In Search of Philosophical Validity and Legality of Children’s Rights: The Analysis of Will Theory of Rights

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Abstract

The concept of process of recognition of human rights is century old phenomenon, but at the same time children and women have been deprived to be in the category of rights holders. The major problem with their deprivation has been named as “capacity to exercise”, that’s why they have not been put in the category of “capacity to hold” even. Many proponents of philosophy and human rights have argued in favor and against as well, that the children have rights or not, or they have limited rights that can be exercise through paternalism i.e. parents or guardian. This paper discusses one of the theories i.e. will theory of rights, debating over that whether children may have rights independently or not.

Keywords: Children Rights, Philosophical Basis, Will Theory, Choice Theory, Power, Capacity, Paternalism.

Introduction

will theory has roots long through the history, as the children throughout the history have been considered incompetent, but in 19th Century, Friedrich Carl Von Savigny, a prominent German jurist, first identified the will theory in the context of contract and property law, although earlier to him, Emmanuel Kant laid down the basis of Will theory (the major proponents of Will theory are, Immanuel Kant 1724 – 1804, Friedrich Carl von Savigny 1779 – 1861, Hans Kelsen 1881 – 1973, H. L. A. Hart 1907 – 1992, Carl Wellman and Hillel Steiner 1946).

 Talking about the substance and meanings of the Will theory, it is also called ‘The Choice Theory’ or ‘The Power Theory’ of rights. According to will theory, ‘for any person asserting the rights would have a choice as to when and whether to exercise them’. The ‘Capacity’ is the central axis of the will theory. This theory has its roots on the prerequisite that in order, for an
individual, to be recognized as a rights’ holder, he or she was to be capable of making and exercising choices (Haar K. et al., 2004).

The will theory was forwarded by H.L.A Hart and defended by the writers such as Carl Wellman, Montague (1980) and Steiner (1994). They argued that the purpose of the rights is, firstly, to grant the freedom to right-holder to control the duties that others owe to him, and secondly to foster and protect the individual autonomy. H.L.A Hart forwarded this idea in; “the individual who has the rights is a small-scale-sovereign (Hart H.L.A. 1982). Talking about rights, Hart holds that only those combinations of incidents, which give their holders some kind of powers and choices, can only be said rights and having no those powers and choices, means there do not exist rights, the base that excludes children from the category of right holders, having not those choices.

The will theorists hold that the right-holder should have control over rights; hence the compulsory and necessary condition to hold a right is, to have sufficient capacity and adequate competence to annul or waive those rights. But this conception deprives the non-autonomous human beings to hold rights, to whom at least some moral rights are necessarily attributed. Hillel Steiner says, “Fetuses, minors, the comatose, the mentally disabled… to say nothing of the members of virtually all known species, must lack all will theory rights”. (Edmunson, 2004)

The advocates of this theory say that all those who have the capacity for making the reasoned decisions, can enforce their wills, so they have rights. Thus, they expelled out the children from the sphere of right holders, as they (children) lacked the capacity for reasoned decision making. To claim a right, right holder must have capacity to exercise the choice. The capacity here connotes the reasoned decision making along with the power to either enforce or waive a choice and even leave it unforced. This concept of the rights provides a direct refusal for the rights of children due to their incapacities, as the majority of the children don’t have sufficient competence to make decisions, exercise choices and claim rights in all circumstances, meant there by that the children are not right holders (Kruger, 2006). If not at all, at least in the circumstances where the children are unable to make competent choices, they are excluded from the group of right holders.

Kate Federle has described the position of “capacity” in will theory to be right holder. She says:

“Having a right means having the power to command respect, to make claims and to have them heard. But if having a right is contingent upon some characteristics, like capacity, then holding the right becomes exclusive and exclusionary, thus only claims made by a particular group of (competent) beings, will be recognized. The confining effects of this kind of rights talk is apparent when the obverse is considered, claims made without the requisite characteristics of a right holder need not to be recognized, although specific claims which reinforce existing hierarchies may be acknowledged. There is historicity to the claims that rights for excluded
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groups evolve from paternalistic notions of the need to protect the weak and ignorant to recognition of capacity and autonomy, for this has been the experience of women and people of color. Children, have been unable to redefine themselves as a competent being; thus, powerful elites decide which, if any, of the claims made by the children they will recognize” (Federle, 1994).

There are numerous problems in this approach of rights. Fortin points out that “the assertion that children, who are too young and incompetent to claim rights, therefore have no rights; has an unattractive logic” (Fortin, 2009). For example, if this approach is applied to the disabled or mentally ill adults, the ‘unattractiveness’ of this approach would be more apparent and increased. This precludes that the parents, other adults and institutions of the society have correlative duties for the children, disabled or mentally retarded adults, who are not enough competent to make their own choices. This way, although indirect, an (incompetent) child may be given the recognition for his rights through the existence of such correlative duty on the adults of the society (Fortin, 2009).

This theory is criticized due to its over emphasizing character of the existence of the remedies. MacCormick forwarded that it is only because a child has a right to care and nurture that the legal imposition on adults or other institutions of the society, to provide such protection, is justified; the existence of the rights presupposes the remedy. This theory can’t provide satisfactory answers when parents or other institutions fail in their correlative duties to protect the children. And this happens often, as it is self-evident that the children have been the frequent victims of major threats either emotionally, physically or sexually even at home (Finkehor, 1979) by their own parents and other nears and dears especially the close family members and friends (MacCormick, 1982).

Hobbes, Locke and Mill’s Theories, Paternalism and Will Theory

In 17th Century, Hobbes argued that the children are protected because they can serve their fathers only (Federle, 1992). He saw the child-father relationship as a relationship of mutual benefit. He argues that the child and father relationship is based upon fear and the child is always in a position of extreme dependence to his father. He supports his argument by taking the help of social contract and says that all the rational citizens for their own protection (in person or in property) who do make a contract with the sovereign, in exchange of their protection, should always abide by and obey the orders of the sovereign authority, and because the children lack the capacity to conclude contracts with the other members of the society and don’t understand the obligations and consequences of these social contracts, that’s why the children neither have natural rights and nor in the term of social contract. Hobbes provides that the children have nothing except one option that to accept their parents (mostly the father) as sovereign and the fathers have all the powers over their children regarding their life and death (Kruger, 1992).
John Locke, after Hobbes, later in the same century, provided that the liberty and freedom to act according to one’s own free will, depends upon the reason. Locke states that the children are in a state of ‘irrationality and ignorance’, but he argues at the same time that the state of ignorance and irrationality is temporary and this stage comes to an end when children get the rational, so making the ways of reason and freedom for them to exert their own wills. He states that during this stage the children are under the temporary control of their parents, which can be cast off on their transition to adulthood. Likewise, Hobbes, Locke provides that this temporary state of inequality of parental control is in the interest of the children, but contrary to Hobbes, he declines the concept of absolute parental control over the children. He says that the children do have some natural rights, alike as adults have, which should be protected (Locke, 1689).

Jean Jacques Rousseau viewed the children as pure, yet corrupted by the society (Breen Claire, 2002). He holds that God creates and makes all the things ‘good’, but it is the man, who meddles with them and they become bad and evil (Breen Claire, 2002).

John Locke had convictions that the children are the property of God, not that of their parents’. He viewed the child as not good, nor bad ((Breen Claire, 2002). He believed that the children have natural rights which need to be protected (Locke, 1960). The children are meant to acquire their place in social and moral order as individual, and parents were under obligation to make their children capable to achieve the state of independence (Breen Claire, 2002). To achieve this stage of independence, the best way to produce national adults out of immature children, children need education (Breen Claire, 2002).

John Locke provided a ‘Fiduciary Model’ for the protection of children. According to this model, the parents are the ‘trustees’ of their children. Parents have the duty and obligation to make developed the rationality and capacities to the best extent and bodily well-being of the child. It entails the dismissal of trusteeship in case of parental failure in this trust. In Locke’s words:

“From [Adam] the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding. But to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents, were by the law of nature under an obligation to preserve, nourish, and educate the children they had begotten, not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them” (Locke et al. 1993).

God creates children, that’s why He owns them, and gives them to the parents in a trust. And the parents are obliged to protect, nourish, preserve and educate the children, God has gifted them (Sorens, 2001). Shapiro endorses the Locke’s ‘trusteeship or fiduciary model’, but wished
to give it secular foundation. He is of the opinion that, state might be the fellow trustee along with the parents, not the settler (initiator) of the trust (Shapiro, 1999).

The state should not be considered philosophically their rightful protector *ipso facto* because the state doesn’t own children after all. Rather we should think about the hypothetical future person in which a child will grow to settle the relationship i.e., the person for whose welfare and interest the relationship of trust is to be conducted. where and whom the parents owe their obligations in this trust relationship and to whom do the children owe their obligations? Suppose that, if every right corresponds and corelates a duty/obligation then it appears that the parents’ right to exercise paternalistic power over their children entails an obligation on the part of the children to their parents, and children’s rights seem to entail an obligation on the part of the parents to their children. However, the questions here is, do the children really owe obligations to their parents? Shapiro is of the opinion that parental benefits to children cannot be the basis for children’s obligations, since children cannot be said to have consented to accept these benefits, nor even to being born. Locke’s interpreter A. John Simmons attacks the view that children have any general obligation to obey their parents, on the grounds that parental obligations are superseded by natural law (Simmon, 1992).

John Stuart Mill, later in 19th Century, provided a dissimilar concept of paternalism to his predecessors. Mill’s libertarian persuasion does not extend his thinking about the children. Mill’s principle of individual liberty states ‘an individual can’t be rightfully compelled to do or forbear because in the opinions of others to do so would not be wise or even right’.

In “On Liberty” Mills portraits the nature, scope and limits of the power that the parents in particular or society in general can exercise legitimately over the individual. He says that it may be acceptable for anyone to harm him/herself to the extent; he/she doesn’t harm others. He adds that as no one can live in isolation or independent of this world, that’s why harms done to oneself or one’s property may also harm others and may deprive the other community as well along with oneself, making it legitimate to prevent them to make harm to themselves or destroying their property. According to Mill, thus the children along with other peoples having not sufficient and intelligent will for ‘self-government’ can be guided or controlled for the sake of community at large (Mill, 2006).

Mill while taking on liberty and capacity says, “That 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 right fully exercised over any member of a civilized community, against his will, is to prevent harm to others. 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” (Mill, 2006).
His thoughts demonstrate that he wants the absolute power of society rather than parents over the children. That makes it, in my view, no liberation inside family and in society too for the children and makes contradictions with political obligations as well. He states that his doctrine of ‘ultimate value of personal choice’ doesn’t extend to the children. And as the children are incapacitated to decide what is in their own interest and in society’s interest, the paternalism is acceptable and the parents must act on the behalf of children (Kruger, 2009). Recently, Gewirth also took traditional account of rights to have some capacity to be rights holder. For example, he says, “it is possible and indeed logically necessary to infer, from the fact that certain objects are the proximate necessary conditions of human action that all rational agents logically must hold or claim, at least implicitly, that they have rights to such objects”. (Raz, 2007)

Dworkin, Shifrin and Martin Binder’s Views over Paternalism, Will Theory and Children’s Rights

Dworkin is of the opinion that everyone has the choice and will to do anything, what does he pleases to do, but this liberty is not absolute. Commenting on the Mill’s theory, he says that, his principle is neither “one” and nor “very simple”. He says that there are two principles i.e. the first one asserts that the self-protection or the prevention of harm to others may be variably a sufficient warrant. The second principle lying in his theory is that the individuals own good is never a sufficient warrant for the exercise of compulsion, either by the individual members or society as a whole (Dworkin, 1972). In the cases of children, Dworkin says that the paternalism can be justified on two grounds, i.e.:

1. Firstly, where it is intended to protect anyone against the irrational propensities, ignorance, deficiencies of emotional and cognitive capacity, either avoidable or unavoidable.

2. Secondly, paternalism is justified where the decisions of the person are potentially dangerous, far reaching and irreversible.

In the words of Dworkin, paternalism is ‘interference with a person’s liberty of an action justified by reasons referring exclusively to the welfare, happiness, good, interests, needs or values of the person being coerced. And the group of individuals whose interests are involved is not necessarily identical with the group of individuals whose freedom is restricted (Dworkin, 1971). Dworkin’s paternalism lies in two values i.e. freedom and benevolence. His paternalism involves “interference with a person’s liberty of action” in other way “coercion”.

On the other hand, Seena V. Shiffrin argues for individual’s will and liberty but holds at the same time that paternalism is justified under the auspices of ‘accommodation’ and ‘unconscionability doctrines’. The liberal and egalitarians favor the doctrine of unconscionability, as a way to resist inequitable contracts, which burden the weak and poor. However, this principle is criticized, due to its paternalistic nature, because it unknots a free and
voluntary contact among responsible agents, only due to the reason that the terms enforce too harsh a bargain against one party. She argues that paternalism neither necessarily violates one’s autonomy nor does it interfere in one’s liberty. She forwards that the paternalistic behaviors are not always contrary to the children’s desires but even some paternalistic behaviors and actions are freedom enhancing (Shifrin, 2006).

However, Martin Binder provides another type i.e. soft paternalism, otherwise called “Autonomy-enhancing paternalism”. This approach, if applied to children, seeks to increase his/her wellbeing by facilitating his/her ability to make critically reflected autonomous decisions. The focal point of this approach is to help individual to become decision makers, rather than to help them in making better decisions. This approach can be defended both on welfare and liberal considerations. Autonomy enhancing paternalism decreases the probability of future paternalistic interventions (Binder et al. 2015), as the individuals get the ability to make their own decisions for their affairs.

Worsfold’s Concept of Paternalism, Will Theory and Child Rights

Hobbes, Locke and Mill are the propagators of paternalism in this or that way. In 20th century Worsfold criticized their concepts of strict paternalism and held their attitude as “negative” although coherent, towards children (Don, 2001). He makes emphasis for the ‘benevolence’ towards the children rather than strict paternalism. He says that a child is not an object to be molded according to the adult’s choices and perceptions, as the earlier three hold. He criticized the three philosophers as they neither accorded the children’s rights nor even for their interests, nor considered children seriously in the perspective of children themselves (Kruger, 2006). Worsfold’s approach is less radical and has taken utilitarian perspective. He believes that once a child is held to be right-holder, the child must be responsible for the consequences of his/her actions. He subscribes his approach to the Rawls’ theory of interconnection between autonomy and rights (Auley, 2001).

Worsfold enumerates three justifying fundamental features of the child rights, firstly identified by Cranston Maurice for the justification of general individual human rights. He further argues that his three criteria are best met within John Rawls’ theory of justice that although having paternalistic approach, proposes a more adequate framework for securing children’s rights to fair treatment (Worsfold, 1974). The criteria of Worsfold’s theory are:

1. First the children rights must be practicable, meaning thereby that these rights should be theoretically possible and acceptable in the given society.

2. Secondly, these rights must be genuinely universal, meant to say that appropriate for all children everywhere. This characteristic may create some misunderstandings about its implications regarding the children of different age groups. For example, someone may argue that the pre-school children should not have rights while the adolescents, who have some capacity, should have, or at least the pre-school and adolescents should not
have the same rights. He included this characteristic for a generally applicable philosophical doctrine of capacity, rather to a particular domain where the rights can be exercised by the children themselves. This differentiation is analogous to the distinction between capacity and the exercising of specific rights, as all the persons (adults) don’t enjoy the same legal rights but they all are presumed to have same capacity to be right holder as in French case the capacité de jouissance and capacité d’exercice.

3. Lastly, the children’s rights should be of paramount importance. All the other considerations can be overridden when the children are accorded with the fair treatment as a right.

Farson (1974) on the other hand reject the Worsfold’s perspective of utilitarian, but argues that granted greater freedom should be given to children not because it may make children as better people, but because expanding the children’s freedom is itself worthwhile (Auley, 2001)

**Rawl’s Theory of Justice and the Children’s Rights**

Rawl’s theory of justice provides some justifications for the rights of the children. According to this theory “in an ideal system of justice each individual should be permitted to act according to one’s personal conception of his or her own best interests, but not at the expense of others” (Rawls, 1971). This theory relies on two basic principles of justice that goes as follows:

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

2. The social and economic inequalities should be arranged in such a way that they are both:
   
   i. To the greatest benefit of the least advantaged, consistent with the just savings principle and
   
   ii. Attached to offices and positions open to all under conditions of fair equality of opportunity.

Rawls says that in formation of initial social contract, children participate to the extent they are capable to participate. One must be ‘rational’ and should have attained the ‘age of reason’ for full participation in this formation process, but he doesn’t specify the age of reason. He argues that the children’s participation increases with the development of their competencies. According to Rawls, the capacity to accept the principles of justice determines who is a member of society, and the person possessing this capacity, whether the capacity is fully developed or not, is entitled to receive full protection of the principles of justice. The interests of the children are protected on their behalf by the adults (parents) till the full development of capacity (Kruger, 2006).
Freeman criticized the Rawls theory and says that how it is acceptable that the same rights as of adult participants should be accorded to the children, who can’t participate fully in generating the necessary principles for a just and fair society (Freeman, 1980). Worsfold argues that, although Rawls’ theory is more libertarian than his predecessors but at the same time points out a problem in the scheme. In his words:

“Whenver adults act on behalf of a child, doing for the child what they would wish done for them if they were in the child’s place, they do so without any mechanism available for children to question their judgment or dispute the correctness of their decisions”. (Worsfold, 1974)

Rawls she herself anticipated another analogous objection regarding the best interest standard applied in the legal proceedings and replies, “paternalistic intervention must be justified by the evident failure or absence of reason and will” (Rawls, 1971), although the notion of the ‘failure’ and absence of reason and will, is not very precise. (Kleinig, 1983)

**Conclusion**

The principles of justice should only be the guiding principles for any paternalistic intervention. The children should always be consulted regarding their preferences and aims. Meaning thereby their preferences should be given more weight if the children are old enough and have rationality, capacity to think about the choices before them. Thus, in my point of view, a reasonable paternalism is justified, it should not be very hard and harsh which may make the children as slaves or prisoners and not too liberal, which may lead them to harm themselves. The parents are the best guides and teachers for their children. So, the parents should be given an opportunity and some authority as well to guide their children necessarily with the consultation of children if they are capable.

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