



Universiteit
Leiden
The Netherlands

Article 5 of the UN Convention on the Rights of the Child: parental guidance and the evolving capacities of the child

Varadan, S.R.

Citation

Varadan, S. R. (2022, June 30). *Article 5 of the UN Convention on the Rights of the Child: parental guidance and the evolving capacities of the child*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/3421100>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/3421100>

Note: To cite this publication please use the final published version (if applicable).

Article 5 of the UN Convention on the Rights of the Child

Article 5 of the UN Convention on the
Rights of the Child
Parental guidance and the evolving capacities of
the child

PROEFSCHRIFT

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op donderdag 30 juni 2022
klokke 11.15 uur

door

Sheila Rose Varadan

geboren te Simcoe Ontario (Canada)

in 1976

Promotores: Prof. dr. T. Liefwaard
Prof. dr. J.E. Doek

Promotiecommissie: Prof. dr. U. Kilkelly (University College Cork, Ireland)
Prof. dr. A.M. Skelton (University of Pretoria, South Africa)
Prof. dr. A.C. Hendriks
Prof. dr. M.C. de Vries

Omslagontwerp: Primo!Studio, Delft
Opmaak binnenwerk: Anne-Marie Krens – Tekstbeeld – Oegstgeest
Drukwerk: Ipskamp Printing – Enschede

© 2022 S.R. Varadan

ISBN: 978 94 6421 700 1

Behoudens de in of krachtens de Auteurswet gestelde uitzonderingen mag niets uit deze uitgave worden veeleenvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Voor zover het maken van reprografische veeleenvoudigingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.stichting-pro.nl).

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.

Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they were meant to be – the unknown person inside each of them is our hope for the future.

Loving Every Child: Wisdom for Parents, Janusz Korczak

For Sam and Jude

Acknowledgements

It is a privilege to be able to pursue doctoral studies. I am indebted to my two supervisors, Ton and Jaap, for their unending patience and unfailing support throughout this process. I'm also grateful to many others – Laura Lundy, Katrien Klep, Claire Fenton-Glynn, Brian Sloan, Elaine Sutherland, Priscilla Alderson and John Tobin – whose encouragement and support made it possible for me to publish the manuscripts in this dissertation. I'm thankful to the members of the External Examining Committee whose helpful comments and insights significantly improved this dissertation. To my peers in the Child Rights Early Career Researchers Network, your camaraderie enabled me to soldier on in the bleaker moments of this PhD journey, particularly during the extended lockdowns (and school closures) in the COVID-19 pandemic. Finally, I would like to extend a special thank you to Anne-Marie Krens for her extraordinary patience and support in finalizing this manuscript for printing.

I am forever indebted to my parents, who made the difficult decision to leave their family in India and emigrate to Canada to secure for us opportunities and privileges they never had. To my father, whose determined optimism and tireless work ethic taught me that anything is possible at any age in life. To my in-laws, Pamela and Jonathan, who have been there at every turn, providing encouragement and a good dose of perspective. In particular, I'm indebted to my father-in-law, Jonathan, whose erudite editing (and sense of humour) not only improved my writing, but clarified my thinking. Lastly, to the many friends and family who were always there to lend an ear, offer words of encouragement and send a care package – Cindy, Sophia, Nancie, Noam, Ma'ayan, Oren, Jonathan and Matt, Pat and Catherine, Jim and Josh, Richelle and Doug, Li and Chris, Pavan, Erin, Char, Ji Hyun, Mike, Lindsay, Yvonne, David and Roxanne, Yasmin, Li and Mary.

Of course, none of this would have been possible without the three most important people in my life – Yoel, Sam and Jude. To Yoel, my partner and best friend, who likely shouldered the heaviest burden in this process, you have been there to support me both in actions and words. Whether that meant enduring my relentless yammering about children's evolving capacities, reading (and rereading) draft manuscripts or absorbing the full responsibilities of childcare alongside a demanding job, I would never have been able to complete this project without your unwavering support. I cherish every day

that we share together. To my two sons, Jude and Sam, you have taught me far more than I will ever be able to teach you. It remains the greatest privilege of my life to be your parent.

Table of contents

1	INTRODUCTION	1
1	Background: rights of the child? Or rights over the child?	2
1.1	The child as 'property' – until 1900	2
1.2	The child as a 'beneficiary of benevolence' – 1901 to 1958	3
1.3	The emerging child rights movement – 1959 to 1978	5
1.4	The drafting of the Convention on the Rights of the Child – 1978 to 1989	7
1.5	Finding common ground: The role of parents and family under the CRC	8
1.6	Article 5: Attempting to 'strike a delicate balance'	10
2	Problem statement: The enigma of article 5 under the CRC	13
3	Research question	16
4	Research methodology and methods	17
4.1	Research methodology	18
4.1.1	Rules and principles of treaty interpretation under international law	19
4.1.2	An interpretative framework for the CRC	22
4.2	Research methods	25
4.2.1	Literary review	25
4.2.2	Case study: informed consent in medical research involving children	27
5	Outline	28
2	THERE'S NO PLACE LIKE HOME: THE ROLE OF INFORMAL CARERS UNDER THE UN CONVENTION ON THE RIGHTS OF THE CHILD	33
	<i>Introduction</i>	33
1	Drafting history – finding a common ground for carers	37
2	Evolving a broad and flexible approach to 'parent' and 'family'	42
3	Recognising informal carers alongside parents	47
3.1	Providing parental support and assistance to informal carers	47
3.1.1	Support and assistance in child-rearing responsibilities (Art. 18)	47
3.1.2	Material assistance for an adequate standard of living (Art. 27)	49
3.2	Supporting informal carers to respect children's unique identity and culture	49

3.3	Supporting informal carers to further children's enjoyment of rights under the CRC	50
3.3.1	Preventing violence against children (Art. 19)	50
3.3.2	Promoting children's right to health (Art. 24)	51
3.3.3	Addressing risks of child-offending	51
3.3.4	Protecting children's rights in criminal justice proceedings (Art. 40)	52
4	Recognising informal carers for children without parental care	53
	<i>Conclusion</i>	58
3	THE PRINCIPLE OF EVOLVING CAPACITIES UNDER THE UN CONVENTION ON THE RIGHTS OF THE CHILD	61
	<i>Introduction</i>	61
1	Drafting history of the 'evolving capacities of the child'	66
1.1	Evolving capacities and the drafting of article 14(2)	67
1.2	Evolving capacities and the drafting of article 15 (Art. 28)	69
1.3	Evolving capacities and the drafting of article 5	69
2	The CRC committee's use of 'evolving capacities' in its general comments	72
2.1	Evolving capacities as an enabling principle	73
2.2	Evolving capacities as an interpretative principle	77
2.2.1	Evolving capacities and the General Principles of the CRC	77
2.2.2	Evolving capacities and civil and political rights under the CRC	81
2.2.3	Reading-in of evolving capacities under the CRC	82
2.3	Evolving capacities as a policy principle	83
2.4	A principle of evolving capacities under the CRC	85
3	Evolving a place for the principle of evolving capacities under the CRC	86
	<i>Conclusion</i>	89
4	THE ROLE OF PARENTS IN THE PROXY INFORMED CONSENT PROCESS IN MEDICAL RESEARCH INVOLVING CHILDREN	91
	<i>Introduction</i>	92
1	Overview of informed consent in medical research ethics	95
1.1	History of informed consent in human subject medical research	95
1.2	International ethical guidelines on informed consent in medical research	97
1.2.1	The ethical dilemma of involving children in medical research	97
1.2.2	International ethical guidelines on proxy informed consent in medical research	98
2	The CRC and informed consent in medical research	101
2.1	The role of the CRC in medical research with children	101
2.2	Article 5 – a unique and necessary provision of the CRC	103

<i>Table of contents</i>	XI
3 Article 5 and proxy informed consent in medical research	105
3.1 Boundaries around proxy decision-making authority	105
3.2 The parent-child relationship in proxy informed consent	106
3.3 The evolving capacities principle and the autonomy of the child	109
<i>Conclusion</i>	112
5 THE PROXY DILEMMA: INFORMED CONSENT IN PAEDIATRIC CLINICAL RESEARCH – A CASE STUDY OF THAILAND	115
<i>Introduction</i>	115
1 Background – the legal and regulatory framework for informed consent in paediatric clinical research in Thailand	120
2 Discerning who is a Legally Acceptable Representative – ‘LAR’	121
2.1 Who is a parent for the purposes of informed consent in children	122
2.2 Who is a guardian for the purposes of informed consent in children	124
3 Discerning the legal requirements for children without a legal representative	127
3.1 Children of minor parents	127
3.2 Children of parents without legal status	129
3.3 Children living without parental care	130
4 Navigating legal uncertainty in informed consent in children	132
4.1 Recognising the common responsibilities of both parents in the informed consent process	133
4.2 Recognising informal carers in the informed consent process	134
4.3 Recognising the child’s right to guidance and direction in the informed consent process	134
<i>Conclusion</i>	136
6 THE CURIOUS CASE OF ARTICLE 5 OF THE CRC	137
<i>Introduction</i>	137
1 The nature of the right created under article 5 of the CRC	141
2 The nature of the legal obligation under article 5	143
2.1 The obligation to respect under international law	143
2.2 The obligation to respect under article 5 of the CRC	145
2.3 The CRC committee’s approach to the legal obligation created under article 5	147
3 A framework to recognise carers under the CRC	152
3.1 The scope of ‘responsibilities, duties and rights’ under article 5 of the CRC	153

3.2	Recognising informal carers and informal care arrangements under the CRC	155
	3.2.1 Informal carers acting in lieu of parents	155
	3.2.2 Informal carers acting alongside parents	156
4	A framework to navigate the parenting relationship	159
	4.1 The meaning of 'appropriate direction and guidance' under article 5 of the CRC	160
	4.2 The child's status as a rights-holder within the family	161
	4.3 The evolving capacities of the child in the exercise of rights	163
5	The concept of evolving capacities under the CRC	167
	5.1 The concept of evolving capacities within the CRC	168
	5.1.1 The concept of evolving capacities and 'due weight' under the CRC	168
	5.1.2 The concept of evolving capacities in the assessment of the best interests of the child	170
	5.1.3 The concept of evolving capacities as a procedural consideration	170
	5.1.4 The concept of evolving capacities in the exercise of civil and political rights	171
	5.2 A broad principle of evolving capacities under the CRC	172
	<i>Conclusion – the curious case of article 5 of the CRC</i>	175
7	INNOVATION OR ENIGMA?	179
1	Unravelling the enigma of article 5	180
2	Next steps – a research agenda for article 5	180
	2.1 A relational conception of rights under international law	180
	2.2 The evolving capacities of the child	182
	2.3 Non-state parties as rights-holders and duty-bearers	183
3	Final thoughts	184
	SUMMARY	187
	SAMENVATTING (DUTCH SUMMARY)	189
	REFERENCES	191
	LIST OF PUBLICATIONS	211
	CURRICULUM VITAE	213