

# The Sovereignty of Children in Law



# The Sovereignty of Children in Law

Edited by

Farhad Malekian and Kerstin Nordlöf

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P U B L I S H I N G

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Edited by Farhad Malekian and Kerstin Nordlöf

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To our four children, whose names have been selected from nature

Alvan: *the sovereignty of colour in nature*

Paliz: *the kingdom of a garden of flowers*

Cariz: *the spring of water in a natural environment*

Afrang: *the power of the sun, the galaxy and the universe*



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## ABSTRACT

The system of the United Nations, as well as many international and regional bodies, imposes various duties on states that consequently have obligations towards the rights of their individuals. This is particularly significant in the case of children who are not only considered one of the most valuable subjects of international regulations, but are also an integral part of the legislation of domestic laws. Despite the fact that laws concerning the rights of children are well settled in the international sphere, and are recognized under the *jus cogens* norms, national laws about children, or national laws having an effect on children, are still not completely adequate. Many legislative and cultural practices expose the fact that children are not recognized as the holders of rights. National legal authorities should not, in accordance with the existing international legislations, plead provisions of their own laws or deficiencies of those laws in response to a request against them for alleged violations of children's rights that have occurred under their jurisdiction. In fact, the absence of appropriate legislation within national legal systems and the reluctance of legal authorities to seriously take children's rights into consideration, have been two of the key reasons for the contraventions of children's rights in national or international conflicts. This book examines many different areas within the law which deal with the specific rights of children such as the philosophy of law, civil law, health law, social law, tax law, criminal law, procedural law, international law, human rights law and the humanitarian law of armed conflict. The intention is to show that there are many rules, provisions, norms, and principles within various areas of the law that relate to the rights of children. The extent of these rights implies the existence of certain regions of law which have to be acknowledged and respected by national authorities. However, the acknowledgement of rights is also a matter of intention, and may be implied or expressed by the practice of authorities. The question of the child constituting a self-ruling subject of justice and its legal ability to create an independent individual legal personality for the protection of its rights, but not necessarily for the exercise of those rights, are the central issues of this book.

# CONTRIBUTORS

## Editors

Distinguished Visiting Professor **Farhad Malekian** is the founder and director of the Institute of International Criminal Law, Uppsala, Sweden. He was one of the leading academics in The World Conference on the Establishment of an International Criminal Court to Enforce International Criminal Law and Human Rights, Associated with the United Nations, International Institute of Higher Studies in Criminal Sciences, Syracuse, Italy (1992 and 1995). Malekian was nominated in Who is Who in 1996. He was listed among the “distinguished leaders in the field” of international criminal law in the twentieth century by L’Association Internationale de Droit Pénal. In 2005, he introduced the Principle of International Tribunality of Jurisdiction at the Cornell Law School. Malekian’s views are analysed internationally and within doctoral dissertations. He is the author of outstanding “selected major treatises” as well as a considerable number of books and articles which have been an integral part of reading literature in different universities such as Europa-universität Viadrina in Frankfurt, Germany; Faculty of Law, University of New South Wales, Sydney, Australia; School of International Studies, University of Trento, Italy; Institute of Hartford Seminary, United States; Mid Sweden University and Stockholm University, Sweden; International Summer University Ohrid, Macedonia; Faculty of Law, University of Canterbury, New Zealand; Kent Law School, University of Kent, Canterbury, United Kingdom.

Malekian’s works are referred to in many languages e.g. English, Arabic, Chinese, Finnish, Danish, Serbian, Russian, German, Norwegian, Latvian, French, Swedish, Turkish and Spanish. To mention just a few, his works include International Criminal Law: The Legal and Critical Analysis of International Crimes (2 volumes, 1991); The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach (2<sup>nd</sup> ed., 1995); Documents on the Principles of International Human Rights (2007); Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal, Cornell International Law Journal (2005); The Homogeneity of International Criminal Court with the

Islamic Jurisprudence, *International Criminal Law Review* (2009); *Principles of Islamic International Criminal Law, A Comparative Search* (2<sup>nd</sup> ed., 2011), *Principles of International Criminal Justice* (forthcoming 2011), and invitation to contribute two articles to the most comprehensive reference work -*Encyclopaedia of Criminology & Criminal Justice* - to be published by Wiley-Blackwell (5 volumes 2012). Malekian also is known for his “dynamic presentations”. F.Malekian.In.Crim.L@telia.com

Professor and Dr of Laws **Kerstin Nordlöf** joined the Örebro University Department of Law in December 2008. In addition to her responsibilities as a professor of law and teaching Penal Law, Criminal Procedural Law, Social Law, International Law, European Union Law, she also lectures on Juvenile Criminal Law. Her basic research interests include Penal Law, Criminal Procedural Law and Evidence, International Law and Social law, with a particular focus on children's rights before the criminal justice system. She is also engaged in questions of trafficking in women and children. Nordlöf also has a particular research interest in the implementation of the rights of children at an international level.

Before joining the Örebro University in Sweden, Nordlöf was an adjunct judge in the Court of Appeal in Stockholm in 2007-2008. For several years she was associate professor of law in Mid Sweden University and head of the Department of Law at the same university. She was also a visiting professor of law in 2005. Nordlöf has also taught for several years in Stockholm where she obtained her degree Doctor of Laws. She has written extensively in the fields of criminal procedure law and criminal law, and delivered international lectures. Some of her articles deal with *The Legal Philosophy of Protecting a Suspect Child* (2006), *International Principles and Rights of Children in Criminal Cases* (2007), and *Economic Raison d'être of Trafficking in Children* (2012). Her forthcoming books are the *Prohibition of Sex Trafficking Constituting Obligatio Erga Omnes, the International Rules of Law for the Protection of Children: Analysis and Documents* (2012) as well as in Swedish the *Criminal Law Procedure for Juveniles* (2012). She is also contributing an article to an indispensable source - the *Encyclopaedia of Criminology & Criminal Justice* - to be published by Wiley-Blackwell (5 volumes 2012). Kerstin.Nordlof@oru.se

## Contributors

**Batohi, Shamila** is a special adviser to the Office of the Prosecutor of the ICC. Shamila.Batohi@icc-cpi.int

**Burns, Angela**, Solicitor, Freelance Author, formerly Senior Lecturer, Programme Director LL.M in Professional Legal Practice, and Deputy Programme Director Legal Practice Course, City Law School, City University, London. angelajburns@hotmail.com

**Chapagai, Raju Prasad** was an adjunct Professor of law at Kathmandu School of Law, 2004-2007. He is mainly educated in constitutional law (LL.M). He has worked as Legal Adviser to the UN Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal). He has also worked in various capacities including a private/defense lawyer in civil and criminal law cases, National Legal Officer and Thematic Adviser on Transitional Justice and Rule of Law, and as a Public Interest Lawyer in the Supreme Court of Nepal on a wide range of human rights issues. He was a former editor of Nepal Bar Council Law Journal (2007 Issue). RChapagai@ohchr.org

**Enquist, Hjärdís Flodström** is a lecturer in the Faculty of Health and Occupational Studies Department of Social Work and Psychology University of Gävle, Sweden. She works extensively with law questions. Hjordis.Flodstrom.Enquist@hig.se

**Ervo, Laura** is professor of law and a researcher at the Örebro University, School of Law, Psychology and Social Work, Sweden. Dr. Ervo is also an adjunct professor at the Universities of Turku, Helsinki and Eastern Finland. Her main field of research is procedural law, especially human rights in proceedings and the law of evidence. Laura.Ervo@oru.se

**Ghazanfari, Hengameh** is a Ph.D. candidate in International Law, Member of Law Faculty, Azad University, Khorramabad Branch, Iran. She also teaches law. ghazanfari\_h50@yahoo.com

**Hamzei, Helen** LL.M. is Ph.D. Fellow and Lecturer at the Grotius Center for International Legal Studies, Faculty of Law, Leiden University, the Netherlands. h.beckmann-hamzei@law.leidenuniv.nl

**Kristoffersson, Eleonor** is professor of law and a lecturer, as well as a researcher at Örebro University in Sweden. She holds a Ph.D. from Jönköping International Business School. She worked at Uppsala University until 2009. She became a professor in tax law at the same university in 2009. She has also been a partner of the Tax Consultancy Firm Svalner Skatt & Transaction in Stockholm, and a member of the Board of advanced rulings (*Skatterättsnämnden*). She is also the head of the Institute for Value-Added Tax research at Stockholm University. Eleonor.Kristoffersson@oru.se

**Köhler-Olsen, Julia** has a Master of Law degree from the University of Oslo (2003), Norway. Since 2006 she has been a Ph.D. student at the Department for Public and International Law, Law Faculty, University of Oslo. Her Ph.D. project is on the child's right to self-determination in relation to religious norms. j.f.kohler-olsen@jus.uio.no

**Mattsson, Titti**, B.A.1988 (Washington D.C.), LL.M. 1991, J.D. 2002 (Lund), is Associate Professor in Public Law at the Faculty of Law at Lund University, Sweden. The main area of her research is on child protection and legal security for children and youth, with a focus on human rights and ethical issues. She has been widely published in monographs, anthologies and in international journals. She is an expert in child law for the Ombudsman for Children in Sweden and member of the Nordic Committee on Bioethics. Titti.Mattsson@jur.lu.se

**Peleg, Noam** is a Ph.D. candidate at University College London, Faculty of Laws, United Kingdom. He has worked as a lawyer with different human rights NGOs in Israel, after a career in journalism. As a practitioner, Noam litigated in cases concerning children's rights, humanitarian law, education law and family. He also worked for the National Committee on the Rights of the Child in Israel. n.peleg@ucl.ac.uk

**Persson, Annina** is a Professor of law. She was educated in law at the University of Stockholm and obtained her PhD in 1998 at the same university. Her thesis was on 'Retention of Title Clauses. A study of the present and future position of a security interest', a comparative study of the legal treatment on retention of title clauses in seven countries. In 2000, she was appointed Associate Professor at the Faculty of Law, Stockholm University. In 2008, she was appointed professor at the School of Law, Psychology and Social work, Örebro University, Sweden, where she

lectures Swedish Commercial Law, Comparative Law and International Trade and Insolvency Law. She has also been guest professor at the Centre for Banking and Finance at Royal Institute of Technology in Stockholm. Annina.persson@oru.se

**Prucnal, Marta**, Doctor of Laws, Jagiellonian University, Cracow, Poland; Visiting Researcher, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. martpru@googlemail.com

**Ragnesten, Lisa**, LL.M., Örebro University, is now working as a Notary at Jönköping District Court, Sweden. She has also lectured in law in the Department of Law in Örebro University. lisa.ragnesten@gmail.com

**Reid, James** is a Senior Lecturer in Childhood Studies in the School of Education and Professional Development at the University of Huddersfield, the United Kingdom. His academic interests include practice with families, particularly with fathers. He is a registered social worker, with experience in practice with children and their families. Prior to his current position, Reid lectured on social work at the University of Teesside and worked with UNICEF in Central Asia. Reid is a Fellow of the Higher Education Academy in the UK. J.Reid@hud.ac.uk

**Sandberg, Kirsten** is Professor of Law at the Department of Public and International Law in University of Oslo. She lectures on child law, welfare law and public administration law. She was recently elected as a member of the UN Committee on the Rights of the child, 2011-2015. She is a co-editor of a book on the CRC and its implementation in Norway, and has written articles on children's right to be heard, the discrimination against children, and the rights of asylum-seeking children, etc. Sandberg is currently heading a research project on children's rights in Norway. She has also temporarily worked as judge in the Supreme Court of Norway in 2010-2011. kirsten.sandberg@jus.uio.no

**Sasan, Navdeep Kour** is assistant Professor in Law at the Law School, University of Jammu, Jammu, India, and has lectured for several years in advance courses in the same university. Kour also has a Ph.D. in law, and is actively involved in the publication of legal articles, individually and collectively. ndksasan.law@gmail.com

**Sveri, Knut** received his law degree and PhD in Oslo. He is the first well-known distinguished professor of criminology in Sweden. Emeritus Professor Dr. Sveri was the head of the Scandinavian Research Council for Criminology between 1974 -1978. He has long debated the nature of law, its formulation, adoption and miss-implementation in Sweden and other Scandinavian countries. Professor Sveri has published extensively on different areas of law and criminology. KNUT.SVERI@SPRAY.SE

**Takata, Kiyoe** is Associate Professor of Social Security Law and Social Service Law, Faculty of Law and Letters, University of the Ryukyus, Japan. She has lectured extensively in law and worked on questions of comparative and social law. In particular, she has a wide range of knowledge regarding the legal system in Scandinavia countries. Takata has also been a visiting scholar in a number of universities. ktakata@ll.u-ryukyu.ac.jp

**Tolonen, Hannele**, LL.M. (University of Helsinki), Trained on the Bench, B.Sc. Econ. & Bus. Adm. (Helsinki School of Economics) is a doctoral student at the University of Helsinki, Finland. Tolonen is writing her dissertation on custody and child care proceedings, her research interests being in the fields of procedural and family law. She is currently working as an assistant at the University of Helsinki, Unit for Legal Studies in Vaasa. Before taking up doctoral studies, she worked as a legal aid counsel. hannele.tolonen@helsinki.fi

**Wang, Lydia Yu-yeh** obtained her degrees from National Taiwan University (LL.B.), University of Washington (LL.M.) and Washington University (J.D.) and is currently an Associate Research Fellow at the Institute of European and American Studies, Academia Sinica (Taipei, Taiwan). Wang was a visiting scholar at the Harvard Law School, University of Leuven and Örebro University. She has written widely on American legal history, American civil rights, European human rights, and European Union law. She is now an associate Research Fellow at the Institute of European and American Studies, Academia Sinica. The majority of her publications and research work can be found at <http://www.ea.sinica.edu.tw>. yywang@sinica.edu.tw



**Wergens, Anna** is a lawyer specialising in issues related to crime victims. She has been working at the Crime Victim Compensation and Support Authority (Brottsoffermyndigheten) in Sweden. She has primarily worked with issues connected to crime victims at an international level. She has led several EU-funded projects on crime victims and published three books on crime victims in the European Union. During 2005-2007 she was the secretary of a governmental committee directed at putting forward proposals on legislation dealing with the counsel for injured persons in Sweden. At present she is connected with International Victimology Institute at Tilburg University and works on her doctoral studies on international standards on victims' rights.  
anna.wergens@brottsoffermyndigheten.se

**Öztürk, Fatih**, is assistant Professor of International Law in the Faculty of Law, Melikşah University, Kayseri, Turkey. He is the director of International Affairs Office, Lecturer of Administrative and Comparative Law. He obtained an LL.B. from Istanbul University, Turkey, an LL.M. from California Western School of Law, San Diego, USA, an LL.M. from Queen's University, Kingston, Canada, and a Ph.D. from Istanbul University, Turkey. attorney33@hotmail.com

# INTRODUCTION

By analogy with the rules which exist to provide legal, social and economic aid to the victims of national or international crimes, it may be possible to suggest that there is also an established legal duty for all states to provide access to resources which can, under reasonable criteria, protect children from the improper conducts of individuals, organisations, and the administration of justice. However, what constitutes the definition of the child is a very intricate question. In accordance with the Convention on the Rights of the Child, a child is a person under 18. It is, not however, easy to describe the precise acceptance or rejection of this age within the national systems of different states. Some states have adhered to this age limit under the Convention, some have accepted it with reservations, and still others have rejected it entirely. Nevertheless, the real issue does not actually relate to recognizing the age limits of childhood or adulthood, but rather the way in which we deal with different matters concerning children under our legal systems. Their rights have not only been given insufficient attention under the jurisdiction of states, but have also been seriously violated by transnational or international criminal actions. The ignoring of children's rights under the jurisdiction of a state covers legislative, judicial, and administrative measures and practices.

It is far from easy to state the current legal position of children in terms of the conventional, customary, general principles of law and case law, although many international treaties dealing directly or indirectly with the rights of children have been ratified. Modern writers therefore assert that there is a trend within the legal machinery of states towards encouraging the doctrine of the protection of children under a particular realm of law called the sovereignty of children. Yet the practice of different legal systems is far from consistent, and there is a persistent divergence between legislation supporting the theory of the recognition of the rights, self-protection, various securities, or autonomous personality of children, and that of the restrictive personality of children under the complete supervision of parents or guardians.

The increased complexity in estimating the effect of ignoring the rights of children under national practices, and the irreversible harm to children

which has been caused by the provisions of different legislations and legal authorities, has resulted in conscious efforts in national and international legal and political communities for the establishment, improvement and protection of the rights of children. This effort has been especially strengthened as a result of the physical and psychological vulnerability of children confronting national, regional, and international problems, for example: the 1989 Convention on the Rights of the Child; the 2000 Optional Protocols on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography; the 1980 Hague Convention on the Civil Aspects of International Child Abduction; the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-Country, as well as the 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. The frameworks of these conventions must be regarded as integral parts of the *jus cogens* system. This is because their provisions are crucial to the protection of the rights of children as a whole, and are therefore obligatory upon all states.

This book examines many different areas of the law, dealing with the rights of children like the philosophy of law, civil law, health law, social law, tax law, criminal law, procedural law, international law, human rights law and humanitarian law of armed conflict. The intention is to show that there are many rules, provisions, norms, and principles within various areas of the law that relate to the rights of children. The anthology of these rights undoubtedly implies the existence of certain regions of law which have to be acknowledged and respected by the national authorities. However, acknowledgement of rights is also a matter of intention, and may be implied or expressed by the practice of the authorities. The question of the child constituting a self-ruling subject of justice and its legal ability to create an independent individual legal personality for the protection of its rights, but not necessarily for the exercise of those rights, are central issues of this book.

The book is the result of a number of different scholars dealing in different ways with the questions of children's issues. These specialist writers, from different parts of the world, examine the impact of regulations and practices relating to children in different legal areas. The intention of these articles is to scrutinize different legal systems in Africa, Asia, Europe and the United States. The editing of the book has therefore been a challenge, owing to the fact that regulations and practices in different societies

diverge to some extent from one another. By presenting them simultaneously, our purpose has been to struggle against the defects of the law and the serious ignorance of legal authorities concerning the issues of children. The themes and the conclusions of different articles demand the modifications, amendments, draft or strengthening of regulations applicable to the rights of children.

It is axiomatic that as long as children are considered inferior human beings and not one of the significant subjects of national law, violations of their rights by different means will, critically, not be recognized as violations. The problems of children, whether cultural, social, economic, educational, medical, criminal, procedural or otherwise, may not be resolved merely by formulating children's terms into national, regional or international legislation. The legal body of law, and the legal practice including the cultural attitudes of various nations have to adapt themselves to the new conditions of the protection of children by exposing and then shifting from traditional methods such as ignorance, threat or force. The fundamental mechanisms of our societies, such as economy, culture and religion, must take into account that the protection of children cannot be carried out by physical force or the unsuccessful words of parents, guardians, teachers, social workers, lawyers, judges or rehabilitation teams.

We have to learn that the integrity of our children cannot solely be guaranteed by the expression of the word love, but by full respect of their position and rights. Strange as it may seem, when we do not respect the rights of others, it might be considered a civil violation or a crime. But when the rights of children are violated it has, on many occasions, been dismissed as custom or argued that they gave their express consent. For example, in the nineties, when a child of 11 was raped in Sweden, the judgment concluded that there was an implicit consent. Similarly, when a child of 7 was raped by an Iranian priest in a Mosque, it was judged as the victim receiving spiritual enlightenment. It is, in principle, true that literally millions of people believe that children are their property or that a child has no rights of his or her own, and thus the conduct of parents, guardians, representatives of organisations, and the administration of justice relating to children are permitted as a matter of law or nature. This basic misunderstanding has to be rectified and the general attitudes of many nations which basically have a culture which decides on children must be promoted by laws. As the United Nations Millennium Declaration of 2000 points out, as leaders we therefore have a serious responsibility to

the entire world, “especially the most vulnerable and, in particular, the children of the world, to whom the future belongs”.

Farhad Malekian  
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**CHAPTER ONE:**

**DIMENSIONS OF THE BEST  
INTERESTS OF THE CHILD**

# THE CHILD AS AN AUTONOMOUS SUBJECT OF JUSTICE

FARHAD MALEKIAN

## Abstract

Justice is certainly not based on self-satisfaction. Nor is it the giving or receiving of pain. If these were the case, justice could be achieved simply by everyone fighting everyone else. Nor is justice the concrete knowledge of empirical laws, legislative frameworks or a collection of particular norms. In each social case, it has its own way of reasoning, approach, understanding, theory, philosophy and conclusion. But the common presumption is that justice should have one supreme aim. This is the protection of the personality of individuals. Thus, justice should have its own sovereignty, its own legal territory and its own autonomy of self-independence. This also includes the way in which we treat the *integrity* of the child. Whatever we are and whatever we want, it is axiomatic that our vision should not be blinded or affected by other, superficial, matters surrounding our social life. The sovereignty of justice should be so strong that no principles of its strength can be associated with other subjective aspirations. Here our intention is, as far as possible, to find a feasible *modus operandi* for the effective recognition and implementation of the rights of the child. The intention is not to convince the state's authorities about those rights, but to realize the *de facto* existence of the rights of the child. This article challenges the theory of justice for children and the understanding of its nature, philosophy, principles, norms, and particularly the interpretation of its *de jure* sources. The question of the child constituting the self-ruling subject of justice and its legal ability in creating an independent individual legal personality for the protection of its rights but not necessarily for the exercise or emancipation of those rights by the child, are the focus of attention of this article.

**Key words:** justice, child, protection



## 1. Introduction

The position of the child as a separate subject of law is a relatively new innovation;<sup>1</sup> there are probably not many legislative bodies around the world that have given the child the recognition of full legal personality as compared to adults. That recognition does not necessarily mean the personal capacity to use the rights, but the capacity to be, and be accepted, in his or her personal capacity as a child. Some movement has, however, been made to that end, but with no particular admission within the domestic practice of states. The criteria of mental ability, wisdom perception, physical power, and personal skill have, as a whole, been some of the most recognized reasons for the prevention of their identification as a full legal person. But, unfortunately, “l’enfant est traité comme une marchandise.”<sup>2</sup>

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<sup>1</sup> For example consult Jane Fortin, *Children’s Rights and the Developing Law* (2009); Elaine E Sutherland., *Children Rights in Scotland* (2009); Martin Guggenheim., *What’s wrong with children’s rights?* (2005); Elaine E Sutherland, *Child and Family Law* (2008); Marie Parker-Jenkins, *Sparing the Rod: schools discipline and children’s rights* (1999); Priscilla Alderson, *Young Children’s Rights: Exploring Beliefs, Attitudes, Principles and Practice* (2000); Michael D. A. Freeman, *The moral status of children: essays on the Rights of the Child* (1997); Mary John, *Children’s Rights and Power: Charging up for a New Century* (2003); Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood* (1992); Michael D. A. Freeman, Philip E. Veerman, *The Ideologies of Children’s Rights* (1992); Eugene Verhellen, *Monitoring children’s rights* (1996); David Archard, *Children: Rights and Childhood* (1993); Geraldine Van Bueren, *The International Law on the Rights of the Child* (1998); James R. Himes, *Implementing the Convention on the Rights of the Child: resource mobilization in low-income countries* (1995); Sharon Detrick, Paul Vlaardingerbroek, *Globalization of child Law: the role of the Hague Conventions* (1999); Sharon Detrick, Jaap Doek, Nigel Cantwell, *The United Nations Convention on the Rights of the Child: a Guide to the “Travaux Préparatoires”* (1992); Lawrence J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (1995); Alfred Glenn Mower, *The Convention on the Rights of the Child: International Support for Children* (1997); Eugene Verhellen, *Convention on the Rights of the Child: background, motivation, strategies, main themes* (2000); Geraldine Van Bueren., *International Documents on Children* (1998); and Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (1999).

<sup>2</sup> Jean Zermatten., *La convention des droits de l’enfant 20 ans, déjà!*  
[www.swiss-paediatrics.org/sites/default/files/29-32.pdf](http://www.swiss-paediatrics.org/sites/default/files/29-32.pdf).

Compared with earlier rules of traditional international law, the rights of the child within our society may be likened to the position of a state controlled by suzerain power. In international law, these rules mean that a state or nation is juridically and politically controlled by another state regarding its external relations with other states. The state in question is, however, permitted to deal with its internal affairs. This is precisely the position of most children in contemporary international society: they are solely accepted as children but are heavily ignored in their external relations. These may include social, educational, economic and other potential activities. The position does not necessarily mean that they do not have regulated rights within various legal systems, but that the rights stipulated within those legal instruments, are mostly integrated into other regulations within our social unity. This gap between rights, to have rights, but not to be given sufficient rights to recognize and use those rights, appropriately is a fact that can be seen within most branches of the legal system such as criminal law, criminal procedures, family law, labour law and also financial regulations.

The aim of this article is not to list different rights of children or analyse them according to the principles of custody or care within civil and common law systems. Such a task has, in effect, been carried out by many of the other writers in this collection on the Sovereignty of Children in Law. The purpose here is, as far as possible, to find a feasible apparatus which may be useful in the effective recognition and implementation of the rights of the child. By “effective recognition and implementation”, we do not mean the acknowledgement of the rights by different legal systems and their implementations. Rather, we simply mean the correct way, with accurate measures, to establish the nature of the legal personality of the child. The purpose is not to convince the social or legal authorities about the existence of those rights, but to realize the existence of the child as a consolidated subject of our legal mechanism. This work therefore challenges the theory of justice and understanding its nature, philosophy, principles, norms and particularly its interpretation in order to reach a definition of justice in connection with the philosophy of the protection of children. The question of the child constituting the self-ruling subject of justice and its legal ability to create an independent, individual legal personality for the protection of its rights but not necessarily for the exercise of those rights by the child, is therefore the main thrust of this article.

## **2. The Concept of Protection**

### **2.1. Uniformity of Protection**

Sooner or later, the protection of the rights of children will have to become one of the most remarkable tasks of our living society.<sup>3</sup> This is based on the fact that children are one of the most frequently referred to subjects of law whether in connection with domestic or international law. In particular, the protection of children has become one of the main aims of international entities such as the various United Nations bodies, the permanent International Criminal Court, Amnesty International, or Human Rights Watch. Speaking personally, what is uppermost in my mind is always, do I provide those necessary pre-conditional shelters for the safety of my four children? Of course, reference to my own children does not necessarily mean that in order to understand the position of children one needs to be a parent, or to be responsible for the care of a child. But the reference is only to provide a hortatory and practical example in the discussion relating to the philosophy of child protection. I nevertheless believe that the protection of my children is necessary, and the granting of such protection should not violate the rights of other minors or adults. Similarly, I ask myself: should the protection of the rights of my children take priority over my own personal protection, ability, and security? In other words, how far should I go without various natural, normal, or legal protections when I estimate the importance of the protection of my children? Does the concept of protection have natural and legal limits, or is it permanent in whatever situation?<sup>4</sup>

My mind is not necessarily occupied by the rule of law and its pressure upon me, but, by the rule of moral law, my personal responsibilities, duties, tasks and the very outer limits of my brain's capacity to understand the fundamental rights of my children in connection with universal values in a world where breaches of law are the most widely reported national or international news stories. I therefore seek for the truth, the ethics of conscience, bliss and harmony between what I understand from the moral

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<sup>3</sup> See *The New Handbook Of Children's Rights: Comparative Policy And Practice* (Bob Franklin, ed., 1991); *Children, Rights, And The Law* (Philip Alston, Stephen Parker, John Seymour editors, 1992). Martin Guggenheim, *What's Wrong With Children's Rights?* (2005).

<sup>4</sup> The history of rights of children, for example, in the United States demonstrates that children were legally subordinate to adults and also subject to adult authority. Martin Guggenheim, *ibid*, p 9.

law or natural law with a slight combination with positive law.<sup>5</sup> The reason is, I feel, that the first cornerstone of the understanding of the nature of the protection of my children is not law, but the way in which I treat their personal or *natural integrity*. This includes the integrity when I shared their creation in the womb, their birth, their infancy, babyhood and childhood, and so on. To these, I may also add the requirements of certain laws that have been discussed and accepted within our social structure. When I talk about “certain laws”, I intentionally draw a line between a good law and a bad law, between a conservative law and a radical law, between a dictatorial law and a democratic law, as well as between the philosophies of one law and another. Thus, one may speak of a just law and an unjust law.<sup>6</sup> Law may give order for the protection of certain subjects due to its own requirements, but the substance of protection, because of its very sensitive perception, cannot be exclusively based on an order and the law itself. This means that sacrificing our own protection may not still be enough for the protection of children, based on the fact that the question of protection is purely conceptual, hypothetical, and personal. Nevertheless, the protection of children should be combined with *faith, trust, belief, worship, and love*.

## 2.2. Realm of Protection

What the source or sources of natural integrity are is not as complicated as in the case of positive law.<sup>7</sup> This is because positive law may not only be heavily subjected to interpretation by philosophers of law or legal authorities of administration of justice, but also by the ordinary layman who does not know about the legal provisions but has his own way of understanding the provisions of social orders.<sup>8</sup> For him, the protection of the rights of children may solely mean having a home, food, drinks,

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<sup>5</sup> For a discussion on the nature of morality and its effects on our judgments see Bernard Gert, *Common Morality: Deciding What to Do* (2004).

<sup>6</sup> The concepts of just and unjust law are two interrelated concepts that have usually been analyzed side-by-side facing each other's arguments. The concepts have been deeply rooted in the traditional philosophy of law and also extended within contemporary national or international law. For many, an unjust law is not law, but the circumstances of power and force. A just law is a law which has *inter alia* the character of human rights norms and respects the personal integrity of minors or adults.

<sup>7</sup> Farhad Malekian, *The Miserable Wedding of Naturalism into Positivism*, ID EST Journal, (2009), pp.139-143.

<sup>8</sup> Ibid, pp.145-146.

clothes, schooling and his/her way of presenting happiness. Here, our intention is not to draw a line between natural law and positive law and assert that one is better than another, or that one is superior to the theory of the other.<sup>9</sup> The purpose, rather, is to become aware that in order to realize the boundaries of positive law one needs to understand the boundaries of natural law.<sup>10</sup> But the contrary may scarcely be the truth. This is as long as our motivation does not coincide with the provisions of positive law.<sup>11</sup> It means that the protection of our children according to the rules of law is not a gift, but that one has to ask or fight for it. This protection may not only be asked for from the administration of justice and legislation authorities, but also from all types of social services.

As we have mentioned above, to understand the purpose of the enhancement of positive law for the protection of the rights of children, an understanding of the natural law may to some extent be a corollary condition. The reason is that the jurisprudence of law rests not only on legal theories, legal philosophers, legal reasoning and the historical theories of law, but also on the elementary principles of natural law, civil law and the law of nations.<sup>12</sup> This can easily be seen within the provisions of the Universal Declaration of Human Rights which fundamentally integrate the principles of natural law into positive law.<sup>13</sup> Although the whole theory of the Declaration is based on a resolution of the General Assembly, and does not therefore have the binding effect of law making treaties, it is considered an integral part of *jus cogens* law because of the safeguarding of some of the most fundamental principles of human civilization.<sup>14</sup> This is the law, the provisions of which are peremptory, and it should not be ignored in the national or international relations of states. Consequently, even though we may have different schools of thought regarding how those significant norms of human rights are to be faced, the philosophy of human rights not only speaks about moral law, but also about positive law. Together, these create a combination of legal protection for all subjects of law and its categories.

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<sup>9</sup> Ibid., pp.147-149.

<sup>10</sup> Ibid., pp.145.

<sup>11</sup> Ibid., pp.145-149.

<sup>12</sup> Ibid., p.146.

<sup>13</sup> Ibid., p.144.

<sup>14</sup> See *infera* section on *Jus Cogens*.

### 2.3. Strength of Adaptability

In the above, I am not trying to put the functions of laws or the real facet of laws alongside one line and habitually present them. My chief intention is to find the way in which I meet the requirements of my children, and which may suit the character of natural or positive law. The reason is that the creation of particular protection for children does not necessarily arrive by email or legislative measures, but how one interprets as well as understands the ethical or practical legislation of social relations. The fact is that I have to understand my children as they wish so that I can realise their interests. This means that I need to be corrected, and if necessary, to be modified so that the personal integrity of my children is not harmed and we will most probably reach the most central points in our minds. Understanding this logic is not so difficult, because if we are all animals by nature, we have to be protected and in a way that, our reasoning will not harm our natural equality, human morality and freedom of expressions as a whole.<sup>15</sup> Protection and expression are thus an integral part of one another and should not be separated from one another, even regarding our children who are minors.

Despite the known or unknown fact that we are, or are not, animals, we have intelligence, and understand that we should not damage each other's integrity.<sup>16</sup> The term "animal" is thus a term of art, but not a term of battle with nature and the reason for our existence.<sup>17</sup> Whatever we are, and whatever we want, it is obviously clear that our vision should not be clouded or be monopolized or affected by other superficial matters surrounding our social life. These might include such things as intellectual pursuits, socializing with colleagues or friends, taking delight in material possessions, sex, taking pleasure in our families and basking in the reflected glory of any of their successes, the environment, and so on.

It is axiomatic that there is nothing wrong with being self-confident or overconfident, which increases our ability reach to achieve various goals. But these feelings or attitudes must unquestionably not conflict with the rights of others, which also includes minors. For us, then, this overconfident ability should be orientated to recognizing the social rights of all persons, old or young. In one sense, it may take legislation to

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<sup>15</sup> For an analysis of moral law see Catherine Wilson, *Moral Animals: Ideals And Constraints In Moral Theory* (2004).

<sup>16</sup> *Ibid.*, at 2.

<sup>17</sup> *Ibid.*, at 2-3.