to have respect for the liberty of the parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

Other documents, the Inter-American Convention on Human Rights, Article 12(4) and the European Convention on Human Rights Protocol 1 Article 2, all ensure children's right of education as decided by their parents. This means that children's right of education is not a children's right, but a parent's right. Same is the situation in the National Law of Pakistan. According to Section 24 of the Guardian and Wards Act, 1890: "A guardian of the Person of a ward is charged with the custody of the ward and must look to the support, health and education, and such other matters as the law to which the ward is subject requires." Unfortunately, the European Court and Commission of Human Rights have also asserted this phenomenon in a number of cases. The Court relates the education of the child to its cus-

This absolute power was given because of the difference between children and adults. The view was that children, being powerless, cannot claim rights and cannot decide what is good for them. In legal terms, as indicated above, the identifying feature of a right is that it embodies a claim which inevitably imposes a duty on another person. Since children cannot perform the correlative or corresponding duty, it has been held that they do not have rights. It was for these reasons that children were denied the status of right holder. Unfortunately, this was the case until recently and courts in number of countries have upheld this absolute power of the parents.

There is no single characteristic which signifies adulthood. Different demarcations based on age, behaviour, indication of mental status and others are made to define adulthood, which also defines the relationship of an individual with the larger community. As children mature, they begin to take decisions for themselves. Law also recognises that children come of age for different purposes at different times. The degree of autonomy given to children and the relative role of state and parents varies from society to society. In many places, a seventeen-year-old may be treated as an adult on charges of committing a violent crime, but the same could well be treated as a child for purposes of contractual relations and also for obtaining a driving licence. A six-year-old may not consent to her own medical care, but she may be forced to testify in the court against her parents. Even the age of adulthood (majority) in law varies from place to place. In one state, a sixteen-year-old person may be treated as an adult of full competence; in another, as a child. This contradiction in the legal treatment of the children shows that they have at least limited capacity as rights holders. The simple explanation of this is that law recognises that the growth of a child is a gradual developmental process, during which a child may have developed some competencies, but not all.

The application of minor status to all below a specific age (eighteen, according to the United Nations Convention on the Rights of the Child) contradicts the present practice of law in different states. Children are persons not only to be seen but also to be heard; law should treat them as persons of full capacity at all times and their point of view should be considered where they are capable of expressing an opinion. As mentioned above, law places children under the control of their parents, who have the authority to decide for the child. This authoritarian guidance for the child was justifiable only as a means of bringing them to the necessary point of maturity. From infancy to adulthood is an ever-changing process. In this gradual developmental process, children come of age for different purposes at different times. This means they have legal capacity to take certain actions and decisions. To that limited extent, they might be viewed as adults for some purposes and children for others.

As mentioned above, the child's growth is a gradual developmental process, during which children acquire the rational and emotional capacities for independence and start to determine the course of their lives. It is possible that the parents are not prepared to facilitate such growth of the child, which will result in a conflict. This may be because of the generally-accepted principle that the parents are the best judge. In the case of a very young child, who is unable to make any decision, parental guidance will facilitate their growth and is crucial not only for the child but also for society. But where the child is mature enough to have an opinion, this guidance may create problems for child growth. We have seen that, for long, the parents and other people in their relation with children have behaved in an authoritarian fashion. Therefore, it is possible that the parents' and children's interest come into conflict. Moreover, like all authority, paren-

to. In *Olsson v Sweden*, it was stated that 'the right to determine the mode of a child's education is an integral part of the right to custody and where the courts have removed a parent's right to custody, that parent no longer has the right to determine the child's education'. These cases interpret the right of children education as the right of the parents. The European Court has also defined children's education in terms of adults' endeavour to transmit their beliefs, culture and other values. In my opinion, the purpose of education is not only to transmit one's parents' beliefs or culture, but also to prepare a child for the responsibilities of adult life.

If the right of education is a children's right, then it should be enjoyed by children, and not by their parents. It is clear that permitting parental wishes to prevail might run counter to the principle of best interest of the child. The child should have the right to decide which education is in his or her best interest, if he or she is mature enough. It is necessary that such decision of the child should be respected and should override any parental claim.

As children are given under the control of the parents so as to protect them from danger, it follows that the parents have the authority to decide about the medical treatment of the child. It is the state's general duty to provide proper medical facilities for all its citizens. In almost all international instruments, such as International Covenant on Economic, Social and Cultural Rights Article 12 and the African Charter on Human and Peoples' Rights, Article 16(2), state parties are bound to provide necessary healthcare to all their subjects. The African Charter on the Rights and Welfare of the Child, Article 14, also list the mandatory measures to be taken by the member state, for the effective implementation of the healthcare of children. However, the parents have the power to decide the method of the treatment for their child.

Children are generally unable to give effective consent, and in order that they may receive the medical treatment they require, their parents are given the power to relieve doctors from the duty not to interfere with the child. This power of the parents is not clear. It should be remembered that the incapacity of the child is not absolute, so if a child is capable of giving consent to his or her treatment, such consent should be regarded.

According to John Eekelaar "adults" duties towards young children cannot be convincingly perceived as reflecting rights held by the children unless it can plausibly be assumed that, if fully informed of the relevant factors and of mature judgement, the children would want such duties to be exercised towards them". This means that parents' exercise of children's rights must benefit the child, not the parents, as it is the child's right which they are exercising. In other words parents act as agents of their children; they have the right of an agent and agent always works for the welfare of its principal.

A child has a right to receive an education of sufficient quality and duration that he or she has a range of choices that can be exercised during adulthood. He also has a right to receive medical treatment which is in his best interest. However, someone has to decide about these. This should be the parent, unless children are unable to make an informed judgement and provided always parents are acting in the best interest of the child. The parents act as agents for children who cannot exercise rights themselves and must, therefore, act in the interests of the true beneficiaries of the right. If the parents decide against the best interest of the child, then it is the state's duty to protect the child. When the child reaches the age of maturity, it should be the child who has the power to decide about his life.

The parents have a right so long as, and only so long as, children cannot take decisions for themselves.