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### Book Review: Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child

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Book Review: Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child, Claire Fenton-Glynn and Brian Sloan (eds), Leiden: Brill Nijhoff 2021. 349 pages, Hardback and ebook, ISBN 978-90-04-44686-1 (hardback) ISBN 978-90-04-44685-4 (ebook). \$140.00  
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The latest book from the United Nations Convention on the Rights of the Child Implementation Project focuses on Article 5 of the convention, which provides:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 5 thus recognizes *parental* rights, responsibilities and duties modified by the *evolving capacities* of the child with the goal of supporting the exercise of the *child's rights* under the CRC. As the fourteen chapters in this volume reflect, the Article functions with inherent tensions and possibilities, between protection of the child from the state by empowering parents, but also protection of the child within the family, when the child might be in conflict with their parents. Both parents and the state are to operate within the evolving developmental capacities of children generally and the specific characteristics of individual children, with the goal of supporting the child's assertion and exercise of their rights.

Because the Article focuses on parents, not surprisingly much of this edited collection focuses on parental rights within the context of family law, although there is some inclusion of health law in various chapters. There is little inclusion of other areas such as social welfare, health issues more generally, or education. As noted by the editors in the introduction, in addition to this primary family law focus, the collection is dominantly Eurocentric and English-speaking countries. The contributors are legal scholars; thus the contributions are limited in terms of disciplinary expertise although many chapters include multidisciplinary approaches.

Divided in five parts, the collection explores general conceptual and theoretical questions, as well as specific substantive situations that test the meaning of Article 5. Part I provides overall interpretation of Article 5 with chapters by Elaine Sutherland, Gerison Lansdown and Aoife Daly. Sutherland focuses on the intent of the drafters of the section, and particularly how they viewed protecting the family from the state in order to protect the child, as well as how to protect child from intra-familial or other harms. Lansdown focuses more specifically on the meaning and operation of evolving capacities as opposed to concepts of autonomy, and the reality that it is a challenge to link to actual developmental capacity while

supporting children's rights irrespective of their present ability to exercise them. In a Daly's chapter she links capacity to four critical concepts: autonomy, protection, evidence, and support, and each of these concepts are linked to other relevant provisions of the CRC, rather than viewing Article 5 in isolation.

Part II applies Article 5 in domestic systems, specifically youth justice (Ursula Kilkelly) and family justice (Nicola Taylor). Kilkelly links capacity to legal responsibility in the criminal justice system and finds this is a very ill-defined topic even though the CRC requires an age-based approach to the establishment of criminal responsibility. She also explores the extent of parental responsibility and involvement when youth are in the criminal justice system, and ultimately advocates for mandatory independent representation for children. This underscores that within this setting parents may act adversely to their children even if they are acting with good intentions. Looking at a very different system, the family law regulation of post-separation parenting, Nicola Taylor evaluates the interface between Article 5 and Article 12. She advocates for the inclusion and participation of children in such proceedings consistent with the responsibilities of parents and the rights of children. As she notes, children often have clear views on post separation arrangements, and their perspectives may change based on evolving capacities and developmental change.

Part III explores parental responsibilities and capacities beyond the scope of Taylor's chapter. John Eekelaar differentiates between respect for parents when the family is intact versus separated parents with respect to resolving conflicts in a way that best serves the child's rights and ensures the best interests of the child is the guiding principle. He acknowledges that intact families may have conflicts as well, but sees that possibility as heightened after separation in a way that might argue for greater state intervention on behalf of the child. Trynie Boezaart focuses on the specific conduct of parental discipline in the form of corporal punishment, arguing that from a child rights perspective it is unreasonable and should not be upheld as within parental authority. The clear conclusion of multidisciplinary research strongly supports such a policy without reservation. Finally, Lize Mills and Sabrina Thompson also look at a very specific issue of parental responsibility and decision making, in surgical interventions on intersex infants. In this instance they argue state actors should protect children's interests given their incapability as infants to exercise a choice. This would counsel waiting until the child's voice and views can be heard rather than succumbing to societal beliefs or pressures that might reflect adult perceptions rather than the identity the child would choose.

Part IV turns the analysis of Article V to adoption and the question of children's participation, particularly older children's participation, in adoption proceedings. Amy McEwan-Strand and Marit Skivenes present an empirical study of Norwegian adoptions from care, finding that many children are not included in the deliberations and are absent from the analysis of decision makers. A chapter on similar decisions involving adoptions from care in New South Wales by Judy Cashmore, Amy Conley Wright and Sarah Hoff suggests that when children's voice and view is included it is often not be given appropriate weight unless it accords with the views of the judge. Rather than being primary, it is used only in a supporting fashion to support an adult decisionmaker's perspective. Finally, Brian Sloan considers how

Article 5 impacts analysis of the rights of unmarried birthfathers, challenging the view that mothers should be permitted to solely decide whether to surrender an infant for adoption and select or have sole input on the adopters.

In the final section, Part V, several case studies are presented on the application of Article 5. Sheila Varadan looks to the participation of children in medical research, and the right to informed consent, suggesting how to frame the role of parents with the right of the child to be heard and decide. Gillian Black explores how Article 5 informs the analysis of a Scottish proposal to give each child an advocate or point of contact, a scheme called the Named Person proposal. While ultimately defeated, Black points out that the proposal did not reference Article 5 and should have. Finally, Mark Henaghan explores New Zealand cases to assess possible applications of Article 5. He argues where there is more than one possible interpretation of how Article 5 should be applied, the interpretation that best serves the child's rights should prevail. In other words, he argues for the primacy of child exercise of child rights.

This is an extremely valuable collection that exposes the broad array of issues encompassed by Article 5. The theoretical chapters in the first Part of the volume by Lansdown and Daly are particularly helpful, and underscore the point made in many subsequent chapters that Article V in essence is an unacknowledged core principle, pervasive in the CRC. Thus unravelling and framing Article 5's complexity and meaning is essential. Lansdown's chapter highlights the distinctive position of the CRC, finding capacity not as a arbitrary status conferred at the age defined adulthood, but rather a more complex layered evolution (which might also be a useful perspective for capacity in various stages of adulthood). Central also is her underscoring of children's agency, rather than adults acting for them, assuming their dependency and incapability and thus fundamentally rejecting a notion of parental rights as knowing what is best for children. Instead, parental responsibility shifts over time, and decreases, in favor of children's responsibility to articulate for themselves. Lansdown identifies four critical elements then in Article 5: state respect for parents, admittedly a traditional principle; parental responsibility to act in accord with and in recognition of child rights, a radical departure from traditional parental rights; the goal that children will exercise their rights (not that parents will do so on their behalf; and defining how this goal of child exercise of child rights is to occur, it is to be according to their evolving capacities. As she notes, this is a fluid concept specific to each individual child. She identifies then key concepts within evolving capacities: emancipatory, protective, and developmental. As she concludes, "The concept of evolving capacities offers a 'road map' to navigate the challenging task of implementing such a comprehensive framework of rights for children at such hugely different stages of life." (48).

Daly's conceptualization of capacity complements this theoretical perspective by linking Article 5 to other core concepts in the CRC: autonomy, evidence, support and protection. Using the context of medical decision-making to give her analysis concrete perspective, she links autonomy to Article 12 (the right to be heard) and thereby underscores the key emphasis in Article 5 of the child exercising the child's rights; uses article 2 (non-discrimination) to require that decision makers should have training in disciplines like psychology and others that inform their understanding of children, so deciding based on evidence, not personal or cultural

assumptions, and to respect all children ; linking article 5 (right to support from adults) to claim that capacity should be supported and increased; and finally linking article 3 (best interests principle) to the concept of protection, noting children's unique vulnerability and adults' responsibility to prevent them from being harmed. Daly's analysis reinforced the integral nature of the CRC, that all provisions are intended to interact with each other to be both distinctive and part of a whole. Her reinforcement of the importance of developmental knowledge and evidence, as well as the importance of support of all children in their identities and without discrimination is especially important.

The volume highlights the radical shift of the CRC overall particularly in the reconceptualization of parents and parental rights. It exposes how complex and context specific is the question of evolving capacities. This is evident when you compare, for example, the differences in the way that child rights play out in youth justice (Kilkelly's chapter)(where a finding of capacity translates potentially into legal responsibility and harsh adverse consequences that may have a negative impact on well-being and development) versus the area of family law post separation arrangements and the inclusion of children's voice and preferences (Taylor's chapter)(where support for the capacity of even very young children can be supported to support their well-being and rights). The collection demonstrates that even where there is a clearcut case and evidence in support of children's rights, such as In Bozaart's chapter on corporal punishment that details the relative acceptance of prohibition in public settings such as schools, but resistance to banning parental corporal punishment, that this demonstrates the strength of traditional concepts of parental rights that would not have conceptualized children as rights holders at all. Another example of the persistence of the strength of parental rights as opposed to robust support of children's rights and voice is evident in the adoption section of the volume, where the frameworks of adoption from care (McEwan-Strand and Skivenes; Cashmore, Wright and Hoff) as well as the framework of voluntary surrender of infants for adoption (Sloan) both demonstrate less than full embrace of child rights. This exposes the importance of more engagement with Article 5, how much is there, and what is needed. What seems core is how to keep children and youth primary, expansion of their rights with evolving capacity while sustaining society's responsibilities that ideally are best served by parents but that means supporting parents.

A volume like this one also triggers the desire for continued analysis and interdisciplinary thinking along the provocative lines begun in this volume. Perspectives on and analysis of Article 5 could be enhanced with extended exploration of developmental science to underscore the range of meaning of evolving capacities and the range of scholarship and difference in the construction of developmental models. This could bring general perspectives on early childhood or adolescence, for example, in as frameworks for particular individual children in an individual case.

A second area of potential analysis is interlinked with the first. That is, that race, ethnic, class and cultural differences are essential to the understanding of unequal world in which child

development occurs but also of the inequitable terms of support for parents. Thus, not only do children actually enjoy lesser rights, or a hierarchy of needs and rights, but also their parents are differentially respected. For example, immigrant children, Gypsy or Traveller children, poor children, ethnic and racial minority children experience both lesser support but also subordination by way of what Professor Dorothy Roberts calls the policing of poor families and families of color. (Dorothy Roberts, *Torn Apart*, 2022) Similarly, during the Covid pandemic the worst outcomes disproportionately have been along class and race lines, causing not only illness for children but also illness and even death of many children's parents. Covid and the policies implemented to deal with the pandemic have also undermined education broadly for children, and even more significantly and deeply for children already inequitably educated. The issues and cases in this book might well play out differently for parents not respected by the state and children whose well-being is ignored. These inequities also point to the importance of embedding analysis in systemic and structural perspectives that unpack and expose the perpetuation of inequalities.

These suggestions only expose the valuable contribution of this volume and its invitation to sophisticated analysis of children within a framework that recognizes their distinctive rights in relation to parents and the state. Indeed, as the drama of reversal of long-held precedent on abortion rights unfolded recently in the United States, the importance of the issues raised in this volume are particularly notable in one case that received outsized attention, involving a 10-year-old girl who had been victimized and sexually assaulted by a family member and sought an abortion when she became pregnant. Because of the recent decision by the United States Supreme Court, which nullified a 50-year-old precedent establishing a constitutional right to abortion, including minors' rights to this choice, the consequence of varying state laws in the wake of the reversal meant this 10-year-old had to cross into another state in order to obtain a legal abortion. How would the general subject of minors' abortion rights, and the specific case of this 10-year-old, be analyzed under Article 5 (without reference to other CRC provisions). The question of evolving capacity would have been critical, and if this young girl was deemed not sufficiently capable, then the role of a judge or her parents in assisting in the decision that would best promote the rights of this child would come into play if Article 5 was the framework. Medical evidence of the detriment of a pregnancy at such a young age physically, developmentally, and in the exercise of the child's rights would be essential and automatic. In the analysis suggested by many American commentators the focus was on how this case represented one of many adverse outcomes from the removal of the choice of termination of a pregnancy. Implicit in much of that commentary was an assumption that her parents would have been essential in the decision-making process, and to carry out crossing state lines to obtain medical care. The Article 5 insights of this volume would argue for a far different and more complex analysis from the perspective of the child, and the child's rights. The hostility of the US, as an outlier to otherwise unanimous ratification of the CRC is well known. The value of this volume, I would argue, is in providing theoretical and exemplar analysis that is critical even for the US in the absence of the CRC. This volume delivers a rich framework to assess children's rights and to reorient the scope of parental rights, as well as suggesting further work to elaborate this critical article of the CRC.