

CHAPTER 9: HOW CHILDREN ARE DISCRIMINATED IN THE USE OF THEIR RIGHTS

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1. Introduction

Interest in the concept of children's rights has grown significantly during the last decade. Two factors appear to be driving a greatly heightened awareness of children as an important minority group with rights of their own. In the first place, there is an increasing appreciation, amongst laypeople and professional, of the States' obligations under the United Nations Convention on the Rights of the Child (UN CRC). Secondly, a greater rights consciousness has been generated by the implementation, at the national level, of the mentioned International Treaty. The fact that children are, like adults, entitled to claim the rights guaranteed by not only the international, but also the internal bodies, has had an extraordinary impact on adult's perceptions of children's status.

Many of those who teach and work with legal principles affecting children are fully committed to the notion that children are rights holders. Nevertheless, these professionals may be unclear how to promote such a notion in a way that enhances children's lives at a practical level, rather than allowing it

to remain a theoretical ideal, which can mean to introduce a sort of age-based discrimination. The law does not stand still and the purpose of this teaching material is to consider the extent to which the emerging legal principles can be used to achieve such a goal. Children, like other minority groups, are affected by various branches of law, all with their own distinctive character. Consequently, although there is a rapidly growing body of international human rights law, we must also pay attention to domestic case law and legislation.

This article will consider the developing law in Europe within a traditional range of legal topics, which reflect children's own activities and the principles used to assist them. The document will be divided into different chapters all broadly considering the extent to which the law acknowledges the growing maturity of adolescents and their capacity for independent thought and action. These chapters will review the extent to which the law encourages adults to consult adolescents and older children over decisions regarding their present and future and the scope they are given to reach legally binding decisions of their own.

The last part of this chapter will treat the way in which the law balances the rights of younger children who are incapable of making decisions for themselves, against parents' powers and responsibilities regarding their upbringing. It will consider how the law's support for parental autonomy, at times, hampers the legal fulfilment of children's own rights in various contexts. Finally, we want to offer the readers a hypothetical example of children's active citizenship to empower children to make use of their rights. We reach this aim by an imaginary story that involves kids themselves.

2. Children as rights holders

The Preamble to the UNCRC states the idea that a child should be afforded the necessary protection and assistance so that he/she can fully assume his/her responsibilities within the community. This characteristic feature or goal of the UNCRC requires that the child is fully recognized as a rights holder who shall be allowed to exercise her/his rights. But in doing so, the parents have the responsibilities, rights and duties to provide the child in a manner consistent with her/his evolving capacities with appropriate direction and guidance (Articles 5 and 14 UNCRC).

In the recognition of children as rights holders the concept of evolving capacities is crucial. This idea represents a recognition of the growing autonomy of the child and the need to respect the gradual acquisition of independent exercise of the rights enshrined in the UNCRC such as the right to freedom

of expression, the right to freedom of thought, conscience and religion and freedom of association.

It should be noted, however, that the concept of evolving capacities has implications for all rights in the UNCRC and demands significant changes at all levels of society. It represents a fundamental challenge to conventional attitudes towards children, questioning some of our deeply held assumptions about children's needs, children's development, protection of children and children's agency.

The arbitrary age limits traditionally imposed by the law in the different European countries are often difficult to justify. For example, the age of criminal responsibility, the age in which a person may consent to medical treatment, marry (with parental or judicial consent), smoke, buy alcohol or leave full-time education. Whilst, in most of the European countries, at 17 teenagers may drive a motorbike, they must wait until they are 18 to vote, sign leases and claim income support. Many adults lack the capacity to exercise all the rights that, as a adult citizens, they are automatically entitled to. Contrarily, countless children who, despite having that mental competence, are denied them, solely by virtue of their minor status.

Competence for decision-making will vary enormously, depending on a variety of factors, such as peer pressure and family environment. It not only depends on the maturity and social circumstances of the person reaching the decision but also on the content and context of the decision in question. Thus whilst a person of any age may need a variety of skills, and therefore a relatively sophisticated type of competence before being able, for example, to consent to surgery, they will require a much lower level of competence to activate a machine (Fortin, 2009: 82–86).

Alderson's research with children in hospital led her to conclude that children develop the competence to make complex decisions about their medical treatment at far earlier ages than adults realise or accept. Indeed she argues that since many children exceed many adults in qualities such as intelligence, ability and prudence, differences between adults and children lie mainly in social beliefs about childhood, rather than in children's actual abilities (Alderson, 1993: 190).

Research on older adolescent's psychological development suggests that a different approach might be justified for those at the upper end of adolescence. It certainly supports those who argue that the current law is too restrictive in its approach of recognising the decision-making capacity of older children. Some writers, like Lindley, argue in favour of a more sophisticated approach to children's liberation. In his view there are good reasons for rejecting the claim that all children should have equal rights to self-determination

because of the significant correlation between childhood and incompetence (Lindley, 1989: 79).

The same author also considers it difficult to justify paternalistic restrictions on all adolescents under the age of 18, simply due to their minor status. He suggests that by the time children are 13, they are sufficiently stable and have sufficient conceptual competence to be able to have the objectives of a life plan. On that basis, he advocates that laws relating to the 13- to 16- year old category should be liberalised. Citing the high rates of adolescent sexual activity below the age of 16, he criticises the laws, which prevent girls under the age of 16 from consenting to sexual intercourse. He also argues that the high levels of truancy in schools indicates that young people between the ages of 13 and 16 should not be forced to remain in full-time compulsory education, but should be allowed to take full-time employment instead. Furthermore, in his view, adolescents should be given political education in schools and allowed to vote (Lindley, 1989: 88–92).

There is a need for considerably greater clarity in the legal principles applying to adolescents and for the law to maintain a better balance between allowing young people as much freedom as they have the capacity for, whilst restraining them from making choices which restrict their own future development.

The law provides a series of mixed messages about the limits to parental authority once children reach adolescence. No doubt this incoherence springs from the fact that society itself is uncertain about how parents should adapt to their children's growing maturity.

Knowledgeable parents might argue that they are supported in such an approach by Article 5 of the UN CRC. This requires governments to respect parent's rights and duties to provide "appropriate direction and guidance in the exercise by the child of the rights recognised". Nevertheless, parents should not overlook the article's qualifying phrase, which emphasises that parental direction and guidance should only be provided "in a manner consistent with the evolving capacities of the child". Furthermore, Articles 12, 13 and 14 of the CRC all emphasise the child's right to develop a capacity for independent thought and action.

Although domestic legislation could usefully encourage changes in parental attitudes, in a lot of occasions it has signally failed to seize the opportunity to do so. Admittedly, the substitution of the new concept of "parental responsibility" for the old "parental rights and duties" reflects the everyday reality of being parent; it also discourages that children are under parents' absolute control. Nevertheless, the failure to impose a duty on parents to consult their children over important matters regarding their own future is really disappointing.

One important step toward the idea of considering children as right holders who shall be allowed to exercise their rights by themselves was made by the Gillick case in the United Kingdom. This case quickly became international news, because it was the first time that Courts recognized child's capacity, and became referred to as "Gillick case".

Indeed, in 1982 Mrs Victoria Gillick took her local health authority (West Norfolk and Wisbech Area Health Authority) and the Department of Health and Social Security to court in an attempt to stop doctors from giving contraceptive advice or treatment to under 16-year-olds without parental consent.

The case went to the High Court where Mr Justice Woolf dismissed Mrs Gillick's claims. The Court of Appeal reversed this decision, but in 1985 it went to the House of Lords and the Law Lords (Lord Scarman, Lord Fraser and Lord Bridge) ruled in favour of the original judgement delivered by Mr Justice Woolf:

"...whether or not a child is capable of giving the necessary consent will depend on the child's maturity and understanding and the nature of the consent required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly and fairly described as true consent."

The case authority provides that the child's voice is heard and listened to in court, when he reaches a sufficient understanding to be capable of making up his own mind. Whether a child is so capable has been held to be a question of fact.

3. Lessons from Gillick

The growing influence of the Gillick case is reflected not only in the different European domestic legislation in force, but also in the case-law. That is the main reason that leads us to point out the principles emanating from this important decision of The House of Lords.

The House of Lord's decision in *Gillick v. Norfolk and Wisbech Area Health Authority* established new legal boundaries for parents' relationships with their adolescent children. It reflected the view that the law should encourage parents to stand back and permit their adolescents to reach important decisions with as little interference as possible.

A recurring concern is that by promoting the rights of children, law and policy will undermine the status and authority of parents. Anxieties such as these drove Victoria Gillick and Sue Axton to seek legal confirmation of their

right to bring their daughters as they thought fit (*Gillick v. Norfolk and Wisbech Area Health Authority*, 1986).

The *Gillick* decision sent a strong message to parents that their own rights of decision-making are constrained and that they have a duty to allow their adolescents to make a gradual transition into adulthood. An interpretation of the law in these terms does not, however, provide clear guidance over the point at which adolescents reach a stage of maturity when they can reach decisions for themselves. Indeed, the weakness of the concept of *Gillick* competence is its uncertainty.

Arguably the European Convention on Human Rights and Fundamental Freedoms (ECHR) strengthened parents' ability to control their teenage offspring by reference to their own rights under Article 8 ECHR. But contrarily, teenagers might themselves claim Convention rights against their parents. How would Mrs *Gillick* have fared if she had gone to court after the implementation of the Human Rights Act (1998), instead of when she did, in the mid-1980s? Some of these issues were clarified when Ms Axon adopted a very similar position to that of Victoria *Gillick* in 2006.

R (Axon) v. Secretary of State for Health and the Family Planning Association provided Silver J with a good opportunity to show how the *Gillick* principles regarding the interrelationship between parents and adolescents can be aligned within the ECHR framework of rights. Ms Axon had claimed that parents are legally responsible for all aspects of their children's welfare, including matters to do with their health and sexuality, and that if doctors keep consultations with children secret, this undermines parents' ability to advise and help them on sexual matters. She also claimed that such rights and responsibilities are reinforced by Article 8 of the ECHR.

In *Silver J's* view, a close reading of the *Gillick* decision refuted all Ms Axon's claims; it remained good law and was unaffected by Ms Axon's right under Article 8 of the ECHR to have her family life respected by the state. His conviction that any parental right or power under Article 8 is no wider than that delineated by the common law, led to his translating their Lordships' idea that parental authority dwindles as the child develops decision-making skills into the confines of Article 8.

To conclude, Ms Axon's parental rights under Article 8 of the ECHR, to advise and guide her daughters had therefore terminated on their attaining *Gillick* competence. This idea of parents simply losing their rights to respect for family life, as soon as their children gain sufficient understanding to reach decisions for themselves, is not fully supported by Strasbourg jurisprudence.

Their Lordships' proposition in *Gillick* that parents lose all rights to influence their son or daughter regarding any decisions reached within his or her competence was not received with enthusiasm by parents, or indeed, by

a conventional and paternalistic judiciary. Only a short time elapsed before the Court of Appeal undermined their Lordships' attempt to ensure that parents respected their adolescents' capacity for autonomy. In different cases, the subject of the application was resisting life-save medical treatment and in each the Court of Appeal held that under its inherent jurisdiction, a court can override a young patient's wishes and authorise life-saving treatment. On the one hand, the Court of Appeal, in *Re R (a minor)* (wardship: consent to treatment), authorised the compulsory use of anti-psychotic drugs to treat a 15-year-old suffering from increasingly paranoid and disturbed behaviour. On the other, the Court of Appeal, in *Re W (a minor)* (medical treatment: Court's jurisdiction), authorised the compulsory treatment of a 16-year-old in a dangerously anorexic state.

4. Legal age limits

The law reflects a sense of deep confusion regarding the point at which children should be allowed to take full responsibility for their activities. Several European legislations, such as Spain, Italy, France or Portugal, bar all those under the age of 18 from full legal "emancipation". A range of disqualifications makes all minors of any age broadly incapable of entering into a legally binding contract, hold a legal state in land, make a will or vote. Nevertheless, a number of adults' freedoms are available to 16 and 17-year-olds, leaving those under the age of 16 the subject of much wider restrictions.

4.1. Under 16 years old

For those under 16, a series of legislative provisions have, over the years, thrown up a collection of bizarrely arbitrary age limits governing a range of activities, such as buying a pet (allowed at the age of 12) and riding a horse without a safety helmet (allowed at age of 14). A 16 year-old can, *inter alia*, buy lottery tickets and aerosol paint, sell scrap metal and join the army). The simple explanation for this legislative hotchpotch is that the qualifying ages have been adopted on *ad hoc* and piecemeal basis.

Especially interesting and of more practical significance are the provisions of the criminal law making the age of 16, 15, 14 or even 13 govern the point at which young people can agree to sexual intercourse. In Europe, countries who have the age of consent set at 16 include Cyprus, Finland, Georgia, Latvia, Lithuania, The Netherlands, the United Kingdom, Norway and Switzerland. For Austria, Germany, Portugal and Italy it is 14, and in France, the Czech Republic, Denmark and Greece it is 15. Spain did have one of the lowest ages of consent on the continent at just 13, though recently agreed to raise this to 16.

Another point that has acquired special importance is the current legislation making full-time education compulsory for those under the age of 16. Those under 16 must remain in school on a full-time basis; and are thereby prevented from gaining financial independence through full time employment.

The rules presently governing the extent to which school children under the age can take part-time work are not only extremely confusing, but fail to protect them adequately. The domestic regulations have introduced very complicated laws limiting the part-time work of children under the age of 16. These now differ considerably; depending on a child's precise age and the type of work he or she is undertaking. The confusion nature of the provisions restricting the hours and days of the week on which children below 16 may work enables them to be widely flouted, not only by employers, but by local authorities, who are responsible for their enforcement.

4.2. Over 16 and under 18

This age group is treated in a strangely ambivalent way in the main parts of Europe. They face a number of formal legal barriers which, *inter alia*, exclude them from voting, standing for Parliament, being a school governor, acquiring a legal state in land or making a donation. Furthermore, those contemplating leaving home will find that there are further several restrictions on their financial independence. They can claim only very limited social security benefits, and with the exceptions of contracts for the supply of "necessaries" and beneficial contracts of service, they cannot enter into any legally binding contract. Meanwhile, certain important freedoms become available, to 16-years-olds. They may consent to surgical, medical or dental treatment, marry with the consent of their parents, join the army and consent to sexual intercourse as stated above.

No clear policy is discernible in the law presently governing those aged between 16 and 18 who seek employment. Generally speaking, it treats them like adults, requiring them to pay national insurance contributions and taxes. Nevertheless, in the main part of Europe, for example, has been recognised the vulnerability of this group of young employees by implementing the Council of Europe's protective employment restrictions. But it was not until 2004, following international criticism, that the statutory minimum wage scheme was extended to 16–17-year-olds. The niggardly introductory rate was officially justified as a balance between stopping exploitation and avoiding young people being enticed out of much-needed education or training by better employment rates. Despite continuing criticism that the present arrangements are discriminatory and encourage the use of younger employees as a force of

cheap labour, there seems little official enthusiasm from bringing their statutory minimum wage into line with that for 18–21-years-olds.

4.3. Liberalising the law for 16–18-years-olds?

Activities not specifically covered by legislation are governed by the House of Lords' decision in Gillick (1986). Their Lordships rejected the proposition that fixed age limits could ever be a satisfactory method of determining a child's legal competence. Providing every child with legal capacity to make if own decisions, "when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision", is a refreshingly liberal approach. Nevertheless, it creates a layer of uncertainty superimposed on an ill-assorted list of inflexible age limits, below which there is not capacity and above which there is total freedom to perform the activity in question.

5. Children's active role

In the present section we would like to develop, as an example, an imaginary situation in which children ask for their rights to be taken into account. You can use this case as the basis for further discussion about the current role played by children in our actual society. At this point it is crucial to emphasize that there is a distinction between being a citizen and acting as a citizen: to be a citizen, in the legal sense, means to enjoy the rights of citizenship necessary for agency and social and political participation. To act as a citizen involves fulfilling the full potential of the status. Nowadays law, as much international as domestic level, only focus its attention to children as rights holders but does not take a step forward and create the suitable conditions to encourage children to act as a veritable citizens. In that way children are clearly excluded of all decision-making processes that affect their lives.

The plot is set in a fictional town called Rainbow, an adult-centric small city where mature people are thinking to set up a children's playground in the old quarry located on the outskirts of the town. To find out what happens next you should read the following pages. Afterwards, you can use the key questions placed at the end the present document to lead a discussion about the vision and treatment offered to children by Law.

6. Conclusion

By contrasting everyday practices of children and their families with legal instruments the great distance between the way children's capacities are defined and tackled becomes apparent. It is easy to conclude that no legal instrument can be technically deemed to be fundamentally good for promoting children's rights and citizenship. To give children and young people a stronger and more services, the "rethinking" by law would need to be substantial.

Adult models of childhood, institutional structures and adult practices towards children-in other words, how children are conceptualized, viewed and treated – are key to understanding the extent to which the law encourages adults to consult adolescents and older children over decisions regarding their present and future and the scope they are given to reach legally binding decisions of their own.

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Case study for reflection

Word of the plan to create a playground area spread round the local children like wildfire, and on the following Saturday afternoon a crowd of them gathered at the quarry.

'We have to have a proper meeting,' July Mackenzie said when she and Ella arrived. 'We need a spokesman. I'll do it.'

Everyone within earshot nodded enthusiastically; July, who had inherited her mother's ability to organise as well as her looks, was well known to them as a leader rather than a follower.

Now she scrambled on to a large rock near the workmen's hut. 'Over hear, everyone,' she shouted. 'Okay, you all know why we're here. The adults have decided to organise a committee to discuss the most accurate way to give as a proper playground, right here.'

'We don't want a playground,' someone shouted, while another voice chimed in with, 'We like the way it is!'. A roar of agreement followed the second remark, and July gave it time to grow before holding up a hand to calm it.

'Right – hands up those who want the playground to go ahead. And hands up those who don't want it,' she went on when all hands remained by their owners' sides. This time a forest of arms waved frantically in the air.

'It looks as though we want this place to stay the way it is.'

'But who's going to listen to us?' someone yelled.

'They have a committee, so we'll have a committee. We'll demand a meeting and we'll tell them what we want.'

‘They won’t listen!’ the same voice insisted, and heads nodded all over the quarry.

Malcolm, who had a very secret crush on July, had been drinking in the sight of her standing above everyone else. She was so convincing; then, realising he should be taking part in the discussion rather than leaving it all to her, he suggested, ‘We could compromise. That means we could come to an arrangement – meet them halfway. We could tell them that we’ll agree to a play ground, but it needs to have what we want in it, not what they want.’

‘Good for you!’ July smiled down at him and his heart sang. ‘Malcolm’s right – we could tell them that we’ll agree to their idea as long as we get to choose what should go in the playground. That way they’re more likely to listen to us, and we’d at least get things the way we want them. What do you think?’

There was a moment’s silence, and then as the children clustered round the rock realised that the compromise could bring them benefits, suggestions began to come from all over the place. ‘A climbing frame – a see-saw – stuff to play Tarzan on – a trampoline – tyre swings – rope climbing!’

Again, July had to hold her hand up for silence. ‘Right, we’ve got started. The next thing we have to do is to form our own committee, and then go home and think about what you would like to see in our playground. Write it down, and we’ll have another meeting here in a week’s time. The committee will make a list of your demands and pass them to the adults’ committee. Okay?’. Then, when heads nodded vigorously. ‘Now we have to nominate our committee.’

‘July as the leader,’ Malcolm shouted, and the others cheered.

‘Ella, write that down,’ ordered July, who had equipped her younger sister with a notebook and a pencil before they left the hose.

‘Me as the chairperson, and then we need a secretary and some committee members – three should do it. Anyone good at writing and willing to be our secretary?’ ‘Please!’ Ella added.

John MacDonald put up his hand. A few seconds later, July voted Gregor in as a committee member since he had been the one to alert the others to the plan to turn their beloved quarry into an official playground. Malcolm volunteered and was voted in, and Peter Hoffman became the third committee member.

‘So over the next week you have to write down the things you want to see in our new playground, and pass it on to one of the committee members,’ July instructed. ‘We’ll get together on Friday afternoon to have a look at your lists, and on Saturday we’ll have another meeting here before we talk to the adults. We’ll have to be quick and we’ll have to be firm. You know what adults are like; if they discover we’re fighting back they’ll probably fill the place with baby swings and a tiny see-saw before we can stop them!’

‘Are you sure about this?. My kids haven’t said a thing about setting up a committee!’

‘I only know about it because July was working on her dad’s computer last night, going to the Internet to find out all about playground equipment. Why shouldn’t the children have a committee, Helen?. You and the others did it’

‘But they’re children!’

‘Never demean children. My July is a very intelligent girl. She has organised the others into writing down their ideas of what they want in this playground,’ Ingrid said proudly. ‘So you ought to warn the adult committee chairman and the others that the kids will soon be looking for a meeting with them. Personally, I think it’s a good idea. Why should our children settled for a playground designed by adults?. Far better to give them what they want as long as it will be reasonable, then everyone will be happy.’

Finally, Helen landed with the task of telling Glen Smith, the adult committee chairman, about the children's playground committee.

That evening Helen met Glen. She told him about the children's playground idea and that they had decided they wanted to be involved in planning it.

Glen's eyebrows shot up. 'The kids want to sit in on the committee?'

'No, they've formed their own committee and now they are putting together ideas on the sort of playground they would like.'

'You're kidding me!'

'I'm not, Glen. The kids are taking it very seriously. They want a meeting with your committee before anything's decided'

'Now just a minute. The kids will be looking for all sorts of fancy things like water slides and so on. We've got to work on a sensible layout first, and then start costing it – and we have to apply for planning permission. Tell them they can come in on the discussion then when all that's done – perhaps.'

'I think we need to hear their views earlier than that, Glen. They say if we go ahead without talking to them, they will have nothing to do with the new playground.'

'Who are these kids anyway?'

'Most of the children in the village between the ages of five and fifteen,' Helen said. 'They don't all want to meet with you, of course, just the committee.'

'Who else is on this so-called committee?'

'July Mackenzie, young Malcolm, Gregor and one of the McDonald children' Helen replied.

'Okay, tell them that we will have a meeting next Friday. I reckon I don't have any other chance,' Glen muttered.

The day arrived. July had her committee members well briefed. They filed in, all of them smartly dressed and with hair well brushed, and solemnly shook hands with the adults. July and John, the secretary, both carried borrowed briefcases, which they opened as soon as they were settled round the table in the City council's meeting room.

July spread the papers she had brought with her over the table. They were all pictures of playground equipment printed from the Internet, each one priced in a neat, clear hand.

'May I start?' she asked, and when Glen nodded, went on briskly, 'We've collected ideas from all the village children who are interested in this play area, and we've also had a meeting with them to find out what they want us to tell you tonight. Now on the whole we like the quarry as it is. We like the old hut and we use it as our headquarters. So it could be nice if it could be patched up a bit'

'That's sounds sensible, and it shouldn't cost much,' Helen agreed.

'That's what we thought. As I said, we like the area the way it is, so we've decided, since you are willing to raise the money for some playground equipment, it should all be wooden, not coloured plastic. That way, it will blend in.'

'You do need to think of the little brothers and sisters,' Naomi suggested.

'We realise that, so we thought we could have, say, four swings for them, and perhaps a little see-saw, and a fenced-off area where they can play safely. We've priced them and they won't cost as much as some of the other things on the Internet.'

Questions for reflection

- Are children and young people's representatives (eg. from networks of child groups and/or children's advisory groups) meaningfully involved in the design of new programmes (plans, budgets, indicators) and legal bodies on issues affecting them in your country?
- Is the legal system prepared to give up some power from adults to children?
- Are complaint mechanisms and other accountability mechanisms accessible to children and young people? or on the contrary, are they excluded?
- Limitations on children's rights to be heard, not only as a collective, but also as an individual: is it a form of discrimination?
- What mechanism would you construct to address the ability of children to be heard in your society?

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