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by D. Kelly Weisberg *

The General Assembly of the United Nations has proclaimed 1979 to be the International Year of the Child. It is also the twentieth anniversary of the United Nations' Declaration of the Rights of the Child. The concept of the rights of the child is of relatively recent origin. This modern notion that a child is entitled to special protection, opportunities and facilities emanates from two historical sources. First, it reflects the culmination of the evolution of the concept of childhood. Second, it springs from the development in the nineteenth and twentieth centuries of the juristic concept of the child as a legal person entitled to the protection of law. A discussion follows of these two sources, although necessarily by means of broad brush strokes to describe practices encompassing numerous centuries and diverse Western countries.

Evolution of the Concept of Childhood

Recognition of childhood, as a separate stage of life, is a modern development. The humanitarian attitude that children are vulnerable, dependent, and distinct from adults, emerged only in the eighteenth century. This is not to say that parents did not love their children in the past. Undoubtedly, there were many loving and tender parents. Nonetheless, barbaric practices towards children were pervasive in all social classes throughout history. And, the general tenor of public opinion held that such policies were acceptable. Public opinion against cruelty toward children was not aroused until the late eighteenth and nineteenth centuries.

Children have long constituted an invisible force in history. The absence of any reference to children throughout early historical records caused one historian to note:

> "There is something mysterious about the silence of all these multitudes of babes in arms, toddlers and adolescents, in the statements men made at the time about their own experience... It is in fact an effort of mind to remember all the time that children were always present in such numbers in the traditional world, nearly half the whole community living in a condition of semi-obliteration."[1]

The salient reason for this silence was that children historically occupied an insignificant position in social life. As Tucker notes: "Children were at the bottom of the social scale. That children were human beings with human needs seldom entered their [adults'] minds..."[2] Adults attached a low value to both children and child-rearing. Children died in vast numbers. In many historical epochs infant mortality was as high as 75%. Children were regarded as easily replaceable. As a corollary to the low social status of children, child-

rearing constituted a menial activity. Child care was not generally regarded as a pleasurable or positive experience, but rather "an obnoxious task which might well be passed on to someone else."[3]

Historical data reveal that not only were children regarded as insignificant, they were also maltreated. Judged by contemporary standards, attitudes and practices toward children showed heartlessness and cruelty. Children were killed, abandoned, beaten, terrorised and sexually abused from earliest times.

Infanticide of both legitimate and illegitimate children was a regular practice of antiquity. Children were thrown into rivers, flung into gutters and dung-heaps and exposed on hills and roadsides. Even as late as the 1890s, dead infants were still a common sight in London streets.[4] The primary victims of infanticide were female children and the illegitimate.

Although an early law of 374 A.D. in Rome declared the killing of an infant to be murder, legal reality differed from social reality. The killing of legitimate children diminished only during the Middle Ages. Illegitimate children, according to deMause, continued to be slaughtered until the nineteenth century.

Child sacrifice constituted another historical social practice.[5] Mutilating children was also practiced. Especially pervasive was the policy of mutilating children to increase their profits in begging. Children were also used as political hostages and as security for debts, both practices found as early as Babylonian times.

Sale of children is another longstanding practice. Child sale was legal in Babylonian times. Although laws in ancient Athens restricted the right of parents to sell children and the Catholic Church endeavoured for centuries to eradicate the practice, child sale has continued into the modern era. In Russia, for example, sale of children was not outlawed until the nineteenth century.

Physical abuse, in the form of beating children, was a pervasive feature of childrearing. According to popular beliefs, beating was both a method of showing affection and forcing a child to learn. Corporal punishment typically began as soon as infants were removed from swaddling clothes. The eighteenth century finally witnessed a major decrease in the practice. In the nineteenth century whipping children became outmoded in both Europe and America. However, beating children as a disciplinary measure still has vestiges in many homes and schools today.

In addition, children have suffered other forms of abuse. Infants were frozen by various customs, including baptism by lengthy dippings in ice-water. They were also subject to "hardening" practices, such as rolling in the snow, dippings in plunge-baths, pricking the soles of their feet, and steam-baths.

Sexual abuse of children, as defined by contemporary standards, was also widely practiced throughout antiquity to modern times. Children in ancient Greece and Rome were sexually abused by older men. Boy brothels flourished in every city. Children, especially of the lower classes, were sold to concubinage from earliest times. Playing publicly with children's genitalia was still common among the upper classes in the seventeenth century, as evidenced by Héroard's account of Louis

XIII's childhood. Indeed, sexual abuse of children occurs in striking proportions in the contemporary world.[6]

The contemporary attitude that a child has worth, with a concomitant concern for her/his physical welfare and happiness, finally took root in the eighteenth and nineteenth centuries in Western Europe. Before that time, children were undifferentiated from adults. They lived, played and worked in the adult world, and were even viewed as having adult sexual appetites. There was no recognition of the special state of childhood, or of life cycle stages.

The evolution of the concept of childhood had occurred gradually over centuries. Instead of a precarious existence fraught with obstacles, childhood became a valued social status. Several factors contributed to this modern concept, including the influence of Christianity, the writings of Rousseau, the replacement of apprenticeship by the growth of schools, and the increasing privacy of the family.[7]

By the beginning of the nineteenth century, a remarkable transformation was evident in parent-child relations. Children's welfare became a legitimate and paramount concern. Bringing up children became a process of socialisation, lacking the previous emphasis on breaking children's wills and bodies. This trend continued into the twentieth century. Today the idea has finally taken hold that children are objects worthy of considerable time and attention by those responsible for them. Adults manifest a special awareness of childhood as a prolonged dependent state in which children are in need of their protection. The social reality of childhood has evolved so that children are now viewed as important beings in their own right.

Children as Juristic Persons

The evolution of the social status of children was an essential precondition of the development of the modern legal notion that children are juristic persons, having rights as well as duties. Legal reality corresponded for centuries to the social reality of childhood. Prior to the nineteenth century, the prevailing jurisprudential emphasis was on the child as property. Thus, children could be sold, abandoned, abused and mutilated with impunity.

However, the child, unlike real or personal property, constituted a form of human chattel owing duties to its master. A child had duties toward parents, especially duties to provide services and wages and duties of obedience and subservience. The child's failure to perform these duties resulted in the imposition of serious sanctions — so severe that in some historical periods they amounted to capital offences.[8]

Historically, in many Western legal systems, the child as a legal person was subsumed in the father. The Roman *patria potestas* epitomised this doctrine of the child as paternal property. In Roman legal development, from the time of the Twelve Tables to post-classical times, the father had virtually unlimited powers over the child, including the right to kill or abandon the child, as well as the right to sell it into slavery. As long as the male head of the family was alive, the child of whatever age remained a dependant, without any recourse to the law for the purpose of calling the family head to account for his actions.

This notion persisted well into the modern era. Thus, the *puissance paternelle* of the French Civil Code gave the father unchecked authority over a child's person and property for the first twenty-one years of the child's life. In addition to having the absolute right to consent to or refuse the child's emanicipation, marriage or enlistment, the father had the right to control the child's mode of life and education. The father's rights were enforceable in court upon his application for an order of detention of a disobedient child. This means of enforcement was modified gradually in the nineteenth century. One law restricted the sanction to cases in which the father had the right to be "gravely dissatisfied" with the child's conduct, and limited detention to one year for children under sixteen. A 1945 ordinance finally abandoned this type of punitive imprisonment.[9]

Parental rights over children were exclusively paternal rights. Both French and German legislation reflected this concept of paternal authority. The French epitomised it by the aforementioned *puissance paternelle*, and it is also apparent in the German Code of 1896, which gives the husband the right to decide all matters of matrimonial life. Mothers had no rights to the custody of minors or the administration of minors' property. Women themselves were long regarded, juristically speaking, as little better than children.

The nineteenth century witnessed a series of developments which transformed the legal status of the child. This transformation was due to several causes, primarily to social legislation following industrialisation and to the emergence of women's rights. For the first time many Western legal systems restricted parental authority in a comprehensive way — limiting the powers of the father and imposing duties on parents and sanctions for their violations.

Two important changes which affected the legal status of the child were the introduction of child labour laws and compulsory education. The movement toward increasing family privacy and the new solicitude manifested toward children was reflected in the genuine concern with child welfare by legislation in the post-industrial era of the nineteenth century. Child labour regulations began to restrict the number of hours per day during which minors could be employed and to regulate their working conditions. The English Factories Act of 1833, providing for salaried inspectors to enforce labour regulations, dates from this period of social concern about the exploitation of children.

Compulsory education laws provided new educational opportunities for children. In addition, by legitimating state intervention in the family, these laws made children a subject of public responsibility. The resultant changes in the status of children can be seen by the end of the nineteenth century through a comparison of some provisions of the French Civil Code of 1804 and the German Civil Code of 1896. The French Code does not specifically mention any parental duties toward the child (CC Art. 203), only those arising from marriage rather than parenthood. However, the German Civil Code (s1627) at the end of the nineteenth century expressly provided that both parents had to exercise their parental powers for the well-being of the child. The German Code also provided for sanctions for parental failures to exercise parental duties, whereas earlier French legislation does not. Thus, "by the end of

the nineteenth century, if not in the beginning, the benevolent exercise of parental power had become an articulate and explicit requirement.[10]

It is no accident that the nineteenth century which gave woman her rights also witnessed the child achieving a more secure legal status. As women's position in the family gradually altered, the doctrine of paternal authority was weakened, thereby weakening also the notion of the child as paternal property.

In English law, for example, married women's rights regarding custody gradually altered. With the Infant's Custody Act of 1839, the Court of Chancery was given the power to award custody to the mother until the child reached the age of seven. The mother's rights were further expanded with the Custody of Infants Acts, 1873, and the Guardianship of Infants Act, 1886. In the past half-century, an even greater measure of equality for women was reached with the Guardianship of Infants Act, 1925, and the more recent Guardianship Act, 1973. The latter provides that the mother shall have the same rights and authority as the law allows to the father.

During the nineteenth century in France and Germany, the woman similarly improved her legal position in the family, with the concomitant beneficial result for the child of the diminution of the father's dominion over the child's person and property. In France, under the Civil Code of 1804, the father alone exercised parental power. This situation altered over the next century, and by 23 July 1942, the mother had the right to be consulted in parental matters, although the father had the final voice. Equality was finally achieved on 4 June 1970 when the law held that the spouses together during the marriage exercise their authority over the children. The historic principle, "The husband is the head of the family" was replaced by "The spouses together assume the moral and material direction of the family." In addition, the former concept of *puissance-paternelle* was renamed "Du l'autorité parentale" signifying a landmark in the modification of the type of control to which children were subject.[11]

German law followed a similar development. Traditionally, German parental power was vested only in the father. The German Civil Code of 1896 emphasised the predominance of the husband in decision-making. Article 1354 gave the husband the right to "decide all matters of matrimonial life." However, the father's power was significantly attenuated by the West German Constitution of 1949 proclaiming the principle of equality of the sexes, and by the Equality Law of 18 June 1957 which was passed to implement the Constitution.[12] Although some provisions still gave the husband preeminence in matters of parental authority, these provisions have been declared unconstitutional. With the equality of women came the erosion of the father's traditional powers in decision-making regarding children. Both parents now are regarded as having a common duty for the protection of the child.

Other nineteenth century reforms improving the status of children occurred in the fields of juvenile justice and child abuse. At the end of the nineteenth century, criminal justice reformers urged the establishment of special procedures and courts for minors. Thus, separate court systems for adults and juveniles were eatablished in the United States from the year 1899, and followed in other European countries.

The nineteenth century also witnessed the development of sanctions for parental cruelty and neglect. Such sanctions protected minors by decreeing that parents incurred criminal liability for cruelty to a child. In England this was accomplished by section 37 of the Poor Relief Act, 1868 (31 + 32 Vict., c. 122), against "cruelty and unnecessary suffering." The concern with child abuse in America dates from the same era, including legislation passed following the Mary Ellen *cause célèbre* in 1874 in New York.

Subsequent nineteenth century legislative reforms provided for the deprivation of parental rights in extreme cases of maltreatment. In previous historical epochs, as has been noted, parents, especially the father, had virtually unlimited powers to chastise a child. In the post-industrialisation era, however, sanctions began to be imposed for parental cruelty to children. One such early regulation was an English statute of 1889 establishing the principle that society could prevent abuse by interfering with parental rights. (Prevention of Cruelty to, and Protection of Children Act, 1889).

These two nineteenth century revolutionary concepts of parental criminal liability and deprivation of parental rights are now firmly established in modern European family legislation. Parental criminal liability is assured in Germany under the Criminal Code s223b (Misshandlung Abhängiger), in France by the offence of *abandon de famille* (P.C. art. 357), and in England by the Children's and Young Persons' Act, 1969. Deprivation or termination of parental rights is also a universally recognised principle. In modern German law (C.C. s1666, par. I), where the well-being of the child is endangered by abuse, the guardianship court is able to order accommodation of the child outside the home. Under Italian law (C.C. art. 330) a tribunal similarly may terminate parental authority, and the French law of 4 June 1970 (C.C. art. 378 and 378-1) invests a court with powers to decree loss of parental authority for acts of neglect if one or both parent(s) has been convicted of a crime against the child.

The legal status of children has continued to improve. Indeed, the field of the rights of children is perhaps the most rapidly changing area of family law. Major legislative advances are evident in the past decade. Some recent reforms in the Anglo-American legal systems include: improving the position of children born out of wedlock; reducing the age of majority; permitting young people under a certain age to give valid consent to surgical, medical or dental treatment, and to seek contraceptives and to undergo abortions without their parents' consent; increasing protection against abuse and neglect; increasing rights for handicapped and institutionalised children; and improving the legal rights of students.[13] Legislation has also resulted in improved administrative and judicial machinery for the protection of children's rights. Legal protections for children also currently extend to the international level, including, for example, the International Labour Organisation's Child Labour Convention regulating world-wide working conditions for juveniles.

UN Declaration of the Rights of the Child

One important international document giving support to the concept

that minors have rights is the UN Declaration of the Rights of the Child. The UN Declaration proclaims general principles of child welfare and thus stresses the rights of children in developing countries as well. In many developing countries today, the social reality of children mirrors historic practices and policies. One such practice is child labour. It has been estimated by the International Labour Organisation that 52 million children under fifteen-years-old work.[14] Child sale is still being practiced, as is mutilation, including female circumcision in some African rural areas. Children are also subject to malnutrition and high infant mortality rates. For example, Guatemala has an infant mortality rate of 84.7 per 1,000 and 81.2 per cent of its children suffer from malnutrition.[15] Sexual abuse is still common, as is maltreatment, especially for institutionalised and handicapped children.

The UN Declaration, which has universal application to these social conditions, has its roots in the post-World War I era, when economic and social factors contributed to dismal conditions for children in war-torn Europe. A former Declaration, adopted in 1924 by the Fifth Assembly of the League of Nations, reflected a predominant concern with the rights of children afflicted by the devastation of war.[16] It emphasised children's material needs, proclaiming that children "must have" means requisite for their normal development, including food for the hungry, nursing for the sick, help for the handicapped, shelter and succour for the orphan and the waif.

The new UN Declaration of the Rights of the Child, reflecting an emphasis that the special needs of children are valid in times of peace as well as war, was proclaimed two decades later. This Declaration took into account social security legislation and also the need to protect children without discrimination. It includes several additional elements, taking into account numerous factors leading to discrimination, especially sex and socio-economic status. It also emphasises that the concept of child care begins early, as early as the pre-natal stage. Other new concepts are manifest, such as ensuring for the child the right to a name and nationality, as well as the right to leisure and recreation. The Declaration also, for the first time, mentions the problem of implementation of these rights by calling on parents, other adults, organisations and local and national authorities to strive to observe these rights by legislative and other measures.

The UN Declaration is an international document with great potential for improving the social and legal status of children in the world. Nevertheless, two primary difficulties are presented by it. The first concerns the binding effect of the document. The Declaration is merely a proclamation of general principles. Most authorities believe that for children to have legally protected rights in international law, the document must be in the form of a convention, becoming binding upon state signatories upon ratification.

Although a binding convention has greater legal force, the danger felt by some is that a convention which was ratified by relatively few states would tend to weaken the persuasive moral force of the Declaration. The economic and social conditions of many countries might make it difficult for them to accept as legal obligations some of the principles concerning the rights of children. However, in 1978 the

Polish government introduced a draft of an International Convention on the Rights of the Child in the UN Commission on Human Rights and this Draft Convention has been circulated to governments for their comments.[17]

The other problem presented by the Declaration, or for that matter also by a Convention, concerns the critical question of implementation. The method suggested in the Polish Draft Convention is similar to the implementation policy adopted by the ILO Convention on Child Labour — the sending of "periodic reports." It has been proposed that reports from countries be solicited after one and then every five years. Such a method, however, suffers from the defect that countries may merely assert that progress is being made by pointing to the existence of applicable legislation, without investigating whether legal reality differs from social reality. Other possible implementation means include a communication procedure under which individuals or organisations and states could make complaints about violations of children's rights, and the sending of teams to selected countries to inquire into children's social and legal status. Some combination of these methods might also be adopted.

The legal status of children, especially in the Western world, has undergone a radical transformation since the days when children were discarded as readily as used property. Today, in many parts of the world, children are valued social beings, imbued with legally protected rights. Parents have duties to protect children during their prolonged dependent state. Children have rights, even against those responsible for their care, in case of abuse and neglect. Dramatic progress has been made in the past decade. Nonetheless, it must be remembered that the social reality of childhood in many parts of the world is still that of a precarious existence fraught with obstacles. It can only be hoped that the International Year of the Child will increase public awareness of these problems and that the social and legal status of the world's children will continue to improve so that the rights of the UN Declaration may be universally realised.

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[1] Peter Laslett, *The World We Have Lost* (New York: 1965), p. 104.

[2] M. J. Tucker, "The Child as Beginning and End: Fifteenth and Sixteenth Century English Childhood," in Lloyd deMause, ed., *The History of Childhood* (New York: Psychohistory Press, 1974), p. 231.

[3] David Hunt, *Parents and Children in History: The Psychology of Family Life in Early Modern France* (New York: Basic Books, 1970), p. 102.

[4] Lloyd deMause, "The Evolution of Childhood," in deMause, *op. cit.*, p. 29.

[5] deMause notes that children were sacrificed by such diverse peoples as the Irish Celts, the Gauls, Scandinavians, Egyptians, Phoenicians, Moabites, Ammonites, and in certain periods, the Israelites. deMause, *op. cit.*, p. 27.

[6] For example, the annual number of female victims of sexual abuse between the ages of four and thirteen in the United States has been estimated at 500,000. John Gagnon, "Female Child Victims of Sex Offences," *Social Problems*, v. 13 (1965).

[7] See Philippe Ariés, *Centuries of Childhood: A Social History of Family Life* (New York: Random House, 1962).

[8] One example of this is the rebellious son law in colonial Massachusetts proclaiming filial disobedience to be a capital offence. See generally Edwin Power, *Crime and Punishment in Colonial Massachusetts* (Boston: Beacon Press, 1966).

[9] See Mary Ann Glendon, "Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies," in *Amer. Journal of Comp. Law*, v. 23 (1975).

[10] Stoljar, "Children, Parents and Guardians," in *Int. Ency. of Comp. Law*, v. 4, p. 14-15.

[11] See generally Colombet, "Commentaire de la loi du 4 juin 1970," *D. Chron.* 1, (1971).

[12] Grundgesetz (1949); Gleichberechtigungsgesetz of 18 June 1957, BGB1, I.609. See also Markovits, "Marriage and the State: A Comparative Look at East and West German Family Law," 24 *Stan. L. Rev.* 116 (1971).

[13] See generally on American law, Robert Mnookin, *The Child and the Law* (Boston: Little, Brown & Co., 1978), and on English reforms see Olive M. Stone, *Family Law* (London: Macmillan Press, 1977).

[14] ILO Bureau of Statistics and Special Studies. Forty million of these children are unremunerated for their labour in family-owned or operated (primarily agricultural) enterprises.

[15] Report, Newsletter of the International Year of the Child Secretariat, Number 1, August 1977, p. 3.

[16] For a study of the evolution of the UN Declaration through its three drafts, see Eliska Chanlett and G. M. Morier, "Declaration of the Rights of the Child," *Int. Child Welfare Rev.*, v. 22, 1968.

[17] Draft Convention on the Rights of the Child submitted by Poland on 7 February 1978, Annex to Commission on Human Rights Resolution 20 (XXXIV).