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

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7 | Innovation or enigma?

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

At the crux of article 5 is an ambition to re-imagine the parent-child relationship, recognising that all children deserve to be parented with respect and tenderness.¹ It promotes a conception of the child as an independent rights-holder, whose voice and agency, even if not determinative, must be respected and listened to by family members exercising influence in her everyday life.² It challenges the traditional liberal western notion of ‘family’,³ offering in its place, a model of parenthood that is not dissimilar to a fiduciary relationship, in which parents exercise rights not for their own benefit, but for the benefit of their child’s enjoyment of rights.⁴ In this regard, it strikes ‘a delicate balance’ that accords respect to the special role of parents, while also recognising the child’s status as an individual and rights-holder within the family.⁵ Finally, it extinguishes any lingering notion that parental rights are

1 Garton Kamchedzera, ‘Article 5: The Child’s Right to Appropriate Direction and Guidance’ in André Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans, Mieke Verheyde, and Bruce Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2012) 13.

2 David Archard, *Children: Rights and childhood*, 2nd ed., (London: Routledge, Taylor and Francis, 2004) 58.

3 Archard, 2004 (n 2) 167-177, 169.

4 Gerison Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti, 2005), ix; David Archard, ‘Do parents own their children?’ (1993) 1 *International Journal of Children’s Rights* 293-301.

5 John Tobin and Sheila Varadan, ‘Article 5: The Right to Parental Direction and Guidance Consistent with a Child’s Evolving Capacities’ in John Tobin and Philip Alston (eds) *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 159-185, 159; Elaine Sutherland, ‘The Enigma of Article 5 of the United Nations Convention on the Rights of the Child: Central or Peripheral?’ in Brian Sloan and Claire Fenton-Glynn (eds) *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Leiden: Brill Nijhoff, 2021) 13-35, 13.

ownership rights, transforming the role of parents from rights-holders over their child to duty-bearers to their child in the child's exercise of rights.⁶

But how does article 5 directly contribute to children's enjoyment and exercise of rights in their everyday lives?

1 UNRAVELLING THE ENIGMA OF ARTICLE 5

This dissertation contemplated this question in two ways. It embarked on a legal doctrinal analysis, examining the scope, content and function of article 5 within the CRC. It then considered the implications of article 5 on children's enjoyment and exercise of rights in the context of informed consent in medical research. Through this analysis, I observed that article 5 functions, not as a standalone legal provision, but as a broader framework informing the interpretation and implementation of other provisions within the CRC: (1) it provides a framework to identify a child's carers; (2) it navigates the parenting relationship between a child and her carers in a manner that accords respect to the child as a rights-holder within the family. I concluded that more guidance is needed from the CRC Committee, specifically to elaborate on the inter-relationship between article 5 and other provisions of the CRC, and to provide guidance to States on the measures needed to ensure its effective implementation. I also called on the CRC Committee to give more consideration to its treatment of 'evolving capacities', providing greater clarity on its meaning and scope of application in the interpretation and implementation of the CRC.

But more research is needed to better understand the implications of article 5, not only for children's rights but for international human rights law more generally. In this brief conclusion, I map out a research agenda, identifying three areas of further inquiry for article 5 of the CRC.

2 NEXT STEPS – A RESEARCH AGENDA FOR ARTICLE 5

2.1 A relational conception of rights under international law

Article 5 introduces a relational conception of rights, which recognises that children will require some degree of support, direction and guidance to claim and exercise their rights under international law.⁷ Article 5 thus acknowledges,

6 Lansdown 2005 (n 4); Tobin and Varadan 2019 (n 5) 184; see also Kamchedzera 2012 (n 1), 13-14; Sutherland 2020 (n 5).

7 John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395-441, 407; John Eekelaar, 'The Importance of Thinking that Children Have Rights' in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights, and the Law* (Oxford: Clarendon Press, 1994) 221-236.

and indeed expects that a child's enjoyment of rights will be connected to and interdependent upon her relationships with parents, families and communities.⁸

However, this relational conception of rights directly challenges the liberal and individualist framework underpinning international human rights law, which has traditionally focused on the vertical relationship between the individual rights-holder and the State, and the formal legal setting for the implementation and enforcement of rights.⁹ A relational conception of rights shifts the focus from the conduct of the State duty-bearer to the intermingled relationships in which an individual lives, relying on those relationships as the basis to claim, realise and enjoy rights.¹⁰ It sees the 'individual as both separate and situated within a web of relationships of care, attachments and interdependency', making it 'impossible to consider the welfare or rights of one [person] in isolation', and understanding the 'family as a unit determined both by the individuals of which it is comprised and by the existing social, political and historical context'.¹¹ A relational conception of rights has implications for the enforcement of legal obligations not only under the CRC, but within international law more generally. The CRC Committee has yet to answer the question of how States should enforce legal obligations under article 5, nor has it elaborated on the legal remedies for violations of article 5 under the CRC. Of the 54 complaints submitted to the CRC Committee under its Optional Protocol to the Convention on the Rights of the Child on a communications procedure,¹² only five allege a violation of article 5,¹³ and thus far, no substantive decision has been issued regarding States' legal obligations in respect of a violation of article 5 under the CRC. More research is needed to better

8 Tobin, 2013 (n 7) 424.

9 I. Brownlie, 'The Protection of Individuals and Groups: Human Rights and Self-Determination' in *Principles of Public International Law*, 7th ed., (Oxford: Oxford University Press, 2008) 553-586, 584.

10 Aoife Daly, 'Chapter 3: The "Liberal Ideal": Autonomy Capacity and the Adult/Child Divide' in *Autonomy and the Courts: Beyond the Right to Be Heard* (Leiden: Brill Nijhoff, 2017) 115-191.

11 Jonathan Herring, 'Compassion, ethics of care and legal rights' (2017) 13(2) *International Journal of Law in Context* 158-171, 165-166; Jonathan Herring, 'Forging a relational approach: Best interests or human rights?' (2013) 13(1) *Medical Law International* 32-54, 48; Jonathan Herring, *Caring and the Law* (Oxford: Hart Publishing, 2013) 1-10, 4.

12 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, entered into force 14 April 2014, adopted by UN General Assembly Resolution, A/RES/66/138, 19 December 2011.

13 CRC Committee, *L.H.L. and A.H.L. v Spain*, Communication No. 13/2017, CRC/C/81/D/13/2017, 17 June 2019; CRC Committee, *X, Y and Z v Finland*, Communication No 6/2016, CRC/C/81/D/2016, 15 May 2019; CRC Committee, *J.J., O.L., A.J. and A.S. vs Finland*, Communication No 87/2019, CRC/C/85/D/87/2019, 11 November 2020; CRC Committee, *Y.F., F.F., T.F. and E.F. vs Panama*, Communication No 48/2018, CRC/C/83/D/48/2018, 28 February 2020; CRC Committee, *C.R. vs Paraguay*, Communication No 20/2017, CRC/C/83/D/30/2017, 12 March 2020.

understand how a relational conception of rights will affect States' legal obligations to provide remedies and redress for rights violations under international human rights law.

2.2 The evolving capacities of the child

The idea that a person's capacities can be dynamic and evolving represents a radical break from individualistic conceptions of competence and autonomy, which were historically framed in binary or absolute terms.¹⁴ It introduces a balancing framework¹⁵ to navigate children's agency, which responds to each child's unique, dynamic and evolving capacities.¹⁶ As Daly explains, it allows children to 'have their autonomy respected without being given the same status as adults and without being abandoned to harmful fates unaided.'¹⁷ Daly proposes a rights-based framework for supporting autonomy that centres around the child's 'capacity rights' under article 5 of the CRC.¹⁸ It places the burden on parents and other carers to support children, providing them with the direction and guidance needed to maximize their capacities.¹⁹ Article 5 thus moves away from a conception of childhood as a fixed or universal concept, recognising that children are not a homogenous group, and capacities will be fluid, dynamic and evolving.²⁰

However, as Rap, Schmidt and Liefwaard warn, the lack of a consistent and 'overarching view on the evolving autonomy of children as rights-holders' can lead to 'arbitrary, restrictive and rigid' age-based policies, which can either exclude children from legal proceedings or presumptively include them without an individualised assessment of their capacities.²¹ Rap, Schmidt and Liefwaard argue for a 'dynamic and coherent perspective on children's growing autonomy' that takes into account 'scientific insights on the development of children.'²² Daly also emphasises that a 'basic understanding' of child development will not only be necessary but critically important to understand how to maximize children's capacities through autonomy support.²³ However, Peleg raises concerns that relying too heavily on developmental psychology or child development science risks treating children as a homogenous group,

14 Tobin, 2013 (n 8) 426-429; see also Tobin and Varadan 2019 (n 2).

15 Aoife Daly, 'Assessing Children's Capacity' (2020) 28(3) *International Journal of Children's Rights* 471-499.

16 Ibid, 480.

17 Daly 2017 (n 10) 132.

18 Daly 2020 (n 15) 471-499.

19 Ibid, 489.

20 Tobin 2013 (n 7) 428; Archard 2004 (n 2) 64.

21 Stephanie Rap, Eva Schmidt & Ton Liefwaard, 'Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?' (2020) 1 *Erasmus Law Review*, 4-11, 11.

22 Ibid, 11.

23 Daly 2020 (n 15) 490.

and fails to take into account the child's unique and individual capabilities.²⁴ It also overlooks the complexity and multidimensional nature of development itself, which encompasses a broader range of disciplines beyond child development science, such as pedagogy, sociology, psychiatry, psychology, anthropology, medicine and political science.²⁵

More consideration needs to be given to the inter-relationship between child development, the right to development, and the evolving capacities of the child under the CRC.²⁶ Peleg suggests that a process of engagement between law and other disciplines could distil a more meaningful understanding of child development that transcends the confines of development psychology or child development science.²⁷ Such an exercise would undoubtedly contribute to a deeper understanding of the scope and content of children's evolving capacities in the exercise and enjoyment of rights under the CRC.

Finally, more research is needed to critically examine how States have come to understand the meaning of 'evolving capacities', to ensure it is being used to support rather than undermine children's enjoyment and exercise of rights under the CRC.

2.3 Non-State parties as rights-holders and duty-bearers

The inclusion of non-State parties as rights-holders and duty-bearers has been described as an innovation of the CRC that may hold promise for other branches of human rights, such as disability rights or rights of elderly persons, both of which rely heavily on non-State actors for the implementation of rights.²⁸ In this regard, the broad inclusion of carers – parents, legal guardians, extended family, community members – under article 5 potentially offers a model framework on how to recognise and support non-State actors who will inevitably play an important role in the implementation of rights.²⁹

24 Noam Peleg, *The Child's Right to Development* (Cambridge: Cambridge University Press, 2019) 198.

25 *Ibid*, 198.

26 Peleg (n 24) 208; see also Sheila Varadan, 'The Child's Right to Development by Noam Peleg' (2020) 34(3) *International Journal of Law, Policy and the Family* 328-332.

27 Peleg 2019 (n 24) 200, 201.

28 Roberta Ruggiero, Diana Volonakis and Karl Hanson, 'The inclusion of "third parties": the status of parenthood in the Convention on the Rights of the Child' in Eva Brems, Ellen Desmet and Wouter Vanderhole (eds) *Children's Rights Law in the Global Human Rights Landscape* (Routledge, Taylor and Francis: London, 2017) 71 - 89.

29 Eva Brems, Ellen Desmet and Wouter Vanderhole, 'Children's rights law and human rights law: analysing present and possible future interactions' in Eva Brems, Ellen Desmet and Wouter Vanderhole (eds) *Children's Rights Law in the Global Human Rights Landscape* (Routledge, Taylor and Francis: London, 2017) 2-5.

However, as Brems, Desmet and Vanderhole observe,³⁰ relying on third parties as duty-bearers can pose challenges for the implementation and enforcement of rights within a formal legal setting. First, there remains ambiguity over who should be recognised as a ‘third-party’ duty-bearer, and how far States’ legal obligations should extend to recognise the responsibilities of non-State actors in the implementation of rights. In the context of the CRC, an overly broad inclusion of carers risks introducing legal incoherence and fragmentation, particularly in respect of States’ legal obligations to those non-State actors primarily responsible for the child, such as biological or legal parents. At the same time, an overly narrow approach risks excluding genuine carers from accessing the assistance and protection needed for them to support and further children’s enjoyment and exercise of rights.

Second, as Ruggiero, Volonakis and Hanson observe, introducing third-parties may enable States to evade their own legal obligations as duty-bearers, by hiding behind the (mis)conduct of non-State actors.³¹ As Ruggiero, Volonakis and Hanson discuss in the context of violence against children, States have sometimes attempted to conceal their own duties to respond to structural causes of violence by emphasising the misconduct of parents or other carers.³²

Third, relying on non-State actors for the implementation of rights assumes a degree of good faith in how these non-State actors exercise their rights and responsibilities. Indeed, as Eekelaar points out, the difficulty of article 5 ‘lies in the assumption that these adults will promote [children’s] rights’, providing direction and guidance that is ‘in the exercise of rights, not in derogation of rights’.³³ As noted above, it remains unclear what steps will need to be taken to ensure carers exercise their rights in a manner that furthers children’s enjoyment and exercise of rights under the CRC. In this regard, more research is needed to better understand the implications of relying on non-State ‘third-party’ actors (parents and other carers) as duty-bearers, and how the State will respond when these duty-bearers fail to uphold their obligations towards the rights-holder. This will be important not only for the enforcement of article 5 but also for the enforcement of rights for other vulnerable persons, such as elderly persons and persons with disabilities, who will also rely on family carers for the implementation of rights and obligations.

3 FINAL THOUGHTS

Returning to the adventures of our heroine Matilda Wormwood, we see a child who is determined to ensure that all children are treated with decency, dignity

30 Ibid.

31 Ruggiero, Volonakis and Hanson 2017 (n 28) 84, 85.

32 Ibid, 85.

33 Eekelaar 1994 (n 7) 233.

and respect by those adults exercising authority over their everyday lives. Whether it means secretly placing superglue in her father's favourite hat or using magic to instil terror in the deplorable Mrs Trunchbull, Matilda is convinced that parents, and indeed all adults, ought to be taught a lesson when they choose to disabuse a child of their rights and dignity. In the end, Matilda finds the guidance and support she needs in Miss Honey, a kind and attentive primary school teacher. When the Wormwood family hurriedly flees to Spain, Matilda orchestrates her own adoption, and Miss Honey becomes her primary caregiver.

But for children in the real world, swapping families, trading in parents or conjuring magic to exact revenge on an unkind carer will simply not be possible. Parenting styles and family relationships will be determined by socio-cultural norms and the realities of life rather than a child's conviction to be treated with respect and dignity within the family. Whether article 5 can truly transform the parent-child relationship and reshape how we view parenthood remains to be seen. At the very least, it forces us to reimagine how we see children within the family, encouraging us to give greater consideration to their unique identities, individuality and evolving capacities in the decisions we make in their everyday lives.

