

The Concept of the Child in the Law

Akihiro TSUCHIYA
Kanazawa University

Abstract

“Children” are typically subject to unilateral restrictions on their legal rights, such as to acquire property and vote, simply because of their status as children. They are deprived of their rights because of their age. However, the legal boundary between “adults” and “children” is unclear. In Japan, the right to vote, which allows one to express one's political will, can only be exercised by individuals aged 18 or over; however, like adults, individuals aged around 12 can be held liable for damages. Even the legal age that distinguishes between childhood and adulthood is variable. Whether or not children are recognized as subjects with legal rights and obligations, that is, as “legal subjects,” is determined by the purpose of each law.

First, a “legal subject” is a legal concept constructed by modern law based on the model of the ideal “merchant,” that is, an individual who supports a contractual society. The law, owing to its requirements for efficiency and stability, unilaterally and collectively categorizes entities that deviate from the “merchant” model, restricting their rights such that they cannot participate in a contractual society. In other words, children are considered entities that have been unilaterally recognized by law as deviating from the “merchant” model and, thus, are deprived of rights.

However, rapid technological innovation in recent years is enabling children to make the same decisions as adults. This blurring of the boundary between children and adults raises the possibility that restricting children's collective rights may be considered a violation of human rights, forcing a legal reflection on and reassessment of the traditional binary view of children and adults.

Key words: child, adult, legal subject, legal boundary, social change

Introduction

In the home, school, and many other places of society, “children” are typically made to follow the decisions made by “adults” because, as children, they cannot

Correspondence:

Akihiro TSUCHIYA, Kanazawa University. Email: aktsuchi@staff.kanazawa-u.ac.jp

object. This logic is generally left unquestioned. The law also restricts various rights granted to adults to minors under the age of 18, such as denying them the right to vote and requiring the consent of their parents or guardians for contracts and other legal acts. However, just as the age of majority was lowered from 20 to 18 years old in April 2022, the legal boundary between children and adults (legal age) is arbitrary and variable. This paper aims to clarify the origins of the legal restrictions on children based on the concept of “legal subject.” It also considers the fluctuating boundaries between children and adults in modern society.

1. The legal boundary between children and adults

Although Japan’s Constitution references “adults” (Article 15(3), the right to vote) and “boys and girls” (Article 26(2), compulsory education), it leaves the age that separates adults from children to be determined by subordinate legislation. At the same time, the Civil Code stipulates that “the enjoyment of private rights commences at birth,” (Article 3(1)), in principle recognizing that all individuals have “legal capacity” (“legal personality”)¹ from birth to death, regardless of age.

However, the Civil Code invalidates legal acts of persons who are not deemed to have “mental capacity”², which is considered equivalent to the mental capacity of an individual between seven and ten years of age. Furthermore, based on the distinction between minors and adults at the age of 18 (Article 4), legal acts by minors “in principle require the consent of a legal representative”(Yamanome 2022:66)³. “Minors do not necessarily have the ability to judge their own interests

¹ “Legal capacity” is defined as the “the capacity to seek, in one's own name, legal protection for personal interests such as freedom, life, and body, to establish an individual's responsible property, to acquire rights related to property, to seek the protection and guarantee of a status that enables one to earn from and dispose of that property, and to be a contributing member of a legally recognized family relationship” (Kawakami 2007:25).

² It is said to be the ability to “recognize and judge the legal consequences of one's own actions” (Kubono 2015:201).

³ Minors are called “persons with limited legal capacity” because their “capacity to act,” which is the ability to perform legal acts alone, is limited. However, this does not mean that all legal acts performed by minors are not recognized. For example, the level of “mental capacity” required for a “relatively simple legal act” such as purchasing an item will be different from that required for a “more complex legal act” such as renting an apartment

and gains compared to adults, and they may conclude disadvantageous contracts because they have little experience in transactions” (Kubono 2015:201). Furthermore, minors are subject to restrictions, such as not being recognized as qualified to become the guardian of an adult or the executor or witness to a will (Ishiwata 2025).

However, under the same Civil Code, people aged 15 or older are recognized as being qualified to consent to ordinary adoption, negotiate the dissolution of an adoptive relation, and write wills. Furthermore, if minors are deemed to have the “responsibility” to recognize that their own actions are illegal and that they will bear legal responsibility (approximately 12 years of age), they will be held liable for damages just as adults are⁴.

Additionally, the right to vote and the right to vote in national referendums are granted to citizens from the age of 18 and the right to be elected from the ages of 25 (House of Representatives, prefectural assemblies, mayors, and municipal assemblies) and 30 (House of Councilors and prefectural governors)⁵. According to Juvenile Law, a “juvenile” is defined as anyone under the age of 20; it sets the age at which a person can be held criminally responsible (capable of responsibility) at 14 or above. Thus, there is no universal boundary; instead, the legal boundary between children and adults is established separately in accordance with the purpose of each law (provision)⁶.

However, these laws appear to have two things in common. First, they treat

(Yamanome 2022:57).

⁴ In the case of the bullying suicide in Otsu City, the claim for damages against the two assailants, who were second-year junior high school students at the time, was accepted (Osaka High Court ruling, February 27, 2020 (Reiwa 2) and finalized).

⁵ Some local government referendum ordinances stipulate that the eligibility to vote is 15 or 16 years of age (Yonezawa 2016:79).

⁶ The Civil Code also establishes the concept of “minor children” in relation to marriage expenses and support. This draws the line between children and adults for each individual, regardless of age, based on whether or not they are economically independent (Habu 2020). As a supplementary note, the Basic Act on Children's Policy (to be enacted on April 1, 2023) defines children as “those who are in the process of mental and physical development.” In other words, it does not set an age category (Article 2).

children and adults as binary constructs and determine the extent of the rights, qualifications, and obligations of the former based on the latter. Second, the laws that specify the legal age, in particular, treat different individuals uniformly based on their age. In the next section, I consider the social and legal background of grouping children in opposition to adults, focusing on the concept of “legal subject.”

2. Legal subjects and children

According to Kashimura (2005), “the law” is “an attempt to regulate or control social interaction through norms” (p. 31), while a social norm encourages general obedience and is justified by the state. However, to efficiently and stably regulate and control the enormous number of daily social interactions, stripping the interactions of their inherent context and formalizing them are necessary. For example, disputes over borrowing and lending money, which frequently involve complex circumstances and human emotions, are addressed using legal aspects such as whether or not there is a “loan agreement” under the Civil Code, the repayment deadline, interest, and prescriptions, etc. In this process, individuals are stripped of their individuality and are treated as abstract constructs of various legal concepts, such as legal and mental capacity, and are subject to legal regulation and control. These individuals are abstracted by the concept of “legal subject.”

“Legal subject” generally refers to “a subject that has rights and obligations” (Kojima 2022:10). However, this fictional subject is constructed by law in accordance with the demands of modern society. Thus, such subjects cannot exist before the law exists, nor can they exist independently of the law. Obata (2007) states the following about the human image that is the model of this “legal subject:”

The image of a person envisioned by modern civil law can be considered as follows. Economic development based on the capitalist mode of production dismantled the premodern, communal social relations that had existed until then and promoted the formation of a free labor market. In this process, people, as subjects of commodity exchange, recognized each other's independence and free will, and social relations were formed, in principle, as contractual relations based on free will. The legal person as the owner of the goods, placed at the center of the idea of a contract between free, independent and equal parties, is

endowed with the attributes of freedom, independence, equality and intelligence with an excellent ability to calculate interests, following the model of the merchant. [Omitted] This modern civil legal image of humans had the character of an average type that was more than an ideal, fictitiously constructed entity, and so the legal order was constructed on the basis of the simple belief that this abstract image of humans was real. (226–227)

According to Obata, modern (civil) law is a legal model constructed from the “merchant model” as the “legal subject” to support a contractual society. Therefore, the “legal subject” assumed by law is an individual who is free, independent, equal, and intelligent with “an excellent ability to calculate interests.” As Max Weber (1974) argued, the formation of formal and rational laws that define in advance the responsibilities and sanctions associated with legal decisions such as contracts contributed significantly to the development of capitalism, and modern law guaranteed that those with the ability to rationally pursue wealth by their own free will could become parties to a contract by fictitiously defining them as “legal subjects.” Conversely, individuals who do not meet the “merchant image” or those for whom it cannot be assumed that they do fit it are considered as deviating from the definition of “legal subject,” and, thus, are excluded in whole or in part from contractual society. This exclusion is based on the requirement of legal efficiency, which categorizes groups as sharing certain attributes; otherwise, it would be extremely costly to prove the actual capabilities of individuals who do not take the “merchant image” for granted.

Thus, legal children can be understood as a group whose distance from the “merchant image” is measured collectively, who are evaluated as “incomplete legal subjects” without being allowed to raise objections, and who are excluded from contractual society. As Fukuoka (2021) stated, “Although there are large individual differences in the level of development of minors, due to the need for legal stability, it should be judged uniformly based on age rather than individual differences”(1). In other words, the constraints placed on children are nothing more than a manipulation according to legal necessity.

3. The fluctuating boundary between children and adults

Currently, the traditional legal status of children is being challenged from two

angles: from the fluctuating boundary between children and adults that may be affected by the rapid advancement of technology and from the criticism of legal studies.

(1) Will children remain children?

Recent technological developments may force us to reconsider the boundary between children and adults. Legal sociologist Saito (2022) argued as follows:

Just as with barrier-free access for the elderly and people with disabilities, barrier-free access for children's participation in society is expected to progress significantly over the next 30 years or so in terms of scientific and technological feasibility. In particular, the development of AI technology is progressing rapidly, and many issues that have not yet emerged in today's society are expected to emerge. [Omitted] As technology develops to assist in judgment and decision-making, it is expected that in the future, even the average five-year-old child will be able to make political and everyday decisions that are in line with their own interests. (12)

In the future, when children are able to accurately access information needed for voting and legal acts in a way they can understand regardless of their age, and can make appropriate decisions assisted by AI, will children become “full legal subjects” like adults? Or will children remain “incomplete legal subjects” and continue to have their rights curtailed? If children's rights continue to be restricted by the current law even after they have the same abilities as adults, it must be persuasively proven that such measures do not constitute unjust discrimination⁷. This also calls into question the need to distinguish between the two.

(2) Worry-free thinking of legal studies

Civil law scholar Yamamoto (2006) criticized the “worry-free thinking” of legal studies.

⁷ Through an examination of American law and precedents, Saito (2022) argued that it is necessary to strictly question the discriminatory nature of restrictions on rights imposed on “children.”

Traditional jurisprudence has often portrayed a very pleasing image of the subject, such as “free and equal parties,” “autonomous parties,” “self-determining subjects,” “rights subjects,” “party autonomy,” and so on. In this context, the subject that desires and creates legal effects of its own volition is considered to be the basic or fundamental form, and the subject with missing parts is given the status of “subject in need of protection.” The role of jurisprudence has been found in refining legal thoughts, techniques, and concepts for this purpose. [Omitted] On the one hand, while praising “autonomous agency that can take responsibility for one's own decisions,” it also seems to have a “worried-free thinking” characteristic of traditional legal studies, which labels those who “lack autonomous agency (as legal studies think)” as “victims” or “the weak,” thereby justifying the lawyers' brazen involvements as “carriers of relief for the vulnerable.” (4-5)

The law has constructed an image of the “legal subject” demanded by modern society, positioning children as “subjects lacking autonomous subjectivity,” and restricting their rights uniformly. Legal studies have rested comfortably on the concept of children as constructed by the law, and, in protecting and rescuing the “vulnerable,” they have ignored questioning the appropriateness of restricting children's rights in their self-initiated activities. However, if we understand “legal subject” as a “subject” created for the convenience of the law and society, then it is the responsibility of legal studies to reimagine the legal status of children in line with changes in society.

4. Conclusion

In this paper, we confirmed that the legal boundary between children and adults is determined in accordance with society's demands. This also suggests that the existing boundary may be reset or even abolished due to social change. Now that the boundary separating the two is fluctuating, critically examining what children are, what adults are, and the very framework of thought that regards the two as opposing concepts, is critical.

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