

RIGHTS OF THE CHILD AND HUMAN RIGHTS

Peter G. Kirchschräger and Thomas Kirchschräger

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” When we read Article 1 of the Universal Declaration of Human Rights and we think about children’s rights, we see that the rights granted by the declaration are also guaranteed to children. Children are bearers of human rights as expressed, e.g. in the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, the International Covenant on Civil and Political Rights of 1966, or as discussed in the frame of philosophical debates since the Enlightenment.¹ Therefore, the question arises of why we develop children’s rights especially when we know already that they are bearers of human rights. Aren’t children human beings? Of course children are human beings and should be treated as such according to all the declarations on human rights. In the twentieth century, however, the recognition was growing that children need special protection and support, if human rights are truly to be guaranteed to them as well. The creation

of special children’s rights was justified by the fact that – due to the status of “being a child” – children are particularly vulnerable and therefore their integrity and dignity need special protection. The first victims are always children.² Children run a higher risk than adults that neither dignity nor respect is paid to them. That they are discriminated against more than adults based on gender, religion, race, as well as any other suspect classification.³ They are treated as objects and not as subjects.⁴ They are seen as property⁵ and as status symbols for the household.⁶ Due to their special needs, they are perceived as a “problem population.”⁷ Attributing rights to children means to free them from the lack of rights and from the status of an end for others and to make them sovereign.⁸

The rights of the child are human rights. The realization that not all human beings have the same access to human rights and the fact that they are persons with their own needs made it necessary to create special treaties of human rights. Granting children particular rights means at the same time to acknowledge their vulnerability, their special needs, and therefore

the necessity to empower them, and to recognize their status as autonomous human beings, as subjects of rights.

But who is this “child” which is on one side vulnerable and on the other side autonomous and a subject of rights? This child is part of a childhood “as a universal, timeless essence, equally (and abstractly) possessed by all children”⁹ and this child is in a certain phase of the life of a human being. The first aspect indicates that the concept of children’s rights – as the concept of human rights – is based on an idea of a child respectively of a human being which constitutes firstly the rights as their justification.¹⁰ Both aspects indicate that childhood is the result of social construction made by the adults in authority. Being of young age does not mean being a child. Childhood has not always existed.¹¹ The concept of childhood is based on cultural and historical contexts. Regarding this, there are good reasons to claim the universality of the rights of the child. First, we understand children’s rights as rights which are basic and universally attributed to all children. Second, the contingency of their origin does not mean automatically the end of their universality. To be able to deny the universality of these rights, we have to present good reasons why children’s rights shouldn’t be valid universally.¹² Third, we have to be aware of the fact that cultures respectively civilizations aren’t eternal entities.¹³ Understanding cultures as something which will always remain the same and are not open for change would give them a metaphysical status. If cultures are not absolute,¹⁴ then we have to present good reasons why a child should be excluded from human rights.¹⁵

The idea of a child as a human being flows directly into the formulation of children’s rights. E.g. if we look at the UN Convention of

the Rights of the Child (CRC), the child is an individual self-agent, a political subject surrounded by “competent authorities,” “competent supervision,” “responsibilities,” “legal guardians,” “persons legally responsible,” “national law,” and the family (Articles 1–9) with an identity defined by “nationality, name, and family relations as recognized by law” (Article 8).

As mentioned above, although children’s rights are man-made and the origins of these rights and the rights themselves have a cultural and historical context, there are good reasons for their universality. There are also pragmatic reasons for the universality of the rights of the child and a universal consensus about the understanding of what and who a child is. We can realize this pragmatic dimension when we look at a convincing pragmatic reason concerning the definition of the end of childhood as an example. The CRC states in Article 1 that a child is a person under the age of 18 unless the age of maturity is attained earlier under the national law applicable to the child. The second part of Article 1 opens the possibility to consider children as adults before 18 years of age and therefore protection measures do not apply through till the 18th year of life. The end of childhood varies from country to country, and even within a country. This leads to the situation that, e.g. the protection of children from sexual exploitation and related forms of violence becomes more difficult where ages other than 18 are used to define a child, even more, when children cross international borders and thus may not be subject to the equivalent levels of protection between states. Therefore, ECPAT International (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) demands: Establishing a standard age to define childhood has impli-

cations for the manner in which child victims are dealt with under the law. Children can never consent to being exploited and abused; they should always be understood as victims before the law, not as criminals. Thus, standardizing the age of consent internationally to the age of 18 years would provide children with greater protection.¹⁶ An amendment to the CRC is suggested which would change the wording in Article 1 (“For the purposes of this Convention, a child means every human being below the age of eighteen.”) and all other direct or indirect references to exemptions under national law would be removed. In this way, no young person unable to exercise their rights fully due to their inherent developmental status (...) would be denied their fundamental human rights due to an underinclusive definition of ‘child’ reflecting the cultural or political objectives of a particular State Party.”¹⁷

As mentioned above, the CRC understands the child as a subject of rights and not anymore as an object of rights. This raises the question if children can be subjects of rights? Do they not still remain objects of rights? We would affirm the first question and deny the second. But then we have to ask why children, e.g. were not considered for their input during the law-making process of the CRC, while a broad-based network of NGOs contributed to it?¹⁸ Just one example makes us aware of the fact that we have to be consistent in our thinking and in our actions if we want to take children seriously as subjects of rights. If not, we abase children to “not ends in themselves but rather creatures in the process of development.”¹⁹

The arguments against children as subjects of rights aren’t very convincing.²⁰ But the discussion shows us that the way in which children are subjects of rights is a special one: At

the beginning somebody else is exercising their rights for them (their parents, legal guardians, the state) and step by step the growing children take over more competences in a gradual process.²¹ The representation of children is defined by the CRC in the following way: “In all actions concerning children (...) the best interests of the child shall be a primary consideration.” (CRC, Article 3) The principle of the “best interests” is the foundation of the rights of the child. Obviously the concept “best interests” is very open and leads to intense legal²² and philosophical²³ discussions. The CRC defines one part of “best interests” open to discussion about the implementation in form and content supporting cultural pluralism in this matter. The other part is to be understood as closely related to the dignity of a child as a human being,²⁴ e.g. the satisfaction of elementary needs, the guarantee of capabilities necessary for a human life and autonomy, and these are therefore universal.

Deliberating the concept of “best interests” of the child another issue arises: Are we formulating the “best interests” of the child from the point of view of the child or the “best interests” of the child from the perspective of the adults in charge?²⁵ There is a hazard of paternalism and a potential of a conflict of interests. Against the first, the CRC emphasizes the code-termination of the child in all matters affecting the child.²⁶ Regarding the second, this conflict zone is part of the process of growing up of the child: A child has to struggle against definitions of his/her best interests by others and to create and live his/her own conception.

Children’s rights highlight the child as a subject of rights. Does a child as a subject of rights have corresponding duties? Yes, a child has the corresponding active and passive duties to respect the children’s rights of any oth-

er child and human rights of any other human being because of, firstly, reciprocal respect for the rights of others (there isn't any good reason why somebody else should be excluded from the rights I claim for myself), and secondly, for the sake of his/her own dignity: "We protect or damage human dignity, our own human dignity, by what we do and not by what we suffer, since we are responsible for what we do and not for what others do to us."²⁷

The most important children's rights document, the CRC, was in a way a success story of commitment of nations from all over the world. The CRC is the most widely accepted human rights treaty – of all the United Nations member states, only the USA and Somalia have not ratified the CRC. Among the international human rights instruments, the CRC is seen as the most complete as it includes civil, political, economic, social, and cultural rights as well as incorporating aspects of humanitarian law. The CRC strives for the goal of guaranteeing children worldwide the following three categories of rights:

- 1. Rights to Provision:** The CRC knows the rights to the resources, the capabilities and the attendance ensuring the survival and the development to their full potential of the children;
- 2. Rights to Protection:** The CRC claims protection of children from exploitation or abuse, above all by adults or institutions threatening their dignity, their survival, and development;
- 3. Rights to Participation:** The CRC calls to provide children with the instruments enabling their participation in the processes of change that will achieve the realization of their rights and ensuring their preparation for playing an active role in society. The implementation of

the rights to participation will change the social paradigm between adults and children.

Related to the CRC, this volume II of the Swiss Human Rights Book will address the link between children's rights as human rights and economic, social, and political development in very different geographical contexts and also from different thematic points of view. After a preface (Greminger), the discussion of the relation between the rights of the child and progress (Kohler) and some conceptual questions of the rights of the child (Kirchschläger/Kirchschläger), an overview of the general measures of implementation of the Convention on the Rights of the Child (Bellamy/Santos Pais) and a look at the Convention from the perspective of the child's best interest and children's views Zermatten will give a general understanding of the Convention of the Rights of the Child and the status quo of its realization. An analysis of the right to speak, to participate, and to decide (Hammarberg/Petrén), a report of the progress in the field of violence against children (Pineiro), a closer look at an example of a group of children with special rights, the children with disabilities (de Alba), and an input about the concrete implementation of the program of economic and social rights given by the CRC (Bilimoria) lead the reader to the meaning of the CRC for a group of children with special needs and to important issues of the three main dimensions of the CRC.

The role of the business community and what fashion has to do with respect is clarified in an interview with Robin Cornelius and Daniel Rüfenacht (Altenburger/Rüffer).

With the right to education (Prengel/Overwien), the right to housing (Gómez), the right

to play (Alexandrova/Koss) and an innovative approach to the realization of children's rights, sports (Ogi), some traditional and some upcoming rights are discussed.

In the following, voices speak up from all over the world about the challenges, struggles, and successes in the realization of children's rights in different geographic areas. The situation of the rights of the child in Switzerland (Müller, Weber, Hug), Romania (Schumacher/Fanconi), India (Jain), Southeast Asia (Abueva), Brazil (Schmitt), Morocco (Sebti) will be discussed.

After the geographical part, a thematic approach to some rights of the child and their developments will be addressed. We have identified some areas where children and the international community have a special, though more challenging, task in realizing children's rights, as e.g. with regard to the rights of migrant children (Bhabha), the phenomenon of female genital cutting (Santos Pais), the rights of child soldiers and the end of their recruitment (Withers, Keitetsi), and with regard to child victims of racism (Wladasch).

To close, the collection of some hard facts supports the examination of the rights of the child (Hug/Altenburger).

NOTES

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- 1 E.g. J. Locke in "The Second Treatise of Government", J.-J. Rousseau in "Du contract social ou principes du droit politique," I. Kant in "Metaphysik der Sitten" or in "Grundlegung der Metaphysik der Sitten" (see T. Göller, *Die Philosophie der Menschenrechte in der europäischen Aufklärung – Locke, Rousseau, Kant*, in: T. Göller (ed.), *Philosophie der Menschenrechte*, Göttingen 1999, p. 150–167).
- 2 The UN Convention on the Rights of the Child recognizes this in particular in articles 6, 9, 11, 16, 19, 20, 22, 23, 24, 27, 32, 33, 34, 35, 36, 37, 38, 39, 40.
- 3 See S. Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, *The International Journal of Children's Rights*, 13, 2005, p. 433–461.
- 4 M. Freeman, *The Moral Status*, The Hague 1997, p. 22.
- 5 See J. Groner, *Hilary's Trial*, New York 1991.
- 6 See M. Kellmer-Pringle, *The Needs of Children*, London 1980.
- 7 S. Spitzer, *Toward a Marxian Theory of Deviance*, *Social Problems*, 22, 1975, p. 638.
- 8 See the definition of "positive liberty" by I. Berlin: "I wish to be an instrument of my own, not other men's acts of will, I wish to be a subject, not an object (...) deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them." (I. Berlin, *Four Essays on Liberty*, Oxford 1969, p. 131.)
- 9 D. Tarulli/H. Skott-Myhre, *The Immanent Rights of the Multitude: An Ontological Framework for Conceptualizing the Issue of Child and Youth Rights*, in: *The International Journal of Children's Rights*, 14, 2006, p. 188.
- 10 Concerning the question of a justification of human rights see: P. Kirchschräger, *Brauchen die Menschenrechte eine (moralische) Begründung?*, in: P. Kirchschräger/T. Kirchschräger et al. (ed.), *Menschenrechte und Kinder*, *Internationales Menschenrechtsforum Luzern (IHRF)*, Vol. IV (in preparation).
- 11 See P. Ariès, *Centuries of Childhood*, London 1962; I. Illich, *Celebration of Awareness*, Harmondsworth 1973; A. James/A. Prout, *Constructing and Reconstructing Childhood*, Basingstoke 1990.
- 12 See G. Lohmann, *Die unterschiedlichen Menschenrechte*, in: K. P. Fritzsche/G. Lohmann (ed.), *Menschenrechte zwischen Anspruch und Wirklichkeit*, Würzburg 2000, p. 11.
- 13 See Y. Onuma, *Towards an Intercivilizational Approach to Human Rights*. For Universalization of Human Rights through Overcoming of a Westcentric Notion of Human Rights, *Asian Yearbook of International Law*, Vol. 7, p. 21–81; see A. A. An-Na'im, *Islamic Foundations for Religious Human Rights*, in: J. Jr. Witte/J. Van der Vyver (ed.), *Religious Human Rights in Global Perspectives*. *Religious Perspectives*, Dordrecht 1966, p. 337–360.
- 14 With regards to "culture" we cannot just assume that every culture accepts the existence of another culture and that every culture wishes to coexist with another culture. (This unjustified assumption seems to be the starting point of the cross-cultural approach.) We agree with O. Höffe that human rights are the foundation on which the coexistence and the dialogue between different cultures are possible. (See O. Höffe, *Kategoriale Rechtsprinzipien*, Frankfurt a. M. 1990.)
- 15 Concerning the universality of children's rights and human rights, respectively, see: M. Freeman, *The Moral Status of Children*, p. 129–147; P. L. Berger, *Are Human Rights Universal?*, *Commentary* 64, September 1977, p. 60–63; Donnelly J., *Cultural Relativism and Universal Human*

- Rights, *Human Rights Quarterly* 6, 1984, p. 400–419; G. Lohmann, *Universalismus und Relativismus der Menschenrechte*, presentation 3rd/4th, May 2005 at the European University Institute, Department for Social and Political Science, Florence, p. 3–4; O. Höffe, *Transzendentaler Tausch. Eine Legitimationsfigur für Menschenrechte?*, in: S. Gosepath/G. Lohmann (ed.), *Philosophie der Menschenrechte*, Frankfurt a. M. 1998, p. 29–47; R. Rorty, *Menschenrechte, Rationalität und Gefühl*, in: S. Shute/S. Hurley (ed.), *Die Idee der Menschenrechte*, Frankfurt a. M. 1996, p. 144–170; C. Taylor, *Conditions of an Unforced Consensus on Human Rights*, in: J. R. Bauer/D. A. Bell (ed.), *The East Asian Challenge for Human Rights*, Cambridge 1999, p. 124–144; A. A. An-Na'im, *The Cultural Mediation of Human Rights*, in: J. R. Bauer/D. A. Bell (ed.), *The East Asian Challenge for Human Rights*, Cambridge 1999, p. 147–168.
- 16** ECPAT International, *Questions & Answers about the Commercial Sexual Exploitation of Children*. An Information booklet by ECPAT International, Bangkok ³2006, p. 3.
- 17** S. Grover, *On Recognizing Children's Universal Rights: What Needs to Change in the Convention on the Rights of the Child*, *The International Journal of Children's Rights*, 12, 2004, p. 269.
- 18** See C. P. Cohen, *The Role of Non-Governmental Organizations in the Drafting of the Convention on the Rights of the Child*, *Human Reports Quarterly*, 12, 1990, p. 137. We can ask ourselves if the CRC would look different with the input of children.
- 19** D. Tarulli/H. Skott-Myhre, *The Immanent Rights of the Multitude: An Ontological Framework for Conceptualizing the Issue of Child and Youth Rights*, in: *The International Journal of Children's Rights*, 14, 2006, p. 195. See also S. C. White, *Being, Becoming and Relationship. Conceptual Challenges of a Child Rights Approach in Development*, *Journal of International Development*, 14, 2002, p. 1095–1104.
- 20** For the discussion see: D. W. Archard, *Children's Rights*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/rights-children/> (download: 24.7.2007).
- 21** See CRC, Article 12.
- 22** See J. Wytenbach, *Grund- und Menschenrechtskonflikte zwischen Eltern, Kind und Staat*, Basel 2006, p. 136ff. It is a very complex and difficult undertaking to find the best way of a legal process to act in the best interest of the child. (See e.g. B. Rölli, *Kinder und Verfahrensrechte*, in: P. Kirchschräger/T. Kirchschräger et al. (ed.), *Menschenrechte und Kinder*, Internationales Menschenrechtsforum Lucerne, (IHRF), Vol. IV (in preparation); S. Choudry/H. Fenwick, *Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act*, *Oxford Journal of Legal Studies*, Vol. 25/3, 2005, p. 453–492.).
- 23** See J. Griffin, *Well-Being. Its Meaning, Measurement, and Moral Importance*, Oxford 1986; P. Schaber, *Gründe für eine objektive Theorie des menschlichen Wohls*, in: H. Steinfahrt (ed.), *Was ist ein gutes Leben?* Frankfurt a. M. 1998, p. 149–166.
- 24** See CRC, Articles 23, 28.2, 37, 39, 40.
- 25** C. Hardman claimed a study in which the children would be seen as “people to be studied in their own right, and not just as receptacles of adult teaching.” (C. Hardman, *Can There Be an Anthropology of Children*, *Journal of Anthropological Society of Oxford*, 4/1, 1973, p. 85.).
- 26** See CRC, Article 12.
- 27** I. Kucuradi, *Human Rights Education of Public Officers*, in: P. Kirchschräger/T. Kirchschräger et al. (ed.), *Menschenrechte und Bildung*, Internationales Menschenrechtsforum Lucerne (IHRF), Vol. III, Bern 2006, p. 221.

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