THE LEGAL AND CULTURAL CONTEXT OF CHILDREN'S RIGHTS IN HONG KONG

■

*B Rwezaura**

Introduction

The adoption by the United Nations of the Convention on the Rights of the Child in 1989 and its subsequent ratification by a large number of states has given a big boost to the children's rights movement world-wide. Children's rights have now acquired a firm status in international law.[1] In countries that have ratified the Convention the major question now is what measures might be taken for implementation. However in Hong Kong the first task is to have the Convention extended to the territory.[2] There are good indications that this matter is being given serious consideration. Assuming that the Convention will be extended to Hong Kong, and sooner rather than later, this article tries to develop a general framework in which the provisions of the Convention might be discussed.

My starting point is that before we can fruitfully talk about the rights of children we must agree first on what we mean by this word 'rights' because it is here that much of the misunderstanding among legal scholars and moral philosophers is to be found.[3] John Eekelaar has noted, for example, that '[i]n declaring that children have rights, the United Nations may have been unaware that philosophers and jurists have differed among themselves over the basis for conceiving that children may have rights."[4] I shall briefly deal with this question in the first part of this article. The second part addresses the question whether adults' obligations to children should continue to be conceived of as mere moral obligations or should be viewed instead as children's enforceable claims. Closely related to this point is the question whether children who lack the capacity to exercise certain rights should, nonetheless, be entitled to those rights which other people may exercise on their behalf.

* Senior Lecturer, Department of Law, University of Hong Kong.

1 The political commitment of world leaders to the implementation of the Children's Convention was expressed at a UN sponsored World Summit for Children, attended by 71 heads of state and at which a 'World Declaration on the Survival, Protection and Development of Children' was adopted. See Dominic McGoldrick, 'Rights of the Child; UK Implementation of the Goals Agreed by the World Summit for Children' (1993) 23 Family Law 536–7. Also, according to Muntarbhorn, 'nearly 140 countries have become parties to this Convention, making it one of the most widely accepted international treaties.' See Vitit Muntarbhorn, 'The International Convention on the Rights of the Child: Universalisation, Localisation and Transnationalisation,' paper presented at the First World Congress on Family Law and Children's Rights, Sydney, Australia, 6 July 1993.

2 Although no reference to this matter is made in the Governor's October 1993 address, it is believed that the Convention will be extended to Hong Kong. This is more so given the fact that both the United Kingdom and the People's Republic of China have ratified the Convention.

3 For a comprehensive and interdisciplinary discussion of children's rights, see Philip Alston et al (eds), *Children, Rights and the Law* (Oxford: Clarendon Press, 1992).

4 John Eekelaar, 'The Importance of Thinking that Children have Rights' in Alston (note 3 above), p 221.

My central argument, however, is contained in the third part where I argue that the Hong Kong legal system as well as the existing statutes governing the legal status of children and the family were not originally intended to cater for the emerging concept of children's rights. The existing statutory law and practice impose a primary obligation on families to care and protect children as a matter of legal duty owed to the state, as parens patriae, and not as a matter of 'right' that parents owe to their children.[5] In concluding this paper I argue that, even if the law governing the child were to be reconstructed to accommodate a new notion of children's rights, the social and cultural context of Hong Kong would have to adjust in order to accommodate the change. Adjustments would be justified by the fact that the protection of children's rights is now recognised to be a collective concern of families as well as of the entire world community. As noted by Stuart Hart, 'child rearing at home, in school, and in the community will determine the course of society, nationally and internationally, and the dignity accorded to all persons.'[6]

What we mean by children's rights

In 1973 Hillary Rodham (now First Lady of the USA) characterised the words 'children's rights' as a slogan in search of a definition.[7] Ten years later, Michael Freeman wrote that the phrase 'children's rights' had become something of a hurrah idea of which we all claim to be in favour but which we also use imprecisely as a catch-all phrase embracing different notions.[8] In 1994 the phrase 'children's rights' continues to be a subject of intense debate.[9] It seems inevitable, therefore, that anyone attempting to engage in a discussion relating to children's rights should start by identifying, even if in a nutshell, what sense one wishes to attach to the term 'children's rights.' I submit that when a person asserts that A has a right to something, such an assertion suggests a number of related consequences. The first is that A has an undisputed claim to that particular thing. Second, that A may not be properly denied his due by those holding it. Third, that A's entitlement does not depend on the good will, kindness, or considerate nature of those holding the thing. And finally, that in the last resort, A will vindicate his/her right by appealing to a higher authority which has the means to enforce the said right.

5 An indication that this obligation is owed to the state is contained in s 4 of the Guardianship of Minors Ordinance, which provides that 'an agreement for a man or woman to give up in whole or in part, in relation to any child of his or hers, the rights and authority referred to in section 3 shall be unenforceable ...'

6 Cited in Nia A Pryde,'A Psychological Perspective on Children's Rights in Hong Kong,' paper presented at the Conference on Children's Rights held at Baptist College (Hong Kong, November 1993).

7 Hillary Rodham, 'Children Under the Law' (1973) 43 Harvard Educational Review 487.

8 M D A Freeman, *The Rights and Wrongs of Children* (London and Dover: Frances Pinter Publishers, 1983), p 6.

This view of rights is also advocated by Joel Feinberg who argues that 'rights ... are not mere gifts or favours, motivated by love or pity, for which gratitude is the sole fitting response. A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame ...'[10] That notion of rights, as argued by Freeman, enables the rights-holder to stand up with dignity and to insist on his entitlement without having to plead or beg for it. Moreover, once the particular entitlement is granted, there should be no expectation imposed on the right-holder to show gratitude for being given what is already his or her own.

Who needs children's rights?

It is clear from the way 'rights' are characterised above that they embody the language of militancy and struggle and are therefore best articulated under conditions where these rights are believed to be denied.[11] Indeed, in countries where the Convention is not yet well known, some government officials believe that it aims at the protection of children in poor Third World countries. Thus, referring to the reasons why Japan has not yet ratified the Convention, Satoshi Minamikata notes that the 'Japanese government has repeatedly taken the stance that the Convention has as its primary objective [the] protecting and improving the lot of children in developing countries ... who are suffering from famine or economic hardships such as street children.'[12] Thus one might speculate that, since Hong Kong children generally enjoy comparatively high standards of health, education, and material well-being, it is quite possible that a feeling similar to that in Japan also exists here.

It seems, therefore, that people are more prepared to deploy the language of rights on behalf of children whose basic needs are being denied or endangered, abused or exploited. In contrast, there is also a tendency for people to become uneasy when rights are demanded on behalf of or by children who belong to what we consider to be 'loving and caring' families, because this sort of claim gives the 'wrong' impression that there is something amiss with that family. As

9 Commenting on the United Nations Children's Convention John Eekelaar has argued that, apart from the disagreement between jurists and philosophers as to the basis for conceiving that children have rights, the problem is 'compounded by the practice of framing policy towards children in the form of general duties to promote their welfare' (in Alston (note 3 above), p 121).

10 Cited in Freeman (note 8 above), p 33.

11 The history of fundamental human rights has been a history of political struggles between the oppressor and oppressed social classes. Hence, an observation that 'rights are never given but have to be fought for' appeals to oppressed social groups but is in turn viewed as 'terrorist language' by those in power. See H Cohen, *Equal Rights for Children* (Totowa, NJ: Littlefields, 1980). For an overview of the historical factors associated with the growth of fundamental human rights movements in Europe and USA see Eugene Kamenka, 'The Anatomy of An Idea' in E Kamenka and A Tay (eds), *Human Rights* (London: Arnold, 1978), pp 1–12.

12 Satoshi Minamikata, 'The Best Interests of the Child in Japan: The Right to Freedom of Expression,' paper presented at the *UNICEF Project on the Best Interests of the Child* (Florence: International Child Development Centre, 1993), p 3.

the family is entitled to privacy and autonomy (a right in the other direction),[13] there will be the problem of who is to intervene and at what stage in order to announce that the rights of a particular child in that family are being violated.[14] The notion of family privacy is part of the liberal democratic ideal that requires a clear boundary to be drawn between the public and the private domain.[15] Moreover, the principle of family autonomy also views the family as a unit in which the interests of its members are aggregated.

Does this mean that the rights of children should be reserved only for endangered children?[16] The answer must be no. This is because children's rights extend beyond the basic needs encapsulated in the child's entitlement to nurture and protection from physical and moral harm as we find stipulated in the criminal law and other related legislation. For example, the Convention makes provisions that go well beyond the child's needs for nurture and protection. Thus under Article 12 of the Convention, state parties are required to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'[17] This is a treaty obligation whose object is to protect the child's right to participate in the decisions affecting him/her. It also constitutes a recognition of a child's right to a level of autonomy that could be easily violated within the context of a loving and caring, but nonetheless paternalistic, family.[18]

Another argument in support of the view that children's rights are for all children is the fact that, in the 20th century, the concern for the welfare of

13 Indeed Art 14(2) of the Convention provides that 'State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.' The specific right referred to here is the child's right to 'freedom of thought, conscience and religion' contained in the preceding Art 14(1). But also see note 15 below.

14 In most jurisdictions, including Hong Kong, there are laws designed to protect children who are in danger even within the context of a family. See eg the Protection of Women and Juveniles Ordinance as amended by Ordinance No 25 of 1993.

15 This principle is well expressed in Art 14 of the Hong Kong Bill of Rights Ordinance, which states that '(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' See also Art 8 of the European Convention of Human Rights which states to the same effect that '(1) Everyone has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others.'

16 This is apart from the problem of determining not only who is an endangered child but also of not having a generally accepted criterion to determine when intervention is most appropriate.

17 Moreover, although Art 5 of the Convention requires states to respect the responsibility of parents to provide direction and guidance to the child in the exercise of those rights protected by the Convention, it also states that the exercise of such parental direction and guidance must be 'consistent with the evolving capacities of the child.' This proviso ensures that the child's right to participate in the determination of questions affecting his/her welfare is preserved and closely tied to that child's evolving capacities.

18 Paternalism is a doctrine that justifies 'interference with a person's liberty of action ... by reasons, referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced' (Freeman (note 8 above), p 52).

children is no longer a private concern of their respective families but has become a public matter for the entire society. Indeed, children are now the concern of the world community and, as noted above, issues relating to children's rights have become a matter of international law. The implications of this notion that children's rights are a public concern is that in some countries, such as Norway, the promotion and 'policing' of children's rights are now entrusted to the children's Ombudsman and this special body is authorised by law to intervene on behalf of children whose rights are being violated and to present the child's point of view.[19] In Hong Kong, the existence of groups such as the Committee on Children's Rights, its parent organisation, Against Child Abuse (ACA), and Child Safe Action signifies growing public concern for children.[20] Such organisations can and do act as focal points for initiating strategies for public education and protection of children's rights.

A question that is often raised and seems to follow from the above argument is whether all children should be entitled to rights irrespective of their age and intellectual capacity to exercise them. This issue might be considered in this way: the term 'child' is both a biological and a socially constructed category.[21] The biological sense of the word 'child' relates to the age of the child.[22] The particular child's need for certain rights will depend on his biological age. Thus a very young child will have greater need for nurture and protection rights and less need for participation, autonomy, or self-actualization rights. In this context, the duty of parents to educate and guide their children becomes a prerequisite to the child's attainment of the necessary intellectual and social capacity to exercise these other rights.[23] In other words, these latent or dormant rights must be implicitly respected and should become part and parcel of the overall scheme and methodology of child rearing. For, as noted by Nia Pryde, 'the way in which children are raised by their parents is an important influence on how they develop and on who and what they become.'[24]

19 See Malfrid G Flekkoy, *A Voice for Children: Speaking Out as Their Ombudsman* (London: Unicef Publications, Jessica Kingsley Publishers, 1991).

20 See Against Child Abuse Ltd, *Annual Report 1991–2* and *10th Anniversary Commemorative Issue 1979–1989*, and Elaine King, 'Hiding to Nothing,' Sunday Morning Post Magazine, 31 October 1993, p 16.

21 In certain African communities, for example, no matter how old a man may be, he may not be considered an adult until he gets married. It is also common that adults may still be viewed or treated as 'children' by their own parents depending on a given social context.

22 A 'child,' for the purposes of the UN Convention on the Rights of the Child, 'means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' (Art 1). Others might argue that an unborn child has been denied similar protection but this point cannot be pursued here.

23 As noted above, this duty is recognised by Art 5 of the Convention; it provides that 'States Parties shall respect the responsibilities, rights and duties of parents ... or legal guardians or other persons legally responsible for the child, to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention' (emphasis supplied).

24 Pryde (note 6 above), p 3.

Although the child's biological condition will significantly determine the ranking in importance of rights, his/her entitlement to the other rights that cannot be immediately asserted or competently exercised is not thereby diminished. One might accept that certain rights are 'suspended' or 'postponed' due to the temporary biological incapacity of the child to exercise them, but this is not equal to saying that these rights do not exist for that child. One might illustrate the point a little further by using the example of an insane person whose legal capacity to perform a number of things remains suspended until he/she recovers, at which point that person assumes all his/her citizenship rights. Indeed, since insanity is, at any rate, a matter of degree, one would be willing to concede that an individual who is mentally ill has the capacity to exercise certain legal rights provided that he/she understands the nature and legal consequences of his/her actions.

The merit of thinking that children have rights at any age is that the justification of keeping those rights 'suspended' or 'postponed' will disappear as soon as the child is able to exercise them. This would get rid of the present problem of fixing an arbitrary age of majority.[25] Indeed, one would strongly argue that the recognition that children have rights is inseparable from the obligation on the part of the parents, the community, and the state to bring up children in a manner conducive to their attainment of the requisite capacity to exercise those rights.[26] John Eekelaar, in a paper appropriately entitled '[t]he importance of thinking that children have rights,' suggests that we need to draw an important distinction between people's actions towards us which are entirely motivated by the desire to promote our welfare (welfarism) where no rights exist, and actions which are performed for us as a result of recognising our potential claims.[27] The former actions are not based on the adult's recognition of a child's claim but rather on the adult's desire to promote that child's welfare.[28] This leads Eekelaar to conclude that an 'adult's duties towards young children cannot be convincingly perceived as reflecting rights held by the children unless it can be plausibly assumed that, if fully informed of the relevant factors and of mature judgement, the children would want such duties to be exercised towards them.'[29]

[25] Although Hong Kong has reduced the age of majority from 21 years to 18 years, the change does not affect the provisions of statutes which specifically fix the age of majority at 21 years (s 2(3), (5), cap 410). See eg s 2, Adoption Ordinance; s 2, Protection of Children and Juveniles Ordinance; and s 2, Domestic Violence Ordinance. In the contemporary period it seems a little odd that the law should continue to regard a 20 year old person as a minor.

[26] The obligation is clearly spelled out in Art 5 of the Convention. Gerald Dworkin puts it in much the same way when he argues that parents 'ought to choose for [children], not as they might want, but in terms of maximizing those interests that will make it possible for them to develop life plans of their own' (in Freeman (note 8 above), p 51).

[27] See Eekelaar (note 4 above), pp 228–9.

[28] The approach which takes children's rights merely as adults' responsibilities towards children accounts for the absence, in our law, of a developed system of legal representation for the child as well as adequate procedures for channelling the child's opinion when important decisions are made about the child's future welfare.

[29] See Eekelaar (note 4 above), p 229.

This approach necessarily changes our entire perspective as to how we should treat children. When we are motivated by 'welfarism' we easily become the best judges of what the beneficiaries of our actions require. This is done without necessarily first checking whether or not our choices reflect the interests of a given child, judged from that child's perspective as a future adult. On the other hand, if we are motivated by a recognition of the potential claims of the child, we would be keen to ascertain, to the extent possible, the wishes of the child before we determine our choice out of a number of available options.[30] Consider, for example, the way children are treated in divorce proceedings in most jurisdictions, including Hong Kong. Although it is now widely recognised that divorce, in most cases, results in adverse psychological and economic consequences for children,[31] it has not been considered necessary to encourage separate legal representation for children as a standard procedure. It is therefore possible, provided the court approves, for parents to agree among themselves as to what should happen to children and how family property should be divided up.[32] It has been argued, for example, that although there are provisions in Hong Kong authorising the court to order separate representation for children in matrimonial proceedings,[33] yet 'these are rarely used in contested matrimonial suits or contested ancillary applications relating to custody or financial provision.'[34] It is not suggested here that either the parents or the court are unlikely to consider seriously the needs and interests of children affected by divorce. The crucial point is that the child's interests in divorce proceedings are not, in practice, given separate protection. It is assumed, correctly or otherwise, that the interests of the child and the interests

30 Section 3(1)(a) of the Guardianship of Minors Ordinance requires the court to 'give due consideration to the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so ...' But this provision is part of the legislative scheme whereby the court as parens patriae looks after the welfare of the child and is free to overrule the wishes of the child. See Power J in *In the Matter of Lee Cheuk Wah (An Infant)* (1983) HCt, MP No 2678 of 1983 where he held that 'the court bears in mind in such cases that the wishes of the young children are ephemeral and change from day to day.' It is not suggested here that Power J was in error but it does often happen that the statutory provisions for consulting children before determining their future proceeds from a 'welfarist' concern for the child rather than a recognition that a child has rights as such. See also the opinion of Cons VP in *Wong v Wong* [1987] HKLR 454.

31 See, eg, E Clive, 'The Financial Consequences of Divorce: Reform from the Scottish Perspective' in M D A Freeman (ed), *State, Law and the Family* (London: Tavistock, 1984), p 196; J M Eekelaar and M MacLean, *Maintenance After Divorce* (Oxford: Clarendon Press, 1986); Lenore Weitzman, *The Divorce Revolution* (New York: The Free Press, 1985); Dana G Stewart, 'Single Custodial Females and their Families: Housing and Coping Strategies After Divorce' (1991) 5 International Journal of Law and the Family 296.

32 See ss 14 and15, Matrimonial Proceedings and Property Ordinance.

33 The Matrimonial Causes Rules, rr 72 and 108 authorise the court, in certain circumstances, to direct that any children concerned be separately represented by counsel in any matrimonial proceedings including applications for ancillary relief and variation of a settlement order. The circumstances under which the court will make such directions include cases where the court is not satisfied that the proposed variation of a settlement order or proposed arrangements for minor children under s 18 of the Matrimonial Proceedings and Property Ordinance do not adversely affect the rights or interests of any children concerned.

34 See Editorial, 'Children's Rights' (1979) 9 HKLJ 210.

of the parents are aggregated.[35] It is submitted that the law of divorce continues to regard the child as the object rather than a subject entitled to claim that legal protection.[36]

The legal context of children's rights in Hong Kong

The legal context of children's rights in Hong Kong consists mostly of the jurisprudence and legal traditions of English common law. The more recent history of English common law shows that children were not entitled to rights as such but were viewed merely as objects of legal protection from harm. There is sufficient evidence pointing to a time when English common law considered a child to be rather like the property of his father.[37] Stone's historical research indicates how, during the 16th and 17th centuries, children were totally dominated by their parents. Children were not expected to have a will of their own and the training of children was equated to the baiting of hawks or the breaking-in of young horses. There was rampant cruelty to children and whipping was a normal method of child training.[38] Relations between parents and children were not warm and affectionate but formal and civil. In 1663 Allestree wrote about patriarchal ownership of children, stressing that 'children are so much the goods, the possessions of their parent, that they cannot, without a kind of theft, give away themselves without the allowance of those that have a right in them.'[39]

In 1889 the first English statute was enacted to prevent cruelty to children in various circumstances both inside and outside the family.[40] Under an earlier

35 It has indeed been aptly noted that '[t]he requirements that the parties to matrimonial proceedings must inform and satisfy the court regarding their arrangements for their children, at the initiation and conclusion of the proceedings, may serve to remind parents of their duties to their children [but these provisions] are scarcely sufficient to prevent children from being used as pawns in a tactical and, sometimes, fierce battle between their parents' (Editorial (note 34 above), p 210).

36 Referring to a comparable situation in Japanese divorce law, Satoshi Minamikata notes that separate legal representation for children in divorce proceedings is extremely important in countries such as Japan where nearly 90% of all divorces are by consent and out of court and furthermore because parents may become too preoccupied with their own marital troubles to deal adequately with their children's future. See Minamikata (note 11 above), pp 9 and 12.

37 A good example of the 18th century view of parental rights over children is given by William Blackstone who contrasted such power with the ancient Roman law where the father had a power of life and death over his children. Blackstone wrote in 1765 that 'the legal power of a parent by our English law is much more moderate but still sufficient to keep a child in order and obedience' (see *Commentaries on the Laws of England*, vol 1 (cited in Brenda M Hoggett and David S Pearl, *The Family, Law and Society: Cases and Materials* (London: Butterworths, 3rd ed 1991), p 408)).

38 Whipping was so common that a 17th century theologian wishing to convey to children the idea of heaven informed them that 'heaven' was a place where children would never be whipped any more: Freeman (note 9 above), p 13. See also R H Helmholz, 'And Were There Children's Rights in Early Modern England? The Canon Law and "Intra-Family" Violence in England, 1400-1640' (1993) 1 International Journal of Children's Rights 23.

39 Freeman (note 9 above), p 16.

40 The Prevention of Cruelty to, and Protection of, Children Act. And before this Act, children courts could invoke the Poor Law Amendment Act of 1868 to render some protection to children. See also Guardianship of Infants Act 1886. For detailed background discussion, see P M Bromley and N V Lowe, *Bromley's Family Law* (London: Buterworths, 1992), pp 288–347 and 312–17.

statute, passed in 1886, the court could intervene to take away a child from the parents if such child was subjected to harm. These statutes, together with the Poor Law Acts, were intended to alleviate the miserable condition of children and the poor caused by the industrial revolution. Even then, the father retained the absolute right to control the custody and education of his children until they attained majority age.[41] It was after the passing of the Guardianship of Minors Act in 1925 that the father's absolute right to his legitimate children was somewhat weakened to incorporate specifically the concept of the welfare of the child as separate from that of the child's parent. This Act also established the principle of equality of guardianship rights between the father and the mother. Since that time the legal status and condition of children have greatly improved in England. Over the last half a century or so, English judges have creatively interpreted the statutory provisions concerning the principle of the 'best interests of the child' to overrule parental wishes in favour of children's welfare.[42] Judges have, for example, coined the concept of a 'mature minor' that promises a greater degree of autonomy for older children than was the case before.[43] More recently, judges have gone as far as declaring that access (that is, visitation rights), which for a long time had been considered the right of the non-custodial parent, is now a child's right.[44] All these developments must be seen as part of a growing consciousness in Western societies of the fact that, within the family unit, 'the individual members have rights and needs as individuals and not simply as the property or chattels of the head of the household.'[45]

41 See *Re Agar-Ellis, Agar-Ellis v Lascelles* (1883) 24 Ch D 317, where the English Court of Appeal held that it could not interfere with a father's legal right to control the custody and education of his children, unless it was shown that the father had committed a wrong against that child.

42 See eg *Gillick v West Norfolk & Wisbech Area Authority* [1986] AC 122, which has been followed in Hong Kong. Although Lord Scarman argues, in *Gillick*, that the common law never considered parental rights over the child to be sovereign or beyond review and control, this is not totally supported by the earlier common law decisions on the point. Thus, relying on these earlier decisions, Bromley and Lowe have noted that '[t]he growing acceptance that a child is a person in his own right led first to concern about his welfare and protection and, more recently, to the recognition that in limited circumstances at least, he might have rights of his own' (Bromley and Lowe (note 37 above), p 289).

43 The concept of the mature minor was developed from previous cases including *Hewer v Bryant* [1970] 1 QB 357, 369, where Lord Denning MR stated that the right of a parent to control his child 'is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice.' This judicial development of the common law culminated in the House of Lords decision in *Gillick* where it was held that parental right to control a minor child is derived from parental duty and as such it was a dwindling right which existed only insofar as it was required for the child's benefit and protection. The Lords also noted that the extent and duration of that right could not be ascertained by reference to a fixed age but depended upon the degree of intelligence and understanding of that particular child and a judgment of what is best for the welfare of the child. Also the question whether a child had sufficient understanding was one of fact to be ascertained by the court and depended upon the specific question to be decided.

44 See, eg, *M v M* [1973] 2 All ER 81; *S v O* [1982] FLR 15; and more recently *Re H* [1992] 1 FLR 148 and *Re S* [1992] 2 FLR 313.

45 Christine Hallet, 'The Best Interests of the Child,' keynote address given at the Forum on Unaccompanied Minors in Hong Kong, *Report of the Proceedings* (Hong Kong, November 1992), p 8.

Yet despite these trends, along with the liberal interpretation of the concept of the child's best interests and the concept of a 'mature minor,' judges in England have not confronted the full implications of thinking that children have rights.[46] Thus in a recent paper Michael Freeman has argued that English judges find it difficult to reconcile 'the rights language with what they consider to be in the child's best interests.'[47] Bernadette Walsh has made the same point, arguing that the fact that in wardship proceedings the court is required to give first and paramount consideration to the interests of the child does not say much about whether the court is entitled 'to disregard the wishes of the mature minor where they happen to be in conflict with what the courts determine to be in his or her best interests.'[48]

It is submitted, therefore, that what is missing in the contemporary English common law jurisprudence is a recognition of a radical conception of children's rights. As Walsh has rightly suggested 'the extent to which the autonomy [rights] of children should be protected will soon cease to be a matter which can be left to the incremental development of the common law.'[49] She recommends legislative action to replace the existing piecemeal approach, especially in view of the fact the Britain has, in December 1991, ratified the Children's Convention.

Turning now to the Hong Kong law relating to children, I submit that it is no better attuned to the recognition of children's rights than is English law. Indeed, as most of the statutes governing children in Hong Kong are based on the English statutory law and recent case law developments are closely followed, there is little probability that the law of the child in Hong Kong would stride well past that of Britain.[50] As I have noted above, courts in Hong Kong apply the English common law in determining issues of guardianship and other matters relating to children. The guiding principle is contained in s 3(1) of the Guardianship of Minors Ordinance, which requires courts to apply the 'welfare of the minor as the first and paramount consideration.' But again as noted above, the law proceeds from a 'welfarist' perspective in which the court assumes the position of a national parent (or super-parent?) and tries as best it can to do what is in the best interests of the child. The principle of the best

46 And others such as Lord Donaldson (in *Re R (A Minor) (Wardship: Medical Treatment)* [1991] 4 All ER 177) are not prepared to accept that a *Gillick*-competent child has a right to refuse medical treatment. This is perhaps an indication of the feeling of some judges that *Gillick* went too far.

47 Michael D A Freeman, 'Access — A Child's Right or a Parent's?,' paper presented at the First World Congress on Family Law and Children's Rights (Sydney, July 1993).

48 Bernadette Walsh, 'The United Nations Convention on the Rights of the Child: A British View' (1991) 5 International Journal of Law and the Family 170, 188.

49 Ibid.

50 Section 18 (1) of the Guardianship of Minors Ordinance spells out the powers of a guardian as follows: 'besides being the guardian of the person of the minor, shall have all rights, powers and duties of a guardian of a minor's estate, including in particular the right to receive and recover in his own name for the benefit of the minor property of whatever description and wherever situated which the minor is entitled to receive or recover.' See also s 14 of the Marriage Ordinance, which entitles a parent to give consent to the marriage of a 'child' who is below 21 years. See also s 13 of the Adoption Ordinance, which spells out the 'rights and duties of parents.'

interests of the child, notwithstanding its flexible nature, has been subjected to fierce criticism, mainly on the ground that it is too subjective and indeterminate.[51] But an even stronger critique of the best interests principle can be made in respect of cases where the application of the principle proceeds from a 'welfarist' perspective rather than a clear acknowledgement of the child's right to participate in the determination of what is best for him/her. The fact that statutory provisions for separate representation of the child have been used rarely in Hong Kong seems to point strongly to a judicial practice that is inclined to be 'satisfied' with the arrangements made by adults for the 'best interests' of the child.[52] It has therefore been suggested that the court should not assume that it can successfully play the role of a guardian ad litem (that is, counsel for the child). And where separate representation for the child would impose a great financial burden on the parents, it has been suggested that public funds should be applied to enhance the office of the Official Solicitor who ordinarily performs the role of guardian ad litem. In sum, neither statutory provisions nor judicial practice exist in Hong Kong that specifically recognise the concept of children's rights in the sense in which it has been described in this article. The furthest that courts are prepared to go is to interpret the best interests of the child principle as widely as possible in the same way that courts in England are now doing.[53]

The social and cultural context of children's rights in Hong Kong

Few would deny that the social and cultural context in which statutory law is introduced has considerable influence on its operation. Such influence can facilitate or, in certain respects, hinder the smooth operation of the enacted law. This article, however, will not consider the larger question of the limits of law as an instrument of social control. It is sufficient merely to mention that law cannot ignore the social context in which it finds itself. This is more so when the subject matter that law seeks to govern is considered by society to be 'domestic' and largely outside state control. Family relations are viewed by most people to be such a matter and are for that reason difficult to regulate.[54] But

51 See especially the much-quoted article by R H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226.

52 See Editorial (note 31 above), p 210.

53 In the case of legal representation for children in matrimonial proceedings, UK appears to be far ahead of Hong Kong. There is, for a example, a growing body of solicitors who have acquired considerable experience in representing children. And to assist them, special handbooks have been developed. See, eg, Philip King and Ian Young, *The Child as Client, A Handbook for Solicitors who Represent Children* (Bristol: Family Law, 1992).

54 Thus when Rev George Staite proposed in 1881 that a law be enacted to protect children within the family, Lord Shaftsbury responded as follows: 'the evils you state are enormous and indisputable, but they are of so private, internal and domestic a character as to be beyond the reach of legislation, and the subject would not, I think, be entertained in either House of Parliament': A Morton, 'Early Days,' cited in Elsie Leung, 'The Legal Perspective,' abstract of a speech delivered to the Child Policy Symposium (Hong Kong, December 12, 1992), p 1.

whereas in jurisdictions such as Britain one would be dealing primarily with statutory law and the extent to which it might reflect values held by families and the community at large, the situation is quite different in plural legal systems, such as Hong Kong, where statutory law and local customary law play a role in regulating family relations.[55]

The question of the extent of interaction between Chinese customary law and English common law is fascinating, but it is also too complex to analyse in an overview paper of this length. And closely connected to it is the question of the extent to which the colonial economy, Western values, and more generally the 20th century forces of modernisation have impacted on the Chinese family in Hong Kong. Both these questions are relevant to an analysis of the social and cultural context of children's rights in Hong Kong. But as my object is merely to point to the major factors and influences that will shape a new conception of children's rights in Hong Kong, I shall confine my comments to a more general level. Commenting on the extent to which the Chinese family has been transformed by economic and social changes, Nia Pryde, relying on a number of studies, has argued that there is some consensus 'that the present day culture of the Chinese has evolved from a single set of shared beliefs and values rooted in tradition, according to which the importance of authority figures has been stressed together with the subordination of individual interests to the needs and norms of the family group.'[56] It is within this Chinese cultural world-view that analysts locate the notion of 'filial piety' according to which children owe unquestioning obedience and respect to their parents. Thus the training and socialisation of Chinese children has traditionally stressed these values which form the foundation supporting the parent and child relationship. The question, however, is whether and to what extent these values have been altered in the face of modernisation and the intermixing of cultures.

In a Hong Kong field study published in 1988, two researchers found that 'despite modernisation, the majority (88.9%) of our respondents still believed that filial piety was essential for a good society. They also agreed (79.4%) that the government should enact laws to penalise those who failed to take care of their parents.'[57] A similar conclusion has been reached by Nia Pryde who notes that in the socialisation of children in contemporary Hong Kong society the influence of both traditional and modern Western ideas is apparent. Pryde

[55] Although courts in Hong Kong have held that the principle of the welfare of the child prevails over Chinese customary law, it is in practice difficult for the court to ignore some elements of Chinese customs. This is more so in cases where the court is invited to determine what is best for a Chinese child in a Chinese environment and where the proposals made by parents seem reasonable and satisfactory to the court.

[56] Pryde (note 6 above), p 6.

[57] Lau Siu-kai and Kuan Hsin-chi have also concluded that the legal ethos of the Hong Kong Chinese is a complex mixture of attitudes and behaviours, shaped by cultural heritage, forces of modernisation, and political changes. See *The Ethos of the Hong Kong Chinese* (Hong Kong: Chinese University Press, 1988), p 142.

argues further that 'while filial piety is still considered important and control of sex and aggression still a major concern, modern fathers are generally less authoritarian than their own fathers ... and the traditional perception of maternal child rearing is beginning to give way to a more egalitarian view.'[58]

Although these findings do not constitute a firm basis for drawing major conclusions, they nonetheless point to an existing social and cultural outlook that cannot be ignored in any consideration of the ultimate effectiveness of any law intended to regulate relationships between parent and child. Such surveys are indeed helpful in explaining people's attitudes towards government policies and vice versa. For example, in 1991 the Hong Kong government considered passing a law to regulate certain child care practices but this was strongly resisted by parents.[59] In the instant case, although the government had sufficient evidence from the Department of Social Welfare and from voluntary agencies that parental neglect of children existed in certain parts of Hong Kong, it still felt hesitant to legislate against such parental shortcomings. Even though this hesitancy might be a result of many factors, including the feeling that law is not the most efficient tool to change such parental behaviour, from a perspective of power relations it is tempting to conclude that the more powerful forces were on the side of the parents and that children's interests were ignored.[60] Certainly some parents are unlikely to see the problem in the same way as law reformers do. As Elsie Leung has correctly noted, because 'child-rearing is considered a private matter, once the law intervenes, the parent feels ashamed that he is told [he is] an unfit parent, that his personal right has been trespassed upon and he will do everything possible to resist such intervention rather than face the problem fairly and squarely.'[61]

In sum, although most parents in other cultures might feel equally uncomfortable if they were to be instructed by law (this being also a question of degree) as to how to raise their own children, it is more so in cultures such as Hong Kong's where the parent has traditionally been viewed as infallible.[62] At any rate, whatever conclusions one might wish to draw from such legislative inaction, it is clear that society's view of the parent and child relationship can be decisive not only at the initial stages of law making but also at the time of

58 Pryde (note 6 above), p 7.

59 In 1991 the government spent three months consulting on whether an ordinance should be enacted to discourage some parents (and other persons in charge of children) from leaving their children unattended for long periods. After consultation it was decided that it was neither desirable nor feasible to introduce such legislation (see South China Morning Post, 29 March 1993).

60 Thus, commenting on the same point, Nia Pryde has noted it was not surprising that the government did not take such a bold step because, 'in a society where parental rights are considered more important than those of children, it is obvious whose will prevail when their concerns, unfortunately, collide' (Pryde (note 6 above), p 10).

61 Leung (note 53 above), p 2.

62 In a survey conducted in 1986 it was found 'that 71.6% of respondents agreed that an unfilial person must be a no-good rascal [while] a substantial minority in the [same] survey (36.6%) even went as far as to say that there were no evil parents in the world': Lau Siu-kai and Kuan Hsin-chi (note 52 above), p 59.

implementing any legislative programme to promote children's rights. Thus, in the Hong Kong context, it is not unreasonable to expect that the language of 'children's rights' will not be viewed with enthusiasm because, rightly or otherwise, it is seen as containing the potential to undermine harmony and to create discord in the family.[63]

On the other hand, recent evidence also indicates certain contradictory social trends, especially among the youth. In a recent a survey on the *Young People's Perception of Family*, conducted by the Hong Kong Federation of Youth Groups, it was revealed that more than 50 per cent of the respondents would make decisions regardless of their family's will, while only one third thought either parent provided a good role model. The same study showed that nearly a quarter of youngsters would, if permitted, prefer to live apart from their parents.[64] Again these trends are not conclusive but would need to be carefully studied in order to identify the direction of social change and to determine the most appropriate forms of intervention aimed at the promotion of children's rights in Hong Kong.

Conclusion

This paper has argued that the concept of children's rights is a radical concept that takes the child to be a person in law who is entitled to the same rights as other people irrespective of age. It is conceded that because of their biological incapacity, children are not able to exercise certain rights. Yet it is also argued that such rights should not be taken away from them but merely suspended or postponed until the children are able to exercise these rights. Within this scheme, parents and third parties who are in charge of bringing up children are obliged to develop those capacities in children which would enable the said children to take over their existing rights as soon they are able to exercise them in a mature and meaningful way. This paper has also argued that the Hong Kong legal system and the cultural context in which it operates are not yet attuned to embrace this radical concept of children's rights. Hence, once the Convention is extended here, certain legal provisions, such as those which require courts in disputes concerning children to have regard to the welfare of the child principle, would have to be reconstructed, by expunging welfarist notions, in order to reflect the new concept of children's rights. On the other hand, since

[63] Hence, much like the old English common law, Confucius' (551–479 BC) teachings, that hold the family to be a fundamental social unit and its head to have absolute power over family members, may have little space for a radical notion of children's rights. Even then, it should be stressed that this patriarchal power had its moral counterweight which obliged parents and others in leadership positions to be considerate, fair, kind, and exemplary in their conduct. As noted by David and Brierley, '[t]he exercise of authority was ... not arbitrary; ... [it] required that explanations precede any command, that arbitration precede judgment and that warning precede punishment': *Major Legal Systems in the World Today* (London: Stevens & Sons, 3rd ed 1985), p 521.

[64] See South China Morning Post, 1 October 1993.

it is reasonable to anticipate a degree of opposition from certain sectors of the community to this concept of children's rights, it is essential to begin preparing the ground now. This will clearly involve not only making new laws, providing new interpretations of existing law, and activating some of the 'sleeping' statutory provisions, but also putting into place adequate machinery for public education and moral and material support for families. As noted in this paper, the international community has now accepted the view that the concern for children's rights and well-being is a collective concern of the entire world community. The acceptance of this principle no doubt creates the obligation upon all states and individual citizens to ensure that all children are guaranteed at least the rights and standards of protection contained in the Children's Convention. In sum, it is submitted that the anticipated extension to Hong Kong of the United Nations Convention on the Rights of the Child will provide the necessary motivation and enthusiasm for a deeper study and debate as well as the opportunity of defining, localising, and implementing the principles contained in the Children's Convention.