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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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Summary

ARTICLE 5 OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD *Parental Guidance and the Evolving Capacities of the Child*

For the most part, history has treated children as the possession of their parents. The right to family was understood as an entitlement of parents over their children, rather than a relational right flowing in both directions between a child and her family. Parenting was viewed as a private matter with little guidance or support from the State in the everyday care of a child. That a child should be seen as an individual and rights-holder within the family was not recognised nor likely contemplated under international law prior to the UN Convention on the Rights of the Child (CRC).

This dissertation focuses on article 5 of the CRC. At the crux of article 5 is an ambition to re-imagine the parent-child relationship, recognising that all children have a right to be parented with respect and tenderness. 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 those adults exercising influence over their everyday lives. It challenges the traditional liberal western notion of 'family', offering 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. In so doing, it strikes 'a delicate balance', according respect to the child's status as an individual rights-holder, while also acknowledging the indispensable role that parents and family will play in the everyday care and upbringing of a child. Importantly, article 5 extinguishes any lingering notion of parental rights as ownership rights, transforming the role of parents from that of rights-holders over their child to duty-bearers to their children in the child's individual exercise of rights.

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

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 exercise of rights in the informed consent process in medical research. Through the analysis, I observed that article 5 functions, not as a standalone legal provision, but as a broader framework informing the interpretation and imple-

mentation of other provisions within the CRC: (1) it provides a framework to identify a child's carers; and (2) it navigates the parent-child decision-making relationship in a manner that accords respect to the child as an individual rights-holder with evolving capacities within the family. In the context of medical research, it reframes the child from a passive and non-autonomous being, to an active agent and rights-holder with evolving autonomy in the informed consent process.

This dissertation concludes by identifying three avenues of further inquiry for article 5 of the CRC: (1) the relational dimension of children's rights under international human rights law; (2) the scope and meaning of 'evolving capacities'; (3) the challenges of recognising non-State 'third-parties' as rights-holders and duty-bearers in international human rights law. Article 5 has been described as 'innovative', 'ground-breaking' and 'transformative', yet it remains elusive. More research is needed to fully understand the implications of article 5 – not only for children's rights but for international human rights law more generally.