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Chapter

Exploring the Tension between the Rights of the Child and Parental Rights: Voices from Ghana

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Abstract

The principle of "best interests of the child" is firmly established in legal jurisprudence and has taken a firm hold on several domestic and global instruments. Generally, the courts rely on this principle in many cases of child custody, child work, child labour, and compulsory education. The norm of best interests of the child seems to be placed at the core of international law in relation to children's rights by Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC). Nevertheless, there is no one universal "best interests of the child" norm owing to cultural variations. In Ghana, this raises issues of conflicts between expectations in the rights and duties of the parent and the right of the child as expressed in the United Nations Convention on the Rights of the Child (UNCRC) and offers a genuine opportunity for reform. The United Nations Convention on the Rights of the Child (UNCRC) adopted the rights of the child that can be classified into three groups: protection rights, provision rights, and participation rights. It appears the best interests of the child is at the centre of international children's rights law which is articulated through Article 3(1) of the UNCRC. Presently, the advocacy of a child's right to welfare grounded on human dignity has generated the present discussion on the rights of the child. Article 18 of the UNCRC provides that parents have a shared and core responsibility for the nurturing of their children and that in undertaking their child upbringing responsibilities, appropriate support shall be offered to parents and legal guardians by State Parties. Usually, the variation between children's rights and parental rights, nonetheless, is not acknowledged by the UNCRC. Furthermore, the UNCRC views children to be competent individuals who should be an essential component of decision-making on issues affecting them. The parent/child contrast demonstrates that there is the need for cooperation that protects the rights of the child, the parent and defines the role of the state. There is the need to explore the best legal and judicial processes for realising this cooperation.

Keywords: right of the child, parental rights, protection rights, provision rights, participation rights

1. Introduction

This chapter explores the current interaction between the parent and the child which is viewed as a split of duties and responsibilities resulting in antagonism between parental and children's rights. The chapter further draws on the Will/Choice

theory of rights, and the Interest/Benefit theory of rights that provide a very important structure for discussion detailing some of the discussions about cultural relativity and childhood; definition of areas in which considerations of welfare are limited; and rights as means of protecting certain individual interests to establishing norms and strategies to avert or deal with the abuse of children's capability to work. In Ghana, "best interests of the child" legal norm is used by the courts in deciding many issues regarding the welfare of the child in relation to parents or legal guardians. Therefore, guaranteeing justice and the highest opportunity for quality of life for children is a key objective of the law court [1]. An order is generally issued by the court for social workers and other child welfare professionals to undertake investigations to determine living conditions of children and their custodial and non-custodial parents to establish the best interests of the child [2]. There is the need to highlight the fact that the principle of best interests of the child depends on the value system or culture of the decision-maker if legal rules do not exist or there is no a hierarchy of values regulating the principle. A universal standard of what constitutes the best interests of the child must not be restrictive, if an accurate assessment of what best promotes the best interests of the child is to be undertaken. There is therefore no one universal "best interests of the child" norm considering cultural variations [3]. Many of the justly different judgements in varied cultures regarding children are practically defensible by the best interests standard [4]. Hence, there is the need to have understanding and adapt the best interests of the child and other legal principles to local contexts in view of the existence of cultural relativism. The unpredictability in judicial determinations and practical challenges for those trying to execute the principle of best interests of the child are because of the ambiguity of the principle which promotes litigation. Although the principle directs much decision-making about children, the principle has unspecified benchmarks devoid of straightforward conceptualisation for practice. Presently, many debates on children's law are about the indefiniteness, imprecision or open-endedness of the principle of "best interests of the child" working benchmark [5]. The vagueness of best interests of the child appears to provide an excuse for biased, whimsical and authoritarian judicial determinations [4]. The open-endedness of the benchmark can permit practices in some cultures which are regarded in other cultures as harmful to children. For example, putting children into work can be seen by the Ghanaian law courts as constructive for the social development of children and be viewed as hazardous by Western standards.

The present relationship between the parent and the child is regarded as a split of duties and responsibilities. This relationship has resulted in antagonism between parental and children's rights [6]. The United Nations Convention on the Rights of the Child (UNCRC) gives parents the primary responsibility for bringing up and developing their children, and it states that children have a right to good parents, implying that parents should exercise fully this responsibility. The UNCRC also makes provision for parental rights that are linked to this responsibility. For example, Article 18 of the UNCRC stipulates that parents have a shared fundamental responsibility for their children's upbringing and that State Parties shall provide the right assistance to parents and legal guardians in performing their child rearing responsibilities. The difference between the parental rights and children's rights, however, is not generally recognised by the UNCRC. The UNCRC presents parental rights in the form of parental responsibility to protect the rights of the child. Furthermore, State Parties have the responsibility of ensuring that the rights of the child are adhered to by all. However, State Parties' responsibility for taking care of the child is subordinated to the parents' rights to take good care of the child. It implies that parents have an irreplaceable responsibility to safeguard the rights of the child. Nonetheless, the UNCRC also considers children to be competent persons who should be a critical part of decision-making on matters that affect them [7].

2. Tension between Children's rights and parental rights in Ghana

There is potential tension between the right of the child and parental rights in child-rearing patterns in Ghana. The primary responsibility for developing and nurturing the child is given to the parent by the UNCRC, and it explains that children have a right to good parents, suggesting that parents should fully exercise this responsibility [8]. Therefore, the rights of the child guaranteed under Article 12 of the UNCRC have possibly undermined parental duties to children as stipulated in Article 3(1) of the UNCRC [9]. Recognising children as rights bearers distinct from parental rights and duties means that parents are mistrusted. Pupavac [10] highlights the mistrust of "carers" since children are recognised as holders of rights distinct from their parents. The concept of rights thinking implies that a child as bearer of rights is an independent and competent person who can exercise his/her rights and accept responsibility for his/her actions. Children are viewed as independent bearers of rights while parents and government have the responsibility to safeguard the rights of the child [11]. It also implies that legitimate professional intervention can be justified in family life if there is tension between the right of the child and parental expectations of the child. The rights viewpoint is associated with focusing on the contrasting interests of those engaged in decision-making [12]. If one wants to reasonably stretch it, Article 3 of the UNCRC considers children as vulnerable objects in need of parents or other authority's protection. Therefore, the UNCRC seems to conflict with itself to some extent. This extends the possible tension between children's rights and expectations of parents in traditional child nurturing styles and obstructs discussion that encourages consensus. Focusing on rights-thinking grounded on the autonomy of the individual hinders caring teamwork amongst parents, children and the state to arrive at an agreement that has the possibility of benefiting all the parties [13]. The feminist concept of the ethics of care is consistent with this critique [14]. Therefore, the feminist movement has raised more awareness of the significance of social interactions [15]. The possibility for tension between parents and children is therefore integrated in the UNCRC itself [16].

Children's rights should be adhered to, nonetheless explaining what constitutes the right of the child will differ from culture to culture. Variations in the cultural and historical circumstances can explain this situation [17]. In Ghana, this is especially relevant since many parents view children's participation in farm and fishing work as a critical component of work socialisation that benefits children and society [18]. Also, it is an economic necessity in other situations [19]. There are variations in the styles of child-rearing in Westernised and non-Westernised societies [20]. Western principles of childhood informed the designed and application of the UNCRC and it fails to consider the cultural differences that enhance children's contribution to family income [21]. Child rearing styles in the Western world try to move children away from the workplace and offer them with a type of childhood that encourages child wellbeing according to Western norms [22]. Many countries have utilised the UNCRC to assess progress in the enhancement of the life chances and opportunities for children [23]. Nonetheless, the UNCRC might confront the prospects, aspirations, and objectives of children who may never hope to exercise the idealised rights offered in the UNCRC [21].

Child trafficking, forced labour, exploitation, and the need for children's "rights to be protected" universally are addressed by Articles 32 and 35 of the UNCRC. Different societies define children's welfare in different ways on a global scale making it hard to identify a relevant idea of rights to cover the interaction between children and parents, and to outline the treatment of children that would be generally accepted by all societies. This leads to the UNCRC being a striving and normative

text that tries to define a universal idea of rights and situation of children around the globe resulting from ten years of extensive deliberations intended to generating a universal text that would best reflect an understanding of different legal regimes and societies [24].

Expectations of parents in traditional child nurturing styles are the main family-level predictor of children's rights [25]. Traditionally, child-rearing styles do not generally acknowledge the opinions or contributions of children in the decision-making process, and parents are inclined to ignore children's rights indicating that parental rights and parental expectations override children's rights when there is tension between the two. Involving children in decision making can be affected positively or negatively by the expectations of parents in traditional nurturing styles [26]. In Ghana, parents expect children to conduct themselves in a set manner through the transmission of some values from the family. Generally, expectations of parents in traditional child nurturing styles are influenced by forebearers which may in turn have effect on the development of children [27]. Parental expectations have been associated with realistic principles and choices that parents make about the future achievement of children [28]. Generally, expectations of parents have been recognised to contribute significantly in upholding children's rights [29]. In addition, the motivation of children to exercise their right, social resilience, and children's aspirations relate to high expectations of parents [30]. Further, the interactions between family background and children's rights are mediated by high expectations of parents [31].

In preparing their children for life in the community, some parents wish to engage their children in indigenous educational methods believing that it is in the "best interests" of the child. This indicates that the "best interests of the child" is determined by persons other than children themselves [4]. Additionally, this suggests that UNCRC believed that the best interests or the welfare of children can be damaged if they exercise their rights under the UNCRC and take wrong decisions [32]. In view of this, children lose the chance to exercise their rights because power is vested in other persons to exercise their rights on their behalf. The inability of children to exercise their rights in their best interests weakens their new position as competent persons. Furthermore, Article 12 of the UNCRC provides any child who can form his/her own opinion the right of freely expressing those opinions on all issues affecting them so that the child might have a more equal role in their interactions with adults and an improved opportunity to think and act independently. Therefore, the UNCRC gives the views of the child due weight according to the age and maturity of the child.

3. The rights and duties of the parent

Attitudes towards the rights and duties of parents have changed over time, reflecting shifts in the way childhood and the status of children is understood. There was the evolution of the power of *parens patriae* as the Industrial Revolution resulted in a new consciousness of childhood [33]. Children were considered to be economic assets under English common law [34], and parents had a legal right to custody of their children [35]. This principle was developed from the ancient understanding of the status of children which viewed children as chattel [36]. The idea that children were the possessions of their parents was dominant as recently as the 18th century in America and other parts of the world [37]. This crude interpretation of children's status as property paved the way for the doctrine of *parens patriae* [38]. The English Chancery Courts' guardianship over infants, idiots and lunatics developed this doctrine [39]. During the evolution of English constitutional

arrangements from the early stages of feudalism, the Monarch reserved certain duties and corresponding powers, referred to as the "royal prerogative" for him/herself. Parens patriae is one of these prerogative powers, which gives rise to state guardianship over children. The Monarch was believed to exercise these powers and duties as "father of the country" or *parens patriae*. These powers of the English Monarch transferred to the governments of the several American States and, in part, to the federal government after the American Revolution and the adoption of the Constitution [40]. Blackstone suggests that the Monarch was the overall guardian of all infants, idiots and lunatics in the British Empire [41].

In its contemporary application, the prerogative has remained true to its ancient interpretation that treats infants as incompetent persons but has further developed to allow the exercise of state power in private custody cases in common law systems. It allows the state to intervene in decisions that are usually made by the parent, when the state finds this necessary for the child's welfare. In both private and public custody disagreements, American courts also applied the parens patriae power [39]. In conjugal proceedings in America for instance, state courts have ruled that they are not bound to apply the custody decrees of foreign countries if the minor whose custody is being contested is physically within the territory of America [42]. Theoretically, the state in its application of parens patriae considers the well-being of the minor at the time an inquiry is made [43]. Furthermore, in cases of abuse and neglect, the power was traditionally invoked to safeguard children from their parents. Physical and mental incapacitation of the parent was the condition under which courts applying the doctrine in private custody disagreements could terminate parental rights. However, the condition of unfitness was grounded on the certainty that the child's interests were served. Additionally, biological parents would in normal circumstances have custody of their children because this was believed to best promote their welfare, not because parent's right to their children was absolute.

4. Theory of rights

This section discusses (i) the Will/Choice theory of rights, and (ii) the Interest/Benefit theory of rights that provide a very important structure for discussion detailing some of the discussions about viewing children as competent persons; definition of areas in which considerations of welfare are limited; and rights as means of protecting certain individual interests to establishing norms and strategies to avert or deal with the abuse of children's capability to work.

4.1 Will/choice theory

The Will/Choice theory of rights developed by Hart [44], is another key theoretical framework of this chapter. At the heart of this theory is the idea that any adult human being of sound mind capable of making decisions has "the right to forbearance on the part of all others from the use of coercion or restraint against him" ([44], p. 175). Thus, the Choice/Will theory suggests that rights are characterised in terms of control exercised by the right-holder over the liberty or duties of others. In Hart's essay, "Are There Any Natural Rights?", he argues that to have a right is to be able to justifiably restrict another person's liberty. In this version, the right-holder can choose whether to restrict another person's liberty. Gunderson [45] refers to this as the "liberty version" of the Choice theory. Mill [46, 47], p. 250 states in his essay, "Utilitarianism", that "when we call anything a person's right, we mean that he or she has a valid claim on society to protect him or her in the

possession of it, either by the force of law or by that of education and opinion." In essence, rights are claims according to Mill.

While accepting that children have claim-rights [48], Fortin [49] imputes the challenges in enforcing these rights in light of their seeming lack of capacity. According to Fortin, this is because children usually rely on adults such as their parents. Other scholars such as Hart, also contends that rights co-relate to duties [48]. But Freeman maintains that it is not every duty that implies a correlative right. Hence, resulting from Hart's view, to have a right would imply a corresponding duty on parents, and on the state where the parents fail to do so [48]. Consequently, Fortin [49] points out that presently many scholars would prefer to use the word "obligations" owed to children rather than "rights". While O'Neill [50] explains that an appeal to rights has slight chance of empowering children since when they are too young, they are incapable of responding to that appeal and by the time they are old enough to respond, they are close to adulthood and free from dependence. Therefore, she notes that the key remedy for children's incapacity is for them to grow up [50]. Fortin [49] also suggests that children can have moral rights before any correlative duties are vested in any person to fulfil them. This moral right should not be obvious about who is obliged to fulfil the right [49]. In pursuant of this, the right of the child to be educated to the level of his or her capabilities is available but it is uncertain who has the power to enforce it and who has the duty to provide it [50]. There is therefore a problem with enforcing children's rights. Hart's Will theory suggests that the fact that rights provide right-holders choices to have a legal right is to have a legally respected choice. However, people simply make sense of legal rights without choices. Neither toddlers nor the comatose are legally competent to make choices, but there appears no theoretical confusion in saying, for example, that young children have a legal right not to be maltreated [51]. If one has a claim-right over some land, then someone else has a duty to keep off the land. However, it is sometimes difficult to establish who exactly has this duty. This is sometimes over-simplified. For example, as far as the claim-right to land is concerned, it is believed that the bearer of the correlative duty is everyone, but it would not be easy to establish this principle in other cases.

In order to explain what is meant by a "measure of control" over a duty, it would be appropriate to again refer to Hart [44] since he is one of the leading proponents of the Will theory. According to Hart, the complete measure of control over X's duty comprises three powers: (a) the power to waive X's duty or not; (b) the power to enforce X's duty or not, given that X has breached it; (c) the power to waive X's duty to compensate, which is consequent upon his original breach [52]. It is important to note the power to enforce X's duty in (b) includes both the power to sue X for compensation and the power to sue for an injunction against X. It may be appropriate to say that the strongest paradigm of a claim-rights are the claim-rights acknowledged in property and contract law. The Will Theory aligns itself closely with these paradigms. In effect, it indeed holds that they provide the essential and satisfactory situations for claim right holding. It therefore stands to reason that in property and contracts, the duties that correlate with claim-rights are duties over which the claim holder usually has the complete measure of control comprising of the powers from (a) to (c).

However, the Will theory is confronted with two major serious oppositions. One is in relation to inalienable rights [53]. Sometimes, a claim-rights holder is restricted from waiving the duties that correlate with his/her claim right. For example, one's duty not to kill or torture cannot be set aside by the person's potential victims releasing him/her from his/her duties [54]. Usually, this is done for the right holder's own good and protection. Therefore, Hart [44] considers such incapacity as a benefit of the Choice theory. Moreover, MacCormick [53] suggests that the protective incapacity is usually seen as reinforcing the claim.

In any case, we do not likely wish to deny that children have a claim right against parents which indicate that parents would not engage children in unsafe working conditions that is a threat to their health, education or development. However, the underlying suggestion is that children lack that capacity to exercise such powers. It is worth highlighting that the critical question here relates to the possibility rather than the fact, of inalienable claims [55]. Will theory make alienable rights incoherent in principle. Hence, there is moral or conceptual inadequacy regarding the nature of claim-rights.

A second criticism relates to incompetent children. Waldron [56] notes that critics of the Will theory consider children's lack of capacity to exercise their rights as a deficit and evidence of its inadequacy. For example, children are incompetent to exercise their right to be protected from engaging in work that constitutes a threat to health, education or development and therefore lacks in the relevant sense the powers because, for instance, children are immature. Thus, the inability of children to waive or enforce their rights is an inadequacy of the Will theory. We cannot therefore say that children no longer have claim right against parents not to engage them in work that constitutes a threat to their health, education or development. The first inadequacy of the theory is that it appears to allow all rights to be waived [54].

There is a second version of the Will/Choice theory propounded by [57]. He suggests that to have a right is to have control over another person's duty. One has control over the duty of another person if he or she has the power to remove the duty or to keep it in force. Gunderson [45] refers to this as the "duty version" of the Will/Choice theory. In the duty version, the right-holder is not necessarily justified in limiting the liberty of those who would violate his/her rights. In this context, the explanation provided here varies from explanations provided by Sumner [57] and Lyons [58] according to which Mill's conceptual analysis of rights is exclusively independent of his substantive moral theory. On Mill's analysis, rights correspond with duties to offer benefits. For Mill, however, one of the most significant duties is the duty not to interfere with another person's liberty. Mill [46, 47] makes this clear in his essay, "On Liberty", when he states that the only justification for coercing a member of a civilised community is to prevent harm to others. Mill then provides exceptions in the case of children and persons who have no capacity of being improved by free and equal discussion. This principle is generally termed as "Mill's Liberty principle" or "Harm principle."

In relation to the duty version, people exercise rights by keeping the duties of others in force or by eliminating those duties. On the other hand, the liberty version enables people to exercise their rights by trying to limit the liberty of other persons. Sumner [59] contends that the choice theory has the theoretical advantage of providing a clear distinction between moral reasoning based on principles of individual autonomy or liberty and moral reasoning founded on considerations of welfare. In relation to the Will/Choice theory, rights may be utilised to simply define areas in which considerations of welfare are limited by considerations of liberty or individual autonomy, because rights establish areas of individual autonomy or liberty.

4.2 Interest/benefit theory

MacCormick [60] and Raz [61] are two of the leading proponents of the Interest/Benefit theory of rights. Acording to this theory, the purpose of rights is to protect certain individual interests [60]. In "Utilitarianism" JS Mill [46, 47], p. 250 indicates that "to have a right is to have something which society ought to defend me in the possession of". The most natural explanation of this sentence is that those things which I possess that society ought to defend me in the possession of are benefits. Thus, rights are benefits secured for persons by rules regulating

relationships [54]. Additionally, rules feature in the interaction between rights and children [54]. Therefore, rules regulate relations between those with responsibility to safeguard the rights of the child and the child. Although there are various types of the Interest theory, they are all inclined to reach the same objective. One type suggests that "X has a right whenever he/she stands to benefit from the performance of a duty". There is another type of the theory by MacCormick [60] and Raz [61]. This type of theory suggests that a child can have a right whether in moral theory or within a legal system [60, 61]. This right is also applicable whenever the safeguarding or advancing the interests of the child is acknowledged by moral theory or the legal system as a basis for imposing obligations. Thus, children have inherent rights regardless of the performance of a duty [54].

The Interest theory largely encompasses all types of rights, but it is unable to explain why rights should be tied to benefits. Furthermore, the rule restraining children from entering contracts can advance a parent's interests. However, no rights are essentially given to the parent by that rule [54]. The Interest theory offers a very compelling interpretation of rights despite these limitations. Hohfeld and Cook [62] suggest that there is a difference between "X" has a book and "X" has a right to "R". The former is described as a normative statement (which means a rule, legal or otherwise) while the latter is descriptive. "X" has a right to "R" is confusing since it may be used to express numerous ideas. This is because such a statement is used in everyday discussion including legal discourse. Consequently, applying the statement, "child 'A' has a right to education" can imply that anybody has a duty to let Child "A" enjoy education so that Child "A" can claim that right against that person. This implies that Child "A" is free to do or refrain from doing something. Even though rights relate to a duty, not every duty will mean that there shall be a correlative right [63]. For example, a parent's duty to advance the best interests of a child would not constitute a right. This is because this duty differs from one culture to the other in the sense that what one culture will regard as adequate for a child cannot always be the same standard in another culture.

The Interest theory is, however, associated with numerous challenges that need to be discussed. Firstly, the right is enforced by someone else rather than the child. This is because interests recognised as giving rise to rights are principally protective rights. These protective rights go further to demonstrate the child's incompetence. There is also lack of certainty in the Interest theory since someone else needs to enforce the rights of the child. Thus, there is no guarantee that the adult who enforces the right will do so in a manner that would serve the best interests of the child [64].

There is also the paternalistic approach which means that the needs of the child are an important factor in the adult's decision [49]. This approach may come with some difficulties such as paternalistic coercion to limit the liberty of the child while accepting the need to promote the capacity of the child for decision-making and responsibility at the same time [49]. Breen [65] criticises the use of *the best interests of the child* standard on grounds of its indeterminacy. Thus, it is difficult to identify exactly what the best interests of the child are.

5. Cultural understanding of the rights of the child and the duties of the parents

In Ghana, many parents want their children go through traditional child nurturing systems which they believe are in the best interests of the child. Parents believe it is the right and duty of the parent to nurture their children based on the traditional child nurturing norms and it is also the right of children to be nurtured according to their cultural traditions. For example, children need to follow their

parents to the farms or fishing. This forms part of the indigenous educational approaches which attempt to nurture children for life. Socialising children is viewed as a normal way of life. Children are engaged in work such as household tasks, farming activities and other tasks. This has persisted for generations and many parents consider engaging children in work as positively moulding the broad development of children as they acquire critical skills in life. Hence, indigenous educational approaches can be articulated in the best interests of the child principle. Since best interest of the child is expressed in its Article 3(1), the UNCRC is committed to safeguarding the principle. Disapproval elsewhere of traditional child nurturing system in Ghana is based on the idea of making sure that children enjoy a reasonable standard of living, secure and complete access to proper education, guaranteed protection from all forms of exploitation, cruelty and abuse, and protection from a social environment that is detrimental to their health and well-being which they believe traditional child nurturing system do not provide for children [6]. Articles 32 and 35 of the UNCRC makes provision for the protection of the right of the child universally and combat exploitation, forced labour, and child trafficking. Child welfare is explained differently by varied societies globally making it challenging to identify an expressive idea of rights to cover the interaction between the parents and the child, and to describe treatment of the child that would be generally accepted by all societies.

There is potential conflict between cultural understanding of the rights of the child and the rights and duties of the parents as articulated in the UNCRC. Generally, the traditional child nurturing system does not acknowledge views or contribution of the child in the decision-making process. Further, parents are inclined to ignore aspect of the Western definition of the right of the child suggesting that parental rights surpass the right of the child whenever conflict emerges. This indicates that best interests of the child is determined by parties other than the child [4]. In view of this, children lose the chance of exercising their rights because power is vested in other parties in exercising those rights on their behalf. The incapacity of children in exercising their rights in their best interests weakens their new position as competent persons. However, children who can form their own opinions are granted the right to express those views freely in all issues affecting them by Article 12 of the UNCRC. Therefore, in accordance with the age and maturity of the child, the views of the child are given due weight. Furthermore, the child is given the right to take part in all processes of decision-making. This is geared towards giving the child a more equal role in his/her interactions with adults and offer an improved opportunity to autonomously reason and act. Therefore, the rights of the child guaranteed under Article 12 of the UNCRC have possibly weakened parental duties to children as articulated in Article 3(1) [66].

The meaning of the idea of rights thinking is that a holder of rights is independent and competent persons with the capacity to exercise his/her rights and by accepting responsibility for his or her actions. Interest theory recognises that the source of rights originates from the fundamental interests of their bearers. Nevertheless, it is contended that there is over-generalisation by the Interest theory regarding the idea of children's rights. It can be improper to contend that children possess rights when they do not have the capacity in claiming those rights or relinquish them. One may challenge the view that children possess interests that are needed to be defended. The idea of rights does not need to be restricted to those who may claim or waive them, in accordance with the Interest theorists since the Interest theory places other persons under the duty to honour those rights on behalf of children. The theorists' position is adopted by Wenar [51], O'Neill [50] and Fortin [49]. This is because children generally depend on adults such as their parents [49].

There are general and different opinions on what aligning traditional child nurturing systems with Article 12 would involve. Researchers contend whether the right of participation as articulated in Article 12 would enhance the welfare of children and whether they present a serious risk to such valued systems in traditional child nurturing in Ghana. Advocates on the right of the child argue that adopting the UNCRC into traditional child nurturing system would enhance child welfare and further respect the right of the child and to empower the child under the national law [24]. Greater representation for children in a broad array of proceedings would be offered by Article 12, while other provisions of the UNCRC would help protect and support children who are vulnerable to exploitation and abuse [67, 68].

6. The way forward

The most effective judicial procedure for legal understanding of participation rights of the child in relation to authority of the parent as expressed in the UNCRC needs to be explored to ensure consistency. This would lead to the protection of the right of the child and the parent as well as description of the role of the state with regard to the discussion on the child–parent dichotomy [7]. The potentials of resolving social issues in the legal setting is explored by a system founded on rights-thinking philosophy and this depends on the use of judicial systems and legal instruments [69]. The motivation of the discussion should be on consensus building rather than winners or losers [70]. The interaction between the right of the child and the parent requires the formulation of a judicial decision for a clear-cut a definite interpretation of the right of the child and the parent [71]. The result of the legal discussion in determining the right of the child relating to participation, health care, freedom of religion, information, privacy and description of age-related boundaries is to give capacity to the child to autonomously exercise his/her right. Additionally, the discussion incorrectly privileges rights [70]. The main difficulty regarding the rights-based viewpoint is the over-emphasis on rights. Economic difficulties relating to deprivation which have a huge effect on the lives of children are usually overlooked in view of the over-emphasis on the right of the child in international law [72]. The viewpoint that recommends a legal solution as the most effective way of averting the violation of the right of the child has been criticised several academics [13]. The UNCRC expresses a change in how the interaction between children and parental rights and expectations in traditional child-rearing styles is considered even though the doctrine of parens patriae remains critical in child welfare. Ghana cannot refuse to comply with the provisions of participation rights in Article 12 of the UNCRC because, in February 1990, it was the first country to ratify the UNCRC which was just three months after the adoption of the UNCRC [23]. Extensive and different views exist on the consequence of making traditional child-rearing styles consistent with Article 12. Academics contend whether participation rights as provided in Article 12 can enhance the welfare of children and whether they present a danger to such valued styles in traditional child-rearing. Advocates of children's rights argue that bringing provisions of the UNCRC into traditional childrearing styles can enhance the welfare of children and their rights will be respected which can empower them under the domestic law [24]. Greater representation for children in a broad range of accounts would be offered by Article 12, while other provisions of the UNCRC would help protect and support children who are vulnerable to abuse [26].

The dimension of parental rights vis-a-vis children's rights needs to be determined in order to harmonise the contrast between children's rights and parental rights and expectations in traditional child nurturing patterns [73]. The UNCRC

deals with this matter by constructing the child's changing capabilities [16]. Hence, parental rights and expectations in traditional child nurturing patterns need to consider children's rights. The right of the child as expressed in the UNCRC makes provision for parental prerogatives [73]. Children and parental rights and duties are functional rights and possibly serve children's rights. The UNCRC has been effective in establishing a legal frameworks and standards that in turn promote pre-existing children's laws, and it could have the same stimulating effect to traditional child nurturing patterns [24]. The UNCRC is a norm-changing text which is a purposely modern and comprehensive declaration of the rights of the child.

The establishment of regional agreements and national laws utilising the UNCRC as a standard around the world shows the effect of the UNCRC to inform norms and laws by establishing a global standard for respecting all children's human dignity [74]. Adopting the UNCRC into traditional child nurturing patterns in Ghana can subsequently lead to sweeping changes in family law jurisprudence by establishing a national legal framework with clear and recognisable aims better suited in meeting the needs of children and their families [24]. The adoption the UNCRC into traditional child nurturing patterns would especially assist in unravelling and updating the extensive definition that currently arises in national legal framework in relation to children's rights vis-à-vis parental rights and duties. Additionally, countries may recognise children's personhood by incorporating their new status into every government policy relating to childhood. This chapter suggests that the discrepancies between children's rights under Article 12 of UNCRC and parental rights and expectations in traditional child nurturing patterns may be harmonised and offer a genuine opportunity to undertake reforms. The seeming inconsistencies, uncertainties and flaws between children's rights to participation and parental rights and expectations in Ghana can be resolved. Article 12 can provide the avenue or serve as a tool for highlighting and re-inspiring engagement with children and parents on their rights and expectations. The UNCRC reflects the past and provides a blueprint for the future. Ghana is provided by the UNCRC with a right opportunity to re-assess the situation of children in modern society and the suitable parental duties and responsibilities in the nurturing of children. The UNCRC expresses a present-day attempt to achieve the right balance between valued traditional child nurturing styles and respecting children's rights.

7. Conclusion

This chapter has examined the current interaction between the parent and the child viewing it as a split of duties and responsibilities. The chapter has provided background to the issue alluding to the possible conflict between the right of the child and parental rights in child nurturing patterns in Ghana. Using two major theories of rights -- Will theory and Interest theory, which have dominated the debate in the last two decades, this chapter suggests that although these theories are rivals both have a role to play. This chapter also captures the advantages of both the benefit and choice theories. The chapter further presented each theory's main difficulties. The first analysis is the interest/benefit theory according to which rights are characterised in the context of benefits secured for the right-holder by others' duties. The second is the choice theory according to which rights are characterised in terms of control exercised by the right-holder over the liberty or duties of others. The benefit theory accounts for the usually held opinion that children have rights although they cannot take decisions needed by competing analyses of rights. Benefit theory can also account for inalienable rights. Inalienable rights are rights which the right-holder cannot eliminate. On the other hand, choice theory accounts

for the fact that rights can be exercised. Thus, to refrain from exercising such a right is simply to refrain from acting. It has been noted that, the relationship between children rights and parental rights has resulted in antagonism between the two. This chapter has proposed cooperation that protects the rights of the child, the parent and defines the role of the state in view of the parent/child dichotomy. Further, there is the need to examine the most effective way of designing legal and judicial procedures for achieving this cooperation.

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Conflict of interest

The authors declare no conflict of interest.

Acronyms and abbreviations

United Nations Convention on the Right of the Child (UNCRC).

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References

[1] Goldstein, J., Solnit, A. J., Goldstein, S., & Freud, A. (1996). *The Best Interests of the Child: The Least Detrimental Alternative*. Simon and Schuster Publishing company.

[2] Stefkovich, J., & Begley, P. T. (2007). Ethical school leadership: Defining the best interests of students. Educational Management Administration & Leadership*, 35*(2), 205-224.

[3] Adonteng-Kissi, O. (2020a). Child Labour Versus Realising Children's Right to Provision, Protection, and Participation in Ghana. Australian Social Work, 1-16.

[4] Parker, S. (1994). The best interests of the child-principles and problems. International Journal of Law, Policy and the Family*, 8*(1), 26-41.

[5] Mnookin, R. H. (1975). Child-custody adjudication: Judicial functions in the face of indeterminacy. Law and Contemporary Problems*, 39*(3), 226-293.

[6] Huntington, C. (2006). Rights Myopia in Child Welfare. UCLA Law Review*, 53*, 637-699.

[7] Westman, J. (1999). Children's Rights, Parents' Prerogatives, and Society's Obligations. Child Psychiatry and Human Development*, 29*(4), 315-328.

[8] Archard, D. (2014). *Children: Rights and childhood*. Routledge.

[9] Tang, K.-L. (2003a). Implementing the United Nations Convention on the Rights of the Child The Canadian Experience. International Social Work*, 46*(3), 277-288.

[10] Pupavac, V. (2001). Misanthropy without borders: The international children's rights regime. Disasters*, 25*(2), 95-112.

[11] Howe, R. B., & Covell, K. (2005). *Empowering children: Children's rights education as a pathway to citizenship*. University of Toronto Press.

[12] Cockburn, T. (2005). Children's participation in social policy: Inclusion, chimera or authenticity? Social Policy and Society*, 4*(2), 109-119.

[13] Roose, R., & Bouverne-De Bie, M. (2007). Do children have rights or do their rights have to be realised? The United Nations Convention on the Rights of the Child as a frame of reference for pedagogical action. Journal of Philosophy of Education*, 41*(3), 431-443.

[14] Parton, N. (2003). Rethinking professional practice: The contributions of social constructionism and the feminist 'ethics of care'. British Journal of Social Work, 33(1), 1-16

[15] Adonteng-Kissi, O. (2020b). Potential conflict between the rights of the child and parental expectations in traditional child-rearing patterns: Resolving the tension. Children and Youth Services Review*, 109*, 104752.

[16] Hammarberg, T. (1990). UN Convention on the Rights of the Child-and How to Make It Work, The. *Hum. Rts. Q., 12*, 97.

[17] Elder, G. H. (2018). *Children of the great depression*. Routledge.

[18] Adonteng-Kissi, O. (2018). Parental perceptions of child labour and human rights: A comparative study of rural and urban Ghana. Child Abuse & Neglect*, 84*, 34-44.

[19] Nardinelli, C. (1990). *Child labor and the Industrial Revolution*. Indiana University Press.

[20] Sharley, V., Ananias, J., Rees, A., & Leonard, E. (2019). Child neglect in

Namibia: Emerging themes and future directions. The British Journal of Social Work, *49*(4), 983-1002.

[21] Westwood, J. (2013). Childhood in different cultures. In T. Maynard & S. Powell (Eds.), *An introduction to early childhood studies* (pp. 11). Sage Publications Ltd.

[22] Liebel, M. (2004). *A will of their own: Cross-cultural perspectives on working children*. Zed Books.

[23] Twum-Danso, A. (2009). Reciprocity, respect and responsibility: the 3Rs underlying parent-child relationships in Ghana and the implications for children's rights. The international journal of children's rights, *17*(3), 415-432.

[24] Lee, S. J. (2017). A Child's Voice vs. a Parent's Control: Resolving a Tension Between the Convention on the Rights of the Child and US Law. *Columbia L.aw Review, 117*, 687.

[25] Jeynes, W. H. (2007). The relationship between parental involvement and urban secondary school student academic achievement: A meta-analysis. Urban education, *42*(1), 82-110.

[26] Rutchick, A. M., Smyth, J. M., Lopoo, L. M., & Dusek, J. B. (2009). Great expectations: The biasing effects of reported child behavior problems on educational expectancies and subsequent academic achievement. Journal of Social and Clinical Psychology, *28*(3), 392-413.

[27] Cintas, H. L. (1995). Cross-cultural similarities and differences in development and the impact of parental expectations on motor behavior. Pediatric physical therapy, *7*(3), 103-111.

[28] Glick, J. E., & White, M. J. (2004). Post-secondary school participation of immigrant and native youth: The role of familial resources and educational expectations. Social Science Research, *33*(2), 272-299.

[29] Vartanian, T. P., Karen, D., Buck, P. W., & Cadge, W. (2007). Early factors leading to college graduation for Asians and Non-Asians in the united states. Sociological Quarterly, *48*(2), 165-197.

[30] Reynolds, A. J. (1998). Resilience among black urban youth prevalence, intervention effects, and mechanisms of influence. American Journal of Orthopsychiatry, *68*(1), 84-100.

[31] Benner, A. D., & Mistry, R. S. (2007). Congruence of mother and teacher educational expectations and low-income youth's academic competence. Journal of Educational Psychology, *99*(1), 140.

[32] Melton, G. (1996). The Child's Right to a Family Environment: Why Children's Rights and Family Values are Compatible. American Psychologist, *51*(12), 1234-1238.

[33] Warzynski, V. (1994). Termination of Parental Rights: The Psychological Parent Standard. Villanova Law Review, *39*, 737-771.

[34] Foster, H., & Freed, D. (1972). A Bill of Rights for Children. Family Law Quarterly, *6*(4), 343-375.

[35] Christopherson, G. (1986). Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings: In re JJB. Minesota Law Review, *71* 1263-1292.

[36] Akre, L. (1991). Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the Best Interest of the Child Standard. Marquarie Law Review, *75*, 628.

[37] Dufault, R. (1991). Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran

v. Bosze. *Connecticut Law Review, 24*, 211-246.

[38] Custer, L. (1978). The Origins of the Doctrine of Parens Patriae. Emory Law Journal, *27*, 195-208.

[39] Minow, M. (1980). Developments in the Law-The Constitution and the Family. Harvard Law Review, *93*, 1156, 1353.

[40] Curtis, G. (1975). The Checkered Career of Parens Patriae: The State as Parent or Tyrant. DePaul Law Review, *25*(4), 895-915.

[41] Blackstone, W., & Christian, E. (1803). *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. In Five Volumes. With an Appendix to Each Volume, Containing Short Tracts Upon Such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia, as a Member of the Federal Union*. William Young Birch, and Abraham Small, no. 17, South Second-street, Robert Carr, printer.

[42] Brand Jr, J., & Hopson Jr, D. (1965). Family Law. University of Kansas Law Review, *14*, 271-292.

[43] Boylston, R. (1958). Full Faith and Credit for Child Custody Decrees. University of Florida Law Review, *11*, 337-343.

[44] Hart, H. (1955). Are there any Natural Rights? The Philosophical Review, *64*(2), 175-191.

[45] Gunderson, M. (1998). A Millian Analysis of Rights. Ideas y valores, *47*(106), 3-17.

[46] Mill, J. (1969a). *Essay on Liberty (1859)*. Longman, Roberts and Green Company.

[47] Mill, J. (1969). Utilítarianism. In J. Robson (Ed.), *Collected Works of John Stuart Mill* (Vol. 10, pp. 250). Routledge and Kegan Paul, 1969b.

[48] Freeman, MDA, and A Alen. 2007. Article 3: The Best Interests of the Child (Martinus Nijhoff Leiden and Boston, US).

[49] Fortin, J. (2006). Accommodating Children's Rights in a Post Human Rights Act Era. The Modern Law Review, *69*(3), 299-326.

[50] O'Neill, O. (1992). Children's Rights and Children's Lives' *International Journal of Law Policy and the Family* *6*(1), 24-42

[51] Wenar, L. (2013). The Nature of Claim-rights. Ethics, *123*(2), 202-229.

[52] Hart, H. (1982). *Essays on Bentham: Jurisprudence and Political Philosophy*. OUP Oxford.

[53] MacCormick, N. (1977). Rights in Legislation'in PMS Hacker and J. In *Raz (eds) Law, Morality and Society (Oxford, 1977)*. Oxford Press.

[54] Freeman, M. (2008). *Lloyd"s Introduction to Jurisprudence* (8th ed., Vol. 117). Sweet & Maxwell

[55] Sreenivasan, G. (2005). A hybrid Theory of Claim-rights. Oxford Journal of Legal Studies, *25*(2), 257-274.

[56] Waldron, J. (1993). A Right-based Critique of Constitutional Rights. Oxford Journal of Legal Studies, *13*(1), 18-51.

[57] Sumner, L. (1987). *The Moral Foundation of Rights*. Clarendon Press.

[58] Lyons, D. (1977). Human rights and the general welfare. Philosophy & Public Affairs, 113-129.

[59] Sumner, L. (2014). *Abortion and Moral Theory*. Princeton University Press.

[60] MacCormick, N. (1982). *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* Clarendon Press.

[61] Raz, J. (1986). *The Morality of Freedom*. Oxford University Press.

[62] Hohfeld, W., & Cook, W. (1920). *Fundamental Legal Conceptions as Applied in Judicial Reasoning: and Other Legal Essays*. Yale University Press.

[63] Hohfeld, W. (1913). Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. The Yale Law Journal, *23*(1), 16-59.

[64] Federle, K. (2000). Children's Rights and the Need for Protection. Family Law Quarterly, *34*(3), 421-440.

[65] Breen, C. (2006). *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Vol. 86). Martinus Nijhoff. https://doi.org/10.1163/ej.9789004148277.i-232.2

[66] Tang, K.-L. (2003b). Implementing the United Nations Convention on the Rights of the Child: the Canadian experience. International social work, *46*(3), 277-288.

[67] Davidson, H. A. (1990). The Child's Right to be Heard and Represented in Judicial Proceedings. Pepperdine Law Review, *18*, 255.

[68] Rutkow, L., & Lozman, J. T. (2006). Suffer the Children: A Call for United States Ratification of the United Nations Convention on the Rights of the Child. Harvard Human Rights Journal, *19*, 161.

[69] Federle, K. H. (1994). Rights flow downhill. The international journal of children's rights, *2*(4), 343-368.

[70] Huntington, C. (2005). Rights myopia in child welfare. UCLA Law Review, *53*, 637.

[71] Huxtable, M. (1994). Child protection: With liberty and justice for all. Social Work, *39*(1), 60-66.

[72] Marshall, D. (1997). The language of childen's rights, the formation of the welfare state, and the democratic experience of poor families in Quebec, 1940-55. Canadian Historical Review, *78*(3), 409-442.

[73] Howe, R. B. (2001). Do parents have fundamental rights? Journal of Canadian Studies, *36*(3), 61-78.

[74] Rios-Kohn, R. (1997). The convention on the rights of the child: Progress and challenges. Geo. J. on Fighting Poverty, *5*, 139.