The rights and wrongs of children's rights

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Abstract

This article covers ethical and legal issues on children's rights in South Africa, in which the constitution defines a child as a person below the age of 18 years. The rights of children are aimed at the provision of protection for children, because the voice of the child is often silent and, when so, the articulation of the right may come from others. Currently the ways in which the South African law decides what constitutes a child and what constitutes an adult is based on age distinction and has inherent inconsistencies. The authors argue that according rights to a child implies that a child is, in his- or herself, valuable. Yet, despite all safeguards, there is still extensive violence and abuse of children in South Africa.

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Introduction

The Constitution of the Republic of South Africa, No. 108 of 1996, is regarded as unmatched when compared to the constitutions of other countries, because it is a rights-based constitution.[1] In rights dialogue, there are three "generations" of rights. First-generation rights are political and civil. They are usually negative rights. Second-generation rights involve the government's socio-economic obligations. Frequently, these are positive rights. Third-generation rights are often referred to as "green" rights. They are exemplified by, for example, environmental considerations such as the right to a clean and healthy environment. All these categories of rights are incorporated in the South African Constitution. The end of apartheid meant that many South Africans were free for the first time. Being free meant, amongst other things, having constitutionally enshrined rights. South African citizens accepted their newly acquired rights with fervour and the rhetoric of rights became the lingua franca of the country.

South Africa's commitments to children

In the South African constitution, a child is defined as a person under the age of 18.[2] Section 28 of the Bill of Rights accords particular rights to the child:

- At all times, the "child's best interests" must remain the guiding principle to be applied in all situations in which children are involved;
- Every child has the right to basic nutrition, shelter, and basic health care, including social services;
- Every child has the right to be protected from maltreatment, neglect, abuse or degradation; and
- Every child has the right not to be detained (imprisoned), unless there is no possible alternative. [3]

The importance of children in South African society is evident by the post-apartheid government's implementation of many acts, laws, and ratifications of international conventions and charters designed to protect their rights. Some of the measures designed to defend and protect them are referred to here. Domestically, the National Programme of Action for Children, overseen by a national steering committee, was established in 1995. This particular programme was envisioned as the vehicle to ascertain that matters concerning children were placed within the circle of broader national development goals. Within development goals, the government introduced free-of-charge antenatal care and health care services for women and children five years of age and under. Other commitments to ensuring legal protection of the rights of the child are found in the Children's Act, No. 38 of 2005, and the Children's Amendment Act, No. 41 of 2007. Both of these acts serve to further align the rights of the child with the Constitution's Bill of Rights. These documents, for example, set out principles and rules for the care and protection of children; the rights and obligations of parents, guardians, and the

state; surrogacy; and the ages of child consent to medical and surgical treatment. Special considerations regarding children and their rights to the termination of pregnancy and to contraception are also included in the Children's Act.

Prior to the implementation of the Children's Act, corporal punishment was banned in 1996 in the Schools Act. In addition, the Domestic Violence Act of 1998 was structured to support the protection of the child from harm arising in the context of familial aggression. The 2002 Child Justice Bill awaits finalisation. Internationally, the South African government ratified the United Nations Convention on the Rights of the Child of 1989 (UNCRC) in 1995, as well as the African Charter on the Rights and Welfare of the Child in 2000. Such conventions, charters, laws, bills and acts to protect the rights of the child are further supported by civil society. The tireless efforts of numerous non-governmental organisations, religious institutions, and corporate and community educational and preventative initiatives and programmes all work towards the goal of protecting the rights of the child. All the correct words are there. In South Africa, the rhetoric of rights is commonplace. South African children are taught they have rights, and adults, having experienced "what it is now to be free", know they have rights.

Children's rights

The human rights movement as a universal framework for recognising the rights of individuals gradually gained momentum as a global movement during the latter part of the 20th century. Within this broad movement, the idea of children's rights also took hold.[4] The wave of realisation that individuals within particular groups were vulnerable to exploitation and injustice naturally included women and children. Through unpacking the hegemony of men's experience, women have pointed out that assumptions of assigned gender roles underlie much of their own rights debates, as well as children's. One of the reasons for this is that many societies assume that the only place a woman has is in a house, caring for children under the control of a patriarch. In this way of thinking and indeed, in many other ways, the women's rights movement in confronting such perceptions is inexorably linked to the wellbeing of children. However, it has become commonplace in the public sphere to consider women's and children's rights as separate atomistic units.[5,6]

Children's rights are aimed at the provision of protection for children. While the rights of women are inalterably linked to women, the rights of the child differ. This is mainly because the voice of the child is often silent and, when this is the case, the articulation of his or her rights must come from others. Such others may represent an assortment of individuals from within but also, commonly, outside the family or community. For example, doctors, teachers, and social workers are bound by moral obligation and law to protect the child from suspicion of or actual harm caused by abuse. In contemporary times, at least for the most part, that children should be protected from harm is accepted as a moral given. This has not always been the case, as the protection of children in the past has been viewed quite differently. For example, "patria potestas" is a Latin legal term that referred to the right a father had to execute his child. This law, in later Roman times, included exposing one's newborn infant, meaning turning the infant's face down to the elements, a practice reserved mainly for newborn girls. Such customs were common outside of Europe as well. Although not necessarily codified in law, such societal practices cause us to reflect on the ways in which children have been historically perceived. The role of the child in family structures, then, is quite different from contemporary society's view that promotes the idea that children have rights and are worthy of protection.

In all early traditions, codes, and laws, the role of children as members of family groups enmeshed in relationships was well recognised. However, to be enmeshed in familial relationships did not include considerations of the child in terms of, for example, his or her emotional ties, psychological development, bonds, etc. Rather, the social role of children was viewed as a means by which the interests of the family group could be expanded. This is similar to many societies today in that children were, and still are, married to increase relational ties with other family groups for power and fortune. For example, in 18th-century England a child, at least a male child, was viewed as a potential heir, the vehicle through which a family's land and property could be maintained and, hopefully, expanded.[7]

Common law in early England carried no statute that accorded children the protection of family support. Such matters, although recognised as social concerns, relied on parental morality to attend to their child's needs. As Blackstone writes: "... by begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as this lies, that the life they have bestowed shall be supported and preserved..."[8] So we see that some areas of life were left to common morality and others fell under the jurisdiction of the law. In contemporary times, the need for law to move into the arena of common morality may reflect other factors. Some of these are attributed to the postmodernist demise of the belief in grand ethical narratives, shifts in social organisation, and the secularisation of religious belief systems.[9]

Although reasons for the legalistic predominance of dialogue concerning human rights are complex, the movement for human rights (including individuals in vulnerable groups) is reinforced by legal-based systems.[10] This makes perfect sense if one is of the opinion that those who wantonly abuse children should be held accountable. However, an individual actually guilty of child abuse can escape his or her action on the basis of a legal technicality. Thus, children's rights discourse does not place the abuser in the same position as would, for example, an ethical analysis of a given case. This is because ethics is concerned with a moral judgment concerning the rightness or wrongness of an action and concurrent acceptance of responsibility. The law, however, is inexorably bound in ethics and morality. For example, child protection movements create a conceptual framework and a reference point with a defined content. This type of construction serves two purposes. First, it represents a source for normativity. Second, it affords open societal engagement in moral discussions concerning the acceptable and non-acceptable limits of actions perpetuated against children. Children's rights legislation is based on international consensus that children themselves deserve moral concern. The legal framework to provide implementation of this moral perspective involves the creation of legal norms for judgments concerning actions that are acceptable or unacceptable concerning children. In this way, the construction of legislation aimed at the protection of the child from harm may be viewed as a provisional end in the moral development of a society. The value of a child is not only codified in law, but is further communicated as a value to members of society.[11]

Concerning the rights of the child, both positive and negative rights are accorded to him or her. A child's positive right to food and shelter requires that someone claim these rights for them; that is, acts on their behalf. An example of a negative right is a child's right not to be abused, which entails the prohibition of others' abuse of him or her. Rights are, of course, justified claims to something: "X". When I make a justified claim to "X", in rights language this means that someone has an obligation to fulfil it. Because of the structure of the language of rights, we see that no right can exist without a correlation. The correlation of a right is commonly referred to as an obligation (duty or responsibility). Rights are also classified as "moral" and "legal".

Moral rights

Moral rights, such as the right to life, are rights that concern mainly human beings. Moral rights are considered intrinsic to being human. One view is that, as long as you are a human being, you are the holder of moral rights. But, if this were broadly applied, then it would necessarily be applied to human children. Since we know that rights and obligations are correlative, and that not all children have the capacity to make a claim, one can appreciate the ways in which positive and negative rights can serve to protect children. Linked to the idea of moral rights is the view that all competent adult human beings are moral agents.

If someone is a moral agent, then that individual can reason, form self-interested judgments, and bear the responsibility for his or her actions. Incompetent adults and children are not considered moral agents, at least from a protectionist perspective, because they are not capable of reason (they cannot formulate or follow moral principles or rules) and cannot deliberate. Rather, they are often referred to as "moral patients". As moral patients are vulnerable, so they are deserving of special protection from suffering by moral laws. Through the intercession of moral agents, moral patients can be protected. This protection is based on moral patients' inherent human dignity and their past or potential competency. Wherever or whenever a human being lives, moral rights can never be taken away. Moral rights are sometimes referred to as "human" or "universal" rights.

Legal rights

Although legal rights are grounded in moral tenets, they differ significantly from moral rights in that they are time and place dependent. As an example of time, we know there was a time when no labour laws existed for children. Concerning place, in South Africa children have a legal right to shelter, which differs from the situation in Malta or Bangladesh, for example. So the legal position of a child in one country may be quite different from that of a child in another. Rights-based arguments in general, even without the difficulties associated with children's rights, are problematic. For one reason, while legislation may exist and conventions or charters are ratified, if no moral agent or system (all systems are composed of moral agents) stands to claim the rights due to children, then no charter, law, or claim serves its purpose. Some argue that the very notion of children holding rights is a misconception. Another reason is that duties and obligations towards children are often constrained by economic and other factors. These duties and obligations may be considered by governments as socially or politically more expedient or simply unaffordable.

For example, a child's "right to health" is an aspirational notion that will remain an empty claim if there is no clarification of what that right actually entails.[12,13] Another

problem is that there is little space for articulation against the legalistic theoretical framework of "human rights" and "children's rights", inasmuch as to present a different approach may imply one is against human dignity.[14] Finally, dilemmas occur as rights may, and often do, conflict. In the context of children's rights, one of the sources of the problem concerns the relational dynamic between children, parents or caregivers and the state. The formulation of fundamental rights in terms of claims versus obligations (duties or responsibilities) tends to set adversarial positions that deny the complexities of human relationships.[15]

Rights-based arguments are inherently antagonistic, because often two individuals are set against each other. In the case of child abuse, the two parties may represent the child and the parent or the child and the state. In the former, this situation is further complicated because of the dependent relationship the child has with the parent.[13,16] In cases of the child and the state, competing legal principles must be balanced, such as the type of obligations the state holds and the legal rights of the child. Moreover, if the obligations imposed on others are absolute in law, then the risk is run that the rhetoric of rights will dissolve into general wants and desires as opposed to morally justifiable individual needs.

Child harm and the rights of a child

If we look at child abuse outside the concept of a rights-based entitlement approach, then it may take on a different dimension. From a different perspective, we can say that causing harm – pain and suffering – to children is morally unacceptable. In many child abuse cases, there is no need to evoke a claim of rights. Nor is there any need to conjure up analogies for its justification. Appeals to the rights of the child may serve to forego the fundamental idea that there exists a moral obligation on the part of all adults to protect children from harm. But we must unpack at least a few problems that arise in that statement.

Who is a child? Who is an adult? The current way in which the law decides this is based on age distinction and has inherent inconsistencies. For example, Part 3 129 (1) of the South African Children's Act grants girl-adults over the age of 12 the right to a termination of pregnancy.[17] Yet concurrently, the Child Justice Bill (B49-2002) notes that: "… between the ages of seven and fourteen, a child can be convicted of a crime but there is a rebuttable presumption that they did not know the difference between right and wrong. The prosecution bears the onus to provide that they did know the difference between right and wrong."[18] The comparison here is not meant to address the question of use in either instance of the moral absolutist terms of "right" and "wrong". Nor is it concerned with termination of pregnancy and a criminal act. The association simply identifies that the age-based classification as being an adult or a child and the applicability of the term "child" are shown as inconsistent within current law. These difficulties, though, point out the need for considering the reasons behind such age distinctions and to open debate with society about such juridical justifications.

Moving beyond public debates or inconsistencies in law, it must be recognised that, for children's rights to exist, it is fundamentally necessary for an age distinction to be made between children and adults. Of course, in the making of age distinctions, there are no guarantees that a child will not regret that some measure of control was not exercised by others concerning his or her immature choice; the burden involved in holding the right to make a mistake. Yet, without that line, no matter how fuzzy or debatable it is, the very notion of children holding or claiming rights would have no meaning.

A related general problem in thinking about child abuse is the notion of child harm. Here we consider whose idea of harm? How should it be best defined? We can agree that, for example, the cultural, economic, and felt experiences of children are not homogeneous. And we can admit that genes play an enormous role in child development, so the responses of an individual child to a particular harm may be enlightened by further developments in the field of genetics. We can also agree that a child is not an autonomous individual who exists separately from his or her family or society. Consensus can also be reached concerning the fact that the neuropsychological period in a child's growth in which damage occurs is critical to furthering our understanding of child harm. We can also admit that the concept of globalisation – here including ideas, technology, politics, the environment, as well as economics (for better or worse) – will influence ways in which societies conceive child harm. So another point to consider is that the concept of what even constitutes harm to children appears to be relativised by culture.[19]

Imagine society X, in which it is tradition to assign from birth a particular girl child to serve as the communal scapegoat for all members of that society. The girl child serves as a vessel into which all the aggressions and frustrations of individuals within that society are poured. So any amount, degree, or type of pain and suffering may be inflicted upon the child until her death. Then she is replaced by another, who will experience the same fate.

Surely, if we were to morally evaluate such a tradition, we would conclude that the social values of society X are degenerate. Harm is wilfully inflicted on a child by a social group. Yet, from the position of a cultural relativist, the claim is made that their tradition, conceived only as a tradition (without conception of harm), is an ancient one and they have a right to keep it flourishing. It is simply a part of their way of life, their culture.

How should we sort out the concept of harm in the context of children's rights? Should we not accept or at least tolerate the traditions of other societies? To believe that no universal laws or principles exist is one position often taken by cultural relativists. So the idea of children holding a universal right to be protected from harm is tossed away as an affront or an anomaly. At the same time, this position insists that a particular tradition be universally accepted or tolerated and be free from condemnation from others who are outside the particular culture. There is something illogical in that position.

For one reason, if the idea is accepted that no outsider may criticise traditions that result in harm to children, then the very nature of traditions, much less culture, is at the least ill conceived. Cultures and the traditions embedded in cultures are not static. It is the very nature of culture to change. Within cultures, traditions are handed down from one generation to another to be accepted, modified, or abandoned. The reassertion of "ancient" traditions within societies may actually represent shifts within a society of the power of a particular group who, for political or social reasons, set out their own agenda. For another reason, one cannot claim to universalise the idea that all traditions must be accepted or tolerated and, at the same time, reject the idea that there are no universalisable principles or rules, such as the rights of a child, to be protected from harm.

Whenever a tradition that entails harm to children is examined, a few essential questions should come to mind. In whose interest is it that a tradition is enabled? In other words, who is harmed? Who is helped? Who can speak? Who cannot? It is in the very nature of the idea of children's rights that moral and legal judgments are mandatory concerning any harm in any form; for example, alienation, malnutrition, oppression, brutality, or injustice inflicted on children in the name of tradition. An argument offering the idea of a sliding scale of harm; for example, what it constitutes and how it is measured, is also theoretically problematic.[20] Not because the notion of placing moral focus on our obligations to a child in pain and suffering is flawed, but because the neuropsychological period of child development in which the harm occurred would be critical when making such an assessment. This, in itself, will present problems.

It is interesting to note that the topic of children is and has been a concern of philosophers throughout history.[21-24] In contemporary times, discussions have not abated. Topics and perspectives are varied; for example, "Sex is over-rated: On the right to reproduce",[25] "Licensing Parents",[26] and the "Banality of Evil".[27-29] Such topics often include suggestions concerning ways in which societal problems can be articulated in terms of both ethics and the law. To meld ethical- and rights-based approaches to the problem of child abuse may involve the development of new paradigms.

Both ethics and the law share certain attributes. For example, they both include perspectives based upon the principle of justice. Both are normative; that is, moral and legal rules serve as direct action guides. However, can we accept that there still exist, at least generally, absolutes in law and ethics that can provide this direction?

The rapidly changing social circumstances in which we live, such as globalisation, environmental change, technological developments, global economic disparities of wealth, population shifts, and the rise in moral pluralism, all contribute in various ways to the postmodern moral unease. The structures of modernity that include the edifices of universalisable moral theories have been assaulted. Perhaps a way out can be found in rights-based laws. But then questions arise such as: Can the legalisation of a right be sufficient to make citizens act in accordance with a grounding moral tenet? In other words, can morality be legalised? This has never worked. The knowledge that legal norms need to be based upon the moral norms of a society makes it is unlikely that the law will be useful in that regard. Ethics is vital to the concept of rights-based law and rights-based law can be viewed as the embodiment of ethics. Neither can be reducible to the other. Perhaps, as is argued, an interactive paradigm between the law and ethics may provide some direction.[30]

Conclusion

Although, as shown, rights are problematic because moral obligations ought to exist prior to rights, the language of rights is powerful. Rights talk is forceful, whether the right in question, or even its existence, can be verified, or not. The point here has been to shed some light on the too common assumption that rights are *the* social panacea. Rather, as a way towards the achievement of social peace

and equilibrium, they are valuable, but they should not be overly relied upon as the solitary means to overcome social harms. The ascription of value and the study of value are part of moral philosophy's concern. How we ascribe value and to whom value is accorded are reflected in the changing ways children are valued in society. If we do not consider something as valuable, then it becomes an object of indifference. According rights to a child implies that a child is, in his- or herself, valuable. Yet, despite all safeguards, violence and abuse of children in South Africa remain extensive.[31-35] Societal values are at the core of the problem. All of us should act to make our society worthy of its children.

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