

Please note: This is a translation of the paper delivered at the conference in June. The original version in Spanish has undergone subsequent revisions that are not reflected in this translation.

Sexual rights for boys, girls, and adolescents

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Introduction

The objective of this paper is to lay out some of the debates yet to be resolved surrounding the sexual rights of individuals during childhood and adolescence. This category of rights is one of the domains in which the shortcomings of current regulations designed to protect certain rights of minors and also the absence of a theoretical foundation for human rights for those phases of life are clearly manifested. The lack of a deep discussion on the rights of boys and girls becomes evident when the attempt is made to define sexual and reproductive rights, since while entitlement is sought in some respects – especially for certain reproductive rights for adolescents such as access to contraception – in other respects a continuing effort is made to justify limiting access for the same age group to related rights, the right to contract marriage being one example.¹

From my point of view one of the central issues is that of consent. *Seriously* addressing this point implies calling into question the criteria that until now have been used to distinguish between certain capacities of minors and adults, a task that very few people have undertaken and that, moreover, is considered irrelevant by the majority of theoreticians. For this reason a discussion of the legal limits of the rights and responsibilities of parents in the exercise of their parental powers will also be necessary.

¹ In some documents, certain reproductive rights for adolescents are recognized while simultaneously governments are advised to take measures to prevent early marriages and the right to determine a child's sexual education is also left to the parents, without any explanation of how these discrepancies which can conflict are justified or reconciled. The result is the fundamental characteristic of the legal framework for children's rights: discretionality.

Another problem related to the topic is found in the lack of a clear definition of the content and scope of so-called *sexual rights*. Frequently the term is used to exclusively designate reproductive rights, which were defined by the International Conference on Population and Development held in Cairo as follows:

Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant UN consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.

The proposal here is to understand sexual rights in a broader fashion in that includes the interests from which these rights originate during childhood and adolescence, inasmuch as they reference basic necessities which must be guaranteed by efficient legal norms, especially when dealing with girls and boys.

We will look for the origin of some of the underlying conceptions in history and employ an interdisciplinary vision which includes developmental psychology to argue for the necessity of protecting the sexual rights of girls and boys. We will also question whether differentiating on the basis of age concerning consent is justified in sexual matters but not in other spheres of life.

Rights, childhood, and sexuality

For several years now, sexuality has been considered a basic part of human life. Studies of the topic reveal the transcendence of this aspect of the person, which has in turn led to the

formulation of a series of rights which have yet to be completely delineated for international instruments: sexual and reproductive rights.² This grouping of rights has even resulted in a series of social movements giving rise to demands from citizens for specific legislation, among which can be found establishing the right to decide for children, to access to contraception, to abortion, sexual freedom, etc.³

Nonetheless, when we attempt to determine how these rights are exercised by children, or whether children are entitled to them, questions arise. Despite being recognized by international instruments – in basic form at least⁴ – and in the constitutions and laws of many states as universal rights, they are not understood as applying to girls and boys. This is one of the examples that illustrates how questionable the universal character of human rights is, since a good part of humanity are not entitled to them. What makes matters worse is that in the majority of cases, the restriction is not even explicit; that is, the right is articulated in general terms even though it is interpreted as excluding girls and boys.⁵ This lack of transparency complicates the matter, given the sense of “*normality*” and “*naturalness*” that comes across in this reading of rights. It sometimes appears that in the best of cases the sexual rights of minors ends in sexual education.

One possible explanation identifies two underlying ideas:

² Reproductive rights are

³ Some authors even consider sexual rights as *fourth generation* rights, as conceptually they have yet to be fully articulated, although it is clear they belong to the classes of rights already recognized as *first* and *second* generation such as the right to personal freedom and the right to health.

⁴ Among the rights that are already recognized by international instruments are the right to marry and start a family, and the right to control how many children to have and when.

⁵ The same occurred with regards to the political rights of women in Mexico. Nothing explicitly prohibited them from voting or receiving votes for office, and nowhere was it even mentioned that only men were entitled to these rights, yet it was simply assumed that women could not participate in the political process. That is why, when Article 34 of the Constitution was reformed in 1953, women were expressly mentioned: *All men and women considered Mexican are citizens of the Republic if they meet the following requirements: (...)*

The first refers to the construction of the autonomous agent as the paradigmatic quality for entitlement. It is possible to identify this tendency going back to the first declarations of rights. The preeminent value is freedom and laws are made to prevent arbitrary incursions into this space. Whoever does not fall into the category of autonomous agents is thus excluded: non-citizens, women, children – but it does not stop here – as one of the rights of the adult-male-landowner was precisely guaranteed protection for a sphere of private immunity which included his family.⁶

In another sense, there appears to be a negative, restricted connotation of sexuality that accompanies a certain conception of childhood. The result is the understanding and regulating of sexual rights as belonging exclusively to the domain of the adult world, isolating childhood and thus articulating the rights in a totally inverse manner; that is, by guaranteeing non-access to them for children. An interesting example can be seen in how *statutory rape*⁷, that is, sexual relations with a person under a certain age, is categorized. Along the same lines, it is worth noting the international movement combating child marriages: the goal is the preservation of sexual freedom and the freedom of choice, yet while for an adult woman these freedoms refer to her ability to freely choose her partner, for a girl it means preventing her from choosing one.⁸

⁶ During the 19th century in France, the father of a family could make use of the state prisons in instances of serious disobedience on the part of his child: *Fathers who have serious reason to complain of the behavior of a child may appeal to the district court; the detention may not exceed one month for children under sixteen years old; from that age until the age of majority, the detention may last up to six months. The formalities – and the protections – are very limited: there is no written document or any legal formality, unless there is an order for arrest, where any mention of the reason for detention is made. If after release the child “strays anew,” detention can be prescribed once again.* (Hunt, Lynn 1991, p. 129)

⁷ In the Civil Code for Mexico City the age limit for statutory rape is set at 12 years: Article 175. Rape will be charged, carrying the same penalty, if: I. Sexual intercourse is carried out with a person under twelve years of age or with a person who does not have the capacity to understand the significance of the act or for any other reason is not able to resist it.

⁸ Without doubt, in many instances of child marriage the offense lies in the fact that the marriage is imposed by the parents, which is a violation of rights whether minors or adults are involved. However, even in cases where the girl

So are boys and girls entitled to sexual rights? What are these rights? Should they be regulated by the State? What role should be played by parental powers? In the case of consenting adults, it is considered that any intervention of the State is totally unacceptable. What other criteria come into play in the case of boys and girls? Where are the limits of privacy to be drawn?

In order to respond to this series of questions, the history of the construction of the concept of child will be put forth to demonstrate how sexuality is excluded. Subsequently, in order to argue that an adequate normative framework is necessary, an explanation will be given of sexual rights based on the theory of basic needs and how they are formulated in terms of interest theory. To this end, legal paternalism will be briefly described as a model for the exercise of rights, covering the legislation currently in place and, lastly, some of the difficult cases or *extreme cases*.

I should advise the readers that the intention of this article is simply posing a series of questions in order to illuminate the topic, with the understanding that it is practically impossible to give a definitive response to an issue involved in the evolution of Western culture over the past several centuries. The objective is only to justify the affirmation that an unresolved problem exists, one that perhaps has not even been identified in this field.

Background: The historical construction of the exclusion of children from sexuality

The first question which should be asked when speaking of the exclusion of a group of people from certain rights centers on its characteristics, meaning those that are held as the cause for differentiated treatment. In the case of girls and boys, there is a legal definition – those under

consents to the marriage, international organizations recommend and feminist groups call for raising the age at which marriage can be contracted. This is the case in Mexico.

the age of 18 in the majority of countries – that is sustainable in some aspects. That childhood is a stage of life would appear unquestionable; at most a debate could be held over the age at which someone is no longer a child, or if it is meaningful to distinguish between children and adolescents, but it is hard to imagine someone questioning what seems at first glance an obvious reality: children are children.

One consequence of implicit exclusion is that it prevents us from realizing that the category whose attributes we claim to know is a historical construction, and inasmuch does not necessarily carry the properties that justify a specific treatment. This is precisely the case for children. The concept of child that we currently have, which seems to be the basis for exclusion, appeared at a relatively late period in Western history and operated, among other things, the separation of the child's world from the universe of sexuality. In the second half of the 20th century, the *history of childhood* revealed to us the ways in which the concept of child was constructed and the implications this phenomenon had.

According to researchers, the generalization of the modern concept of child, or what Phillipe Ariès⁹ identified as the affirmation of the *modern sentiment of childhood*, did not fully occur until the 18th century. Before then, when the child shared spaces and activities with the adult it was not considered reprehensible. Ariès bases his affirmation on pictorial representations from each time period in which children are characterized as miniature adults and lack the proportions and attitudes pertaining to their age. One event that, according to the author, marks the beginning of the process is the appearance in paintings from the 16th century of the *outfit for*

⁹ There are many authors who explain the rise of the modern concept of childhood using different theories. Phillipe Ariès (1987), Lloyd de Mause (1982), and Linda Pollok (1993) are three who deserve mention.

children; that is, clothing appropriate for the characteristic activities that we now understand as proper for people during childhood, especially those involving play and games.

For many centuries, some practices that we now consider unacceptable were commonplace, such as certain ways of caressing children that only stopped when they entered puberty. In the 15th century a movement headed by Juan Gerson (1363 – 1429) began studying the sexual behaviors of children with the objective of heightening people's sentiment of guilt when in confession. Running counter to the customs of the time, the author proposed keeping childhood safe from danger by changing the way children were educated, talking to them calmly avoiding foul language, prohibiting them from kissing and touching each other in play, and avoiding an excess of contact with adults, at least in bed. These were the conceptions (together with those of other moralists) that eventually became dominant, although at the time they were not applied. The common belief at the time was that children were practically asexual beings until the onset of puberty (Ariès 1987, pp. 150 – 152). The image of the child Christ reflects the vision of childhood as the age of innocence. The subsequent centuries were decisive in the propagation of these ideas which resulted in the conformation of a serie of notions and practices related to sexuality and childhood.

The reform of the Church in the Occident is another of the causes for the rise in interest in childhood, fundamentally based on the concern for education. There was a belief that people are naturally inclined to evil which made necessary a pedagogy that would enable them to control these primitive instincts on an individual level while at the same time enabling political coexistence on a collective level (Revel 1988, pp. 173 – 182).

The recommendations of the moralists were slow to be implemented in practice, children continued to be considered innocent and asexual until puberty and participated in adult activities from funerals, games, and poetry, to theatric productions with adult themes.

The triumph of the educators and moralists began in the 17th century and with it came a new attitude regarding childhood, according to Ariès (1987, pp. 534 – 35). During this time the moral stance as regards certain shared activities of children and adults also changed. Some educators had already condemned the collective moral indifference, but it was only in the 17th century that general disapproval of pastimes and activities considered harmful for the education of children and the preservation of their morality took form (Ariès, 1987, p. 119). Ariès observes that this new separation of activities that are proper for children from those that are reserved for adults is originally carried out only in the upper classes of society, as young and old in the lower social strata continue participating together in the same games for some time (Ariès, 1987, p. 142).¹⁰

Thus began the triumph of the notion of childhood innocence that one century later would already be a common attitude. There is talk of the weakness and extreme ignorance of childhood, but in the author's judgment, this unfavorable moral conception that stresses vulnerability appears as a reaction to the child's acquisition of a protagonist role within the family. The sentiment of purity leads to a dualistic moral attitude towards childhood, as on one side an effort is made to preserve the child from corruption (especially sexual) while on the other there are efforts to strengthen it by developing character and the use of reason, for which end educators recommend tempering excessive affections and dedicate themselves to designing an entire array

¹⁰ This situation also corresponds with the process of individualization: the person becoming aware of the differences between self and other. This occurred in the same way at the socioeconomic level.

of behavioral norms in line with their sense of decorum.¹¹ This ethical transformation was intensely promoted by the State and the Church, who begin to take over education with the objective of providing instruction and guaranteeing respect for the new morality by means of new institutional structures – grammar schools – that spread rapidly. Parents welcome them warmly since they feel themselves lacking the ability to successfully achieve the educative mission alone or the preparation to match the knowledge that the school could pass on.

The 18th century can be considered, according to many authors, the century of the moralists, as it is during this period that the perception of childhood that they forwarded is consolidated and that the recommendations of the pedagogues are implemented into practice. The new role the child assumes in the home and in society prompts a series of recommendations for rigor and discipline meant to control it. With this new attitude the characteristics and needs that are specific to each child and to each stage of development become evident, such that the grammar schools begin separating the students by age groups.

At the outset of the 19th century, two opposing attitudes towards childhood coexist: that of those who believed that children were by nature bad making it necessary to bow their will using suffering and those who thought (as did the followers of Rousseau) that children were born good but with capabilities that had to be developed. Figures completely dedicated to the study and work of childhood began to appear: Pestalozzi, Fröbel, Unamuno, Carderera (Delgado 1998, pp. 161 – 84). It is in this century that the systematic study of child psychology is born. In the legal domain, the great changes produced in the 18th century largely influence how children are

¹¹ Parents, whom nature has wisely disposed to love their children, are led to, if reason does not temper the great strength of their affection, allow their love to naturally degenerate into blind tenderness. They love their children, as is their duty; yet frequently, they love their personal defects. They say one should not upset children (Locke [1693] 1994, p. 66).

considered. The idea begins to emerge of the State's obligation to protect the child and as the educational system expands mandatory scholarization and diverse public sanitary services are introduced. Meanwhile, as a consequence of industrialization, the first social laws with respect to children are enacted in 1841 to limit work in factories.

Once the rights to freedom are consolidated as subject to immunity in the private sphere of the male-adult-landowner the family belongs to, however, the child, considered a vulnerable and incapable being, holds rights that are derived from the civil liberties of the father and is therefore subject to his power and outside the reach of the law. At this point, law goes no further than offering protection within the limits permitted by the inviolable space of the family and thus only addresses children that for some reason fall outside it: the poor, the orphans, and delinquents.

A historical examination of how childhood has been treated reveals ambiguity with regards the sexuality of children, along with oscillatory swings that probably coexisted (and continue to coexist) in the same time period: from considering children to be asexual being and thus incapable of experiencing feelings associated with sexuality, to attempting to reduce physical contact because of the innate predisposition for evil of every human being. All of which is tied to the creation of guilty feeling.

The “*discovery*” of childhood brought about its segregation from the adult world and an increasingly radical divorce with respect to the practices of adult sexuality. Schools are to a certain point, inasmuch as privileged spaces created for girls and boys, the representation of this idea. Childhood and sexuality are thus positioned as antagonistic concepts that must be kept apart. This ambiguity continues to prevail in our times, a proof of which is the attitude towards

sexual rights, the lack of explicit recognition of those rights, and the debates surrounding themes such as sex education in which boys and girls – of course – do not participate.

This ambivalence continues through the phase of adolescence, although recently there have been reclamations from persons from this age group for access to reproductive rights. The arguments rest on a series of interpretations derived from international instruments and local laws. The problem is that the same norms could be validly employed to justify the opposite argument, that is, to justify from certain perspectives strict limitation in the exercise of these rights. The most paradigmatic case involves the invocation of a conception which can apparently carry any interpretation: the best interest of the child. Yet, as we will try to show further on, these attempts to detach a range of rights using vague norms and principles, long from contributing to the a balanced formation of a normative framework, emphasize the discretionary character of the laws regulating childhood and adolescence and submit the exercise of rights to the mercy of those in charge. Without doubt, this has been the distinctive mark of the legal treatment of childhood and adolescence.

4. Sexual needs during childhood and adolescence

The next step in this line of argumentation consists of determining what the sexuality of children and adolescents is. One interesting approach is provided by the perspective that sees basic needs¹² as the foundation of the rights.¹³ Ochaíta and Espinosa have devised a system of

¹² Using needs as a foundation for rights has been extensively developed by several authors. Some of the more relevant examples are Marx, Maslow, Max Neef, Rawls, Doyal and Gough, De Lucas and Añón, Hierro, Garzón Valdés and Zimmerling.

¹³ The existence of needs does not by itself justify their translation into rights; so the link between the two must be demonstrated. This argumentative bridge can be made by considering interest theories as the origin of subjective rights. Interest theory holds that rights are legally protected interests, so that the identification of an interest is a valid reason for the creation of a legal norm. Needs thus operate as interests and provide the foundation for human rights. Because of space limitations it is not possible to cover the complete argument in this text (González Contró, 2008).

classification based on the proposal of Doyal and Gough to identify physical health and autonomy as basic needs. Starting with this distinction the authors derive a series of secondary needs that are universal but become manifest in different ways at each stage of development.¹⁴

Physical Health	Autonomy
<ul style="list-style-type: none"> ◦ Adequate nourishment ◦ Adequate lodging ◦ Adequate clothing and hygiene ◦ Healthcare ◦ Sleep and rest ◦ Adequate exterior space ◦ Physical exercise ◦ Safety from risk of physical harm 	<ul style="list-style-type: none"> ◦ Active participation and stable norms ◦ Primary emotional bonding ◦ Interaction with adults ◦ Interaction with peers ◦ Formal education ◦ Informal education ◦ Play and leisure time ◦ Safety from risk of psychological harm
Sexual needs ¹⁵	

As can be observed, sexual needs equally involve basic needs for autonomy and for physical health and, although present throughout one's life, manifest themselves differently in each period. What follows is a brief exposition of the forms these needs take in each developmental stage and the necessary legal protections:

¹⁴ The separation and classification of primary satisfiers and secondary needs follows an effort to simplify matters since they function as an integrated whole and satisfiers, needs, individual characteristics and cultural context all interact in a complex system. It must be made clear that the division into stages does not imply accepting critical periods of development (which would result in fragmentation), since the process is unique in every human being and occurs gradually over time. The division stems from an attempt to make it easier to understand the transformations that occur in childhood and the generic characteristics of each developmental period.

¹⁵ Including sexual needs is an innovation to the taxonomy proposed by Doyal and Gough.

Early childhood (from a child's first month until approximately two years of age) During the first years of human life – starting at five months – babies begin to explore their body and engage in self-stimulating behavior. Adults should accept such behavior as natural and protect the child from potential sexual abuse (Ochaíta and Espinosa 2004, p. 271).

Pre-school age (from two to six years of age) During this period many concrete aspects of sexual needs appear; children learn to distinguish between the sexes and demonstrate certain behavior such as self-exploring, self-stimulating, curiosity towards companions of the opposite sex, etc. They also demonstrate interest in aspects related to sexuality, and their questions should be answered truthfully on a level appropriate for their age. It is also at this time that children discover their gender identity and the stereotypical roles that correspond to their sex. In this sense it is important to respect the child's right to develop their gender identity, even though it might seem to adults that this representation does not correspond to the way roles are assigned within the family. The influence of communication media in constructing the meaning of being a man or a woman should not be underestimated (Ochaíta and Espinosa 2004, pp. 286 – 288).

Primary school age (from six years of age until puberty, whose onset generally begins at twelve or thirteen years of age) As regards sexual needs, children in this stage undertake the construction of an image of their sexual and gender identities and the stereotypes so rigidly defined in the prior stage undergo some loosening. Children in this stage can understand that sexual and gender identities remain constant throughout life and do not depend on external factors (such as for example biology, clothing, decorations, or profession). The role of parents in this process is fundamental because they furnish the principal references for children learning the most essential and significant elements of sexual behavior (Ochaíta and Espinosa 2004, pp. 299 –

300). It is also important that they receive an adequate sexual education in terms of emotional training and personal awareness as a fundamental element of identity.

Puberty and adolescence¹⁶ (from puberty until eighteen years of age) Sexual needs begin taking on great relevance, as reaching sexual maturity means the young people are able to perform sexual intercourse, which makes it necessary to pay special attention to sexual education and the prevention of pregnancy and illnesses. Affective-sexual education should address, among other things, the bond with the other, responsibility and self-awareness in order to work out a life project in which sexuality is an essential component (Ochaíta and Espinosa 2004, p. 316).

As is easily seen, what is proposed is a broader conceptualization of sexuality. The use of a restricted definition has resulted in the limitations of rights associated with it. The proposal to consider sexuality as a fundamental component of human beings that is integrated by a series of related elements permits a better understanding of its relevance throughout the entire human lifespan and the different ways sexual rights are manifested and exercised. Without doubt, this would require the establishment of regulation to protect those rights that would in turn imply restricting other rights (especially those linked to parental powers), which does not seem likely to occur soon given the deep-rooted culture of the relationship between parents and children. Added to this is the consolidation of a liberal paradigm of rights entitlement, whose exercise is based on a certain type of autonomy that girls and boys presumably lack.

¹⁶ Adolescence was the last stage of childhood to appear in history and presents significant variations relative to cultural context, given the phenomenon observable in many industrialized countries in which this stage tends to grow in duration.

5. Legal paternalism and child rights

In order to better understand the difficulties that are introduced with respect to sexual rights, a brief description of legal paternalism as model of intervention in the exercise of rights will be given. Observable within this theme are also the differences in the ways interference in personal decisions is interpreted when it is a question of girls and boys. While it is considered unacceptable for adults, in general terms intromission into private life is considered reasonable when dealing with minors when it is a question of actions meant to protect the minor, and in fact this is the form that the majority of their rights takes. Put another way, children's rights are in general mandatory rights¹⁷, meaning they can't be renounced by the bearer.

In this way legal paternalism¹⁸ justifies the exercise of rights in childhood and adolescence by means of two fundamental mechanisms: the first can be summarized by the responsibilities linked to parental power by recognizing the parents' capacity to decide what is best for their children, and the second takes form through impositions determined directly by the state that do not leave any degree of choice, not even to the parents, with respect to the enforcement of the rights. In a well-balanced system another fundamental actor in the decision-making process involving the life of a child would have to be the child him or herself.

Paternalism is based on the premise that individuals are capable of making the wrong decisions with respect to their best interest, which justifies the imposition of measures by the authorities to preserve goods and practices commonly considered valuable. The same term is

¹⁷ Feinberg distinguishes between mandatory rights and discretionary rights (Feinberg 1980).

¹⁸ The other two models of state intervention are liberationism and moral perfectionism. The former proposes identifying total autonomy as the means of ending the oppression of children while the latter is exemplified by the state in which models and ideals for living based on personal excellence are imposed. Neither are considered wholly justified, as liberationism neglects certain characteristics of childhood which leads it to justify some protective measures that go against the child's decisions, while at the other extreme, in moral perfectionism no possibility of free choice in the present or future is granted.

often employed with a strongly pejorative connotation to decry some types of state intervention into the private lives of individuals. Many politicians and laws are discredited as being paternalistic in cases where the state is seen as trying to *treat us like children*. These cases are evidence in and of themselves of how far the conceptualization of children extends socially and its strong repercussions in the legal and political spheres.

Paternalism is generally associated with the imposition of measures by the State designed to prevent individuals from hurting themselves or their interests.¹⁹ To this end the public authority prescribes certain behaviors or courses of action for people that are likely to contribute to achieving the preferences and plans in life that they themselves have freely determined, thus protecting the subject from acts and or omissions that affect their self-interest or the conditions that subtend it, even when in opposition to their will, that is, whether or not they consent. Examples of paternalist measures are the mandatory use of seatbelts in automobiles and helmets on motorcycles, mandatory schooling, the criminalization of the sale of drugs, mandatory pension payments, and the ban on the sale of medicine without prescription.

In the case of girls and boys, the exercise of rights implies another paternalist intervention. This is reflected in the fact that compliance is not left to the will of the bearer. For example, the right to education is interpreted as a mandatory right, that is, although it is considered a right in that it represents an interest of the boy or girl that is legally protected, it is not a right that implicitly carry a presumption of the capability for renouncement as most rights

¹⁹ Feinberg considers the second case, that is, the protection of the person's interests, constitutes an "extreme" version of paternalism: "The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm or in its extreme version, to guide them, whether they like it or not." (Feinberg 1980, p. 110)

do for adults.²⁰ It is thus understood that it is the parent who, before all others, must see that the requirement of the mandatory right is met, and if they do not, the subsidiary action of the state would be warranted.²¹ In this case not even the parents may decide whether or not the right is to be exercised so, put otherwise, it is also mandatory for adults.

What happens, then, when sexual and reproductive rights are understood as freedoms? Is it necessary to recognize parental rights? What are the limits of paternalism?

6. The context of sexual rights in international law and Mexican legislation

One of the characteristics of how childhood and adolescence have been legally treated is the great degree of discretion awarded to the adult actors; parents, teachers, judges, authorities, etc. Rights related to parenthood, specifically parental powers, are a clear example. Whoever exercises these powers is attributed a group of rights and responsibilities for them to exercise and fulfill in accordance with their criteria.²² Although current trends demonstrate a reduction in discretionary powers as rights are more clearly formulated, the conceptualization that children are virtually the property of their parents is still dominant.²³ The Convention on the Rights of the Child, approved by the General Assembly of the United Nations on November 20, 1989, makes absolutely no mention to rights related to sexual needs. The explanation appears simple given the nature of the instrument, which required the approval of practically every country in the world. The Convention is one more proof of the silence surrounding the theme when girls and boys are concerned. The only expressed allusion is the right to protections against any form of sexual

²⁰ The “most” refers to the fact that, as observed by Hierro, there are cases in which adults are denied the right to renounce their access to the right in question.

²¹ The text of Article 4 of the Mexican Constitution clearly defines the roles of parent and state as paternalist agents.

²² A clear example of this is found in the Universal Declaration of Human Rights, which establishes in Section 3 of Article 26: *Parents have a prior right to choose the kind of education that shall be given to their children.*

²³ Civil law is not the only domain characterized by arbitrariness. Criminal law was also characterized by the lack of legal certainty for children and adolescents who commit acts classified as crimes by criminal codes.

abuse or exploitation.²⁴ Similarly, the *Facultative Protocol to the Convention on the Rights of the Child on child trafficking, children's prostitution and children's pornography* was also approved, but just as in the Convention, its only concern is the prevention of the most extreme forms of violations of rights associated with sexual needs. Fundamental questions in addition to those already outlined, such as the age of consent for sexual intercourse, the freedom of access to contraception, or the right to respect no matter one's sexual orientation or preference, are not even mentioned. They are left to the judgment of each state, where in most cases there is also a lack of clear regulation. It is implicitly understood that the final decision is left to the parents in the absence of a clear legal framework.

This is a serious problem because it fails to provide any protection for an extremely vulnerable group of people, even more so when the child or adolescent concerned is also a woman. In this situation, in cultures whose respect for rights is dubious, many cultural practices are justified such as mandatory head or face cover²⁵ or child marriage, and even practices more notoriously abusive of more fundamental rights such as the one referred to as “*female circumcision*.”²⁶

²⁴ Article 19. 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 34. States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

²⁵ There different variations of the veil: *hijab* is a veil that covers the head; *khimar* is a veil which reaches to the waist yet leaves the face uncovered; the *chador* which covers the entire body except the face; the *niqab* which covers all of the face except the eyes; and the *burka* which covers both the face and the entire body with a screen over the eyes that permits limited vision.

²⁶ For Freeman the so-called “female circumcision” is a euphemism of male circumcision that possesses absolutely no similarity in terms of the physical effects. Freeman also observes that there are various types of “circumcision”:

In traditionally liberal countries, another characteristic stemming from the demands for sexual and reproductive rights is the emergence of a schizophrenic system for adolescents' rights. In Mexico City, for example, an adolescent can give consent in order to have an abortion performed on her, but not in order to have her appendix removed much less any right to political participation, which are reserved for adults. Just as in international law, clear regulation on the limits of the rights and their exercise is lacking. In the best of cases these definition have been delegated to secondary legislation, many of which lack democratic legitimacy because of their origin in regulations handed down by the executive power.²⁷ This occurs despite the fact that Article 4 of the Mexican Constitution recognizes the right of all people to make *free and informed* choices regarding how many and how frequently to have children. As in the majority of cases, however, this is not understood as applying to minors.

The federal character of the Mexican State also results in a greater ambiguity regarding adolescents since some states expressly recognize certain rights – very much reduced – related to the exercise of sexuality and education on the matter, while others lack regulation.

7. The extreme cases under debate

Besides the obvious difficulty of formulating the sexual rights of girls and boys that is derived from their status as minors and incapacity to give consent, there are even more complex cases. With a view to generate debate, a discussion follows of extreme cases in which, as they concern children and rights related to sexuality, no general agreement on intervention or on the limits to the exercise of those rights exists. The questions that serve as the connecting thread are:

ritual, sunna, clitoridectomy and infabulation, each with a different set of physical and psychological consequences for the girl (Freeman 1997, p. 142).

²⁷ One example is the OFFICIAL MEXICAN NORM, NOM 005-SSA2-1993, *On Family Planning Services*

Who is entitled to the right? Who is authorized to exercise the right, with the understanding that it is a question of freedom of choice? What happens to consent?

- Intersexual children. Intersexual children are born with ambiguous (hermaphrodite) genitals making it necessary to assign a sex. This decision is a prerequisite for the birth certificate and civil registry. The procedure for deciding the sex is based on a medical exam which identifies which sex is more viable, but parental consent is required.

- Pederasty, estupro, and child prostitution. This grouping is directly tied to the issue of consent. Starting at what age should consent be recognized? Should an adolescent be able to practice prostitution by consent? Is there really a such thing as child prostitution.

Regarding consent, one argument used in *contrario sensu* is the categorization of statutory rape in such a way that consent stands as an implicit right despite the essential nature of criminal law. The fact that these instances do not follow the typical categories does not mean the acts are legally permitted. The decision could be either politically motivated or result from the conclusion that the legal matter at heart does not fall under the jurisdiction of criminal law but rather under that of some other type of normativity.

Experts observe that, not only for adolescents but rather at every stage of development, an important factor is the difference in age between the parties. In other words, a relationship between individuals who are two or three years apart in age cannot compare to one where the individuals are ten, twenty, or fifty years apart. During infancy and primary school-age this is a criterion for determining whether or not sexual abuse has occurred.

◦ Marriage involving children.²⁸ Some international instruments (organs) suggest that an age should be fixed below which marriage cannot be contracted. Often the same groups who argue that the minimum age for marriage should be raised also mobilize for the recognition of reproductive rights for adolescents. On what basis may an adolescent's consent to have sexual relations be respected, but not to marry? What does this mean for the principle of progressive autonomy proposed in the Convention on the Rights of the Child?

◦ The right to identity of the child vs. the right to confidentiality of the donor in cases of assisted reproduction. Mexican legislation prohibits paternity tests in cases of married women whose husbands had not been unknown before the child. In the context of Mexican society decades ago, this regulation is understandable, as it was impossible then to establish paternity with certainty. Today this is possible, but in addition a series of rights have been recognized that are linked to technological development, such as the right to identity, that may have consequences on the right to health. This is made more serious by the fact that the woman who gives birth to a child is no longer necessarily the woman who provides the genetic material. What happens to this right in cases where one of the children's parents is an anonymous donor? Which right prevails? How are serious situations such as marriage between relatives to be avoided? Is there a way to justify differentiated treatment between "*naturally*" conceived children and assisted conception when it comes to the obligation to provide nourishment?

²⁸ One year ago, the international press was stirred by the news of a divorce between a Yemeni girl of 8 years whom her father had forced to marry a man 28 years older than her. This was not the case in another instance also covered by the news media in 2009, this time in Unayzah, Saudi Arabia, where a tribunal denied the petition for divorce made by the mother of another 8 year-old girl married to a 58 year-old man. In this case the couple did not live together. In both cases the marriages were contracted by the parents of the girls for economic motives.

8. A few approximations in guise of a conclusion

The first conclusion that jumps to mind is the necessity of clearly and adequately defining sexual and reproductive rights in terms of basic needs. Defining them this way would go far in reducing the degree of arbitrariness left to paternalist agents, to the benefit of the higher interests of the child.

The enormous difficulty implied by the task of translating sexual needs into rights, given their nature, characteristics, and the stage of life in which they appear, does not pass unnoticed. What is needed, however, is finding formulas to protect this aspect of life for people who are in a state of vulnerability. Of course, this mainly implies a cultural transformation of how childhood, sexuality, and the relationship between children and parents are conceptualized.

The second conclusion is that we must recognize the general tendency to concede adolescents' right to consent to have sexual relationships, due to the fact that they are old enough to reproduce. This affirmation, however, must be linked to the theme of consent – which is present at every phase of life – in such a way to establish a criterion to prevent abuse. Moreover, this implies addressing the topic of autonomy in the exercise of rights from a holistic perspective based on an awareness of the development of different capacities for decision. It means taking rights seriously.

Meanwhile, looking at the rights of girls and boys leads us to an interrogation of the character of human rights themselves. We can either hold that human rights are not universal and accept the consequences that this affirmation would imply and that would justify any exclusion, or we can conclude that sexual and reproductive rights, understood in a strict sense, are not in fact human rights. I favor the latter, both because it allows for a conceptualization of sexuality

much broader than that based on rights, and because it forces a redefinition of existing rights in such a way that everyone be entitled to them.

Lastly, we affirm that, if the domain of sexuality in the extensive sense of the term is fundamental to the development of the individual, then it is necessary to create an adequate normative context that guarantees these rights. This also implies protecting against related risks, for which the most effective means is educating girls and boys how to protect themselves. This requires both recognizing and knowing what the needs are:

In this way alone can we instill in our boys and girls an “erotiphile” attitude that will allow them to fully develop as individuals and, at the same time, arm them with strategies and resources protect themselves from certain risks and forms of abuse (Ochaíta and Espinosa 2004, p. 253).

In the end, what this is about is a group of topics that need to be discussed. The arguments regarding the rights of girls, boys, and adolescents began with the premises of the irrelevance of the will in the exercise of rights and of the exclusion from entitlement. A new discussion needs to begin with an interrogation of these suppositions, one that above all includes girls, boys, and adolescents in the discussion of their rights.

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