

## THE EMPOWERED EVOLVING CHILD

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### ABSTRACT

*The United Nations Convention on the Rights of the Child (CRC) is an international treaty that recognizes children as rights-holders. Pursuant to Article 1, children are persons under the age of 18. The CRC is built upon four main building blocks of principles namely the right of the child to non-discrimination, upholding the best interests of the child, the child's right to life, survival and development and the right of the child to have his views heard as found in Article 2, Article 3, Article 6 and Article 12 respectively. The CRC has been signed and ratified by Malaysia with reservations to five Articles including Article 2. Although the CRC supports a child protectionism and child welfare template, an alternative rights framework voiced in the CRC is the right of the child to be involved in the decision-making process of issues affecting the child's life and not to be regarded as a silent outsider. This paper argues that the framework in Article 5 and Article 12 presents a sustainable framework of potential autonomy rights for the child in the realization of the child's right to health pursuant to Article 24 of the CRC. This is seen in the amalgamation of Article 12 upholding the participatory rights of the child and Article 5 which recognizes the concept of the evolving capacities of the child. Thus, the CRC can be regarded as providing a framework of rights for the evolving child who is moving steadily towards maturity and empowerment.*

Key words: Child, Rights, Article 5, Evolving Capacities

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### INTRODUCTION

This paper looks at the United Nations Convention on the Rights of the Child (CRC), a statement of children's legal rights, which recognises that children can be perceived as rights holders. In accordance with Article 49(1), the CRC was adopted by the General Assembly of the United Nations on the 20th of November 1990 and came into force on the 2nd of September 1990. It has close to universal ratification with the United States of America and South Sudan opting not to ratify the treaty. Malaysia signed the CRC in 1994 and ratified it in 1995 subject to reservations (Dusuki, 2013, p.213). The signatory governments, including Malaysia have agreed to uphold and respect the rights contained under the CRC.

The current emphasis by the Committee on the Rights of the Child (the Committee), established under Article 43 of the CRC, on the concept of the evolving capacities of the child under Article 5 of the CRC and the framework within which it is discussed is an important area that requires further examination. Varadan notes that the term "evolving capacities" appears over 80 times in the General Comments of the Child Rights Committee (Varadan, 2019, p.308). In 2018 the Child Rights Committee held a 'Day of General Discussion' with a focus on the topic, 'Protecting and Empowering Children as Human Rights Defenders' placing children at the forefront of their own rights and the rights of others (United Nations Committee on the Rights of the Child, 2018).

The Committee reiterated the following view stated in 2016 that:

The Convention on the Rights of the Child defines a child as every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier and emphasizes that States should respect and ensure the rights embodied in the Convention to each child within their jurisdiction without discrimination of any kind. While the Convention recognizes the rights of all persons under 18 years, the implementation of rights should take account of children's development and their evolving capacities (United Nations Committee on the Rights of the Child, 2016, p. 2).

By so doing the Committee has emphasised the importance of the concept of the "evolving capacities" of the child. The phrase "evolving capacities of the child" is seen in two provisions namely Article 5 and Article 14(2) of the CRC. However, it has been suggested that the "...significance of 'evolving capacities' within the framework of the CRC remains unclear." (Varadan, 2019, p.307). This paper thus attempts to explore the significance of "evolving capacities" under Article 5.

The CRC covers civil, political, economic, social and cultural rights and does not offer a clear distinction between them, stressing the indivisibility and importance of all rights (Detrick, 1999, p. 27). The Committee has emphasised that the rights of the child are interconnected and constitute a single indivisible whole (Committee on the Rights of the Child, United Nations, 2007). Due to the indivisibility of rights and the importance of all rights, this paper does not explore Article 5 in isolation but connects it to the participatory rights of the child in Article 12 of the CRC. Article 12 is among the core principles of the CRC. The CRC contains four core principles namely the principle of non-discrimination found in Article 2 of the CRC, the best

interest of the child being given primary consideration under Article 3, the child's right to life, survival and development under Article 6 and the right of the child to be heard under Article 12 (Parkes, 2013, pp.6-7).

Due to the recent resonance and emphasis of children as 'Child Rights Defenders' and the prominence given to the concept of the evolving capacities of the child, this paper focuses on the significance and importance of the concept of the evolving capacities of the child and the need for clarification of the concept and its corresponding application in the child rights framework.

The objectives of this paper thus include the examination of Article 5 of the CRC and the concept of the evolving capacities of the child and the possibility of the utilisation of the rights in Article 5 and Article 12 as a coherent framework to assess whether the child can independently claim his right to health under Article 24 of the CRC without the need for third party consent. The discussion of evolving capacities in this paper is limited to the provisions of Article 5 and does not extend to include Article 14(2) of the CRC. Further this paper only deals with the mobilisation of Article 24 and the issue of the potential of independent access to medical treatment.

To address the objectives stated above, this paper adopted traditional legal research methods which involve an engagement with the law and legal concepts and thus includes an analysis of academic work, judicial pronouncements in decided cases, treaties and conventions. This is often referred to as the doctrinal approach to legal research (McConville and Wing, 2017).

The following section of the paper explores the broad understanding of the definition of a child under the CRC and the rights the child has within the matrix of other corresponding rights holders, particularly parents. Subsequently, the paper addresses the provisions of Article 5 and the concept of evolving capacities. The paper then examines the child's right to health and the issue of consent to medical treatment and this is then followed by a discussion on the child's potential autonomy rights in medical treatment. Conclusions drawn from the discussion are considered at the end of the paper.

### **THE CHILD, CHILD RIGHTS AND PARENTAL RIGHTS**

Article 1 of the CRC states that a child is below the age of 18 years. A child is generally not regarded as an autonomous being, capable of independent decision-making. The child's age is presumed to be a barrier to maturity and capacity. Bhaie states that:

Infancy is a legal disability, which like mental incapacity prevents a minor from assuming fully the legal rights and liabilities of an adult. The restrictions which the law therefore imposes upon a minor are in every case to ensure the benefit of the minor having regard to his tender years and presumed lack of judgment (2011, p.8).

An adult can participate fully in civic life, subject to the limitations set by the law. Adults are generally regarded as self-regulating beings and autonomous unless their mental capacity is such as to deprive them of the ability to be self-reliant and self-governing. Children are regarded as dependants and not regarded as fully autonomous beings in matters pertaining to their lives including their medical treatment. Children are dependent on and governed by their families namely their father, mother and relatives or guardians. Parents have parental rights, or parental responsibility or parental power over their children.

Hohfeld's (1913) observations that rights do not exist in isolation but exist in a matrix of relationships ring true in the area of child rights where multiple relationships, claims and privileges, powers and duties interconnect and clash. The concept of parental power is that the parent is dominant over the child and thus has the authority to make decisions pertaining to almost every aspect of the child's life. Thus, necessarily, there might, at times, be a conflict or a tension between the concepts of parental rights and child rights.

In England and Wales, the concept of parental responsibility is used. Parental responsibility includes the right to look after the child and make decisions relating to his care and upbringing, for example in relation to the child's education and medical treatment. Thus, the law often requires that the parent provides consent on behalf of the child for the child's involvement in certain activities. The word 'consent' can mean permission or agreement to do something. Consent has to be valid and may be either implied or express. Consent has to be real consent. Consent in form alone is insufficient. The individual has to voluntarily consent (free from duress, fraud and other vitiating factors), he has to know what he is consenting to (informed consent) and the individual must have the capacity to consent. Therefore, a child is seen as being incapacitated by their age of minority and is deprived of giving valid consent in certain instances for example, for his own medical treatment.

However, the reality is that although children are classified by age, as being below the age of 18, that age group encompasses children of varying stages of development including babies, toddlers, teenagers and adolescents. It is a fact of physical growth that as children grow older their bodies undergo change and transformation as their sexual organs develop and they develop secondary sexual characteristics. Changes also occur in the brain. Adolescence is a period of childhood and in terms of age, an adolescent is defined as aged between 10 and 19. According to the United Nations Children's Fund (UNICEF), "...the manifest gulf in experience that separates younger and older adolescents makes it useful to consider this second decade of life as two parts: early adolescence (10–14 years) and late adolescence (15–19 years)" (2011, p. 6).

During the period of early adolescence, the frontal lobe which is located at the front part of the brain starts to develop. This is the part of the brain that is said to govern acts like reasoning and the making of decisions. Research has found that adolescence is a time of continuing brain growth and change. By late adolescence the body is still undergoing some changes, but the main physical changes have usually taken place. At this stage "...the brain continues to develop and reorganize itself, and the capacity for analytical and reflective thought is greatly enhanced" (UNICEF, 2011, p. 11). The child in essence is evolving.

## ARTICLE 5 AND THE EVOLVING CAPACITIES OF THE CHILD

When Article 5 was first introduced, Van Bueren described it as “a new principle in international law” (Van Bueren, 1995, p. 51). Article 5 refers to the requirement for State Parties to respect parental or equivalent rights in providing guidance and direction to the child in relation to the exercise by the child of the Convention rights in a manner that is consistent with the evolving capacities of the child.

Article 5 reads as follows:

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 brings forth an arena which requires balancing of the rights of the parents and the rights of the child as the ultimate decision makers on issues impacting the child.

Tobin and Varadan note that the Committee has made comments in relation to Article 5 that have been “...uncoupled from any reference to parental direction and guidance” (2019 p. 178). Tobin and Varadan also point out that the Committee has raised three types of principles in relation to discussion of Article 5 namely as an ‘enabling principle’, a ‘policy principle’ and an ‘interpretative principle.’ They state:

The committee’s use of the principle of evolving capacities could be said to fall into three broad categories: (a) ‘evolving capacities as an enabling principle’ in which the child is enabled in the exercise of his or her rights under the Convention; (b) ‘evolving capacities as an interpretative principle’ in which a child’s evolving capacities is enlisted as a tool to interpret provisions under the Convention; and (c) ‘evolving capacities as a policy principle’ in which the concept of the children’s evolving capacities is used to navigate policy issues related to children’s agency and autonomy in the exercise of their rights (Tobin and Varadan, 2019, p.178).

This paper stresses the importance of recognising the evolving capacities of the child under Article 5 of the CRC. This recognition of the concept of the “evolving capacities” of the child ensures that the child is recognised and respected in his current state of maturity, development and capacity, his views are respected, and that where he has the capacity to do so, his decisions are respected. Thus, Article 5 has the potential of creating autonomy rights for the child.

The very definition of a child as being a person below the age of 18 captures a range of varying mental, intellectual and physical developments among children. The maturity and capacity of a child varies from child to child and is not a constant. Children are evolving adults. The concept of “evolving capacities,” as set out in Article 5 of the CRC, introduces the idea that children should be able to exercise their rights as they acquire the capacity to do so, rather than when they reach a certain age. It requires parents or legal guardians to guide children appropriately and respect the extent to which they can exercise their rights for themselves (Child Rights International Network, 2009).

Article 5 further suggests that parents should provide direction and guidance to the child as appropriately required by the child in line with the individual child’s age, development, capacity and maturity. Parental guidance and direction are not absolute control mechanisms but are relative to the growing, evolving capacities of the child. Thus, the parameters of parental responsibility have a co-relationship with the age and maturity of the child. There appears to be a direct correlation between parental rights and the child’s evolving capacities. Thus, as suggested by Lord Scarman in *Gillick v West Norfolk Wisbech Area Health Authority and Department of Health and Social Security* (1985) 3 All ER 402:

Parental rights ...yields to the child’s right to make his or her own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision (1985, 3 All ER at p.422).

The Committee has also recognised the relationship between Article 5 and Article 3 and 12 stating that, “...the evolving capacities of the child (art 5) must be taken into consideration when the child’s best interests and the right to be heard are at stake” (United Nations Child Rights Committee, 2013, para 44, p.11).

Lansdown observed the importance of interconnecting evolving capacities of the child and participation noting that, “...it is important to examine the inter-relationship between the concept of evolving capacity embodied in Article 5 and the concept of participation contained in Article 12 of the Convention” (Lansdown, 2005, p. 3).

This paper includes Article 12 in the equation of the evolving capacities of the child. Article 12 also embraces the concept of the developing child and his right to voice out his thoughts in matters affecting him. Article 12 states *inter alia*:

States Parties shall assure to the child who can form his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Those views may be taken into account in coming to a decision in line with both the age of the child and the maturity of the child. Article 12 of the CRC read together with Article 5 is a rights model that reflects the evolving capacities of the child and the participatory rights of the child in line with his age and maturity. The CRC clearly states that the State Parties should respect the evolving capacities of the child and one of the novel innovative strategies of the CRC is the concept of child participation. The concept of the 'evolving' capacities of the child in Article 5 may be utilised as an overarching principle together with Article 12 of the CRC in claiming the rights under the CRC.

Freeman was of the view that the notion of autonomy was integral to the idea of child rights. Gilmore and Glennon refer to Freeman's insistence that a moral justification exist for the concept of child rights based on autonomy (2012, p. 389). Freeman believes that rights protect the integrity of a person and that to believe in autonomy is to believe that anyone's autonomy is as morally significant as anyone else's. We should therefore respect a child's autonomy, treating the child as a person and a rights holder. Freeman also refers to the concept of present and future autonomy of the child (1992, pp. 52-71).

The child's right to health under Article 24 will be discussed as an example of the possible fruition of the concept of the evolving capacities of the child and the participatory rights of the child which may eventually translate into autonomy rights for some children.

### **THE CHILD'S RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH AND THE REQUIREMENT OF INFORMED CONSENT FOR MEDICAL TREATMENT**

Article 24(1) of the CRC indicates that States Parties are to:

...recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

The World Health Organisation (WHO) defines health as, "...a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." (WHO, n.d.). Tobin points out that the formulation was never intended to provide individuals with a guarantee of health but to place a responsibility on the Government for the health of their people which can only be recognised by the provision of adequate health care and social measures (Tobin, 2012). This recognizes that the level of health enjoyed by an individual whether physical or mental will be dependent on factors peculiar to an individual and the resources available to a state. Since the individual concerned is the child, the State must provide services appropriate for children. It is important to have good infrastructure in relation to healthcare facilities and it is equally important that children are able to access such facilities and services. The economic, social and legal position of children in society puts them in an exceptionally vulnerable position. Where the law stipulates that the child requires parental consent to access medical treatment, this is an additional barrier to the child's independent access to medical treatment.

The doctor requires the informed consent of the patient in relation to his or her medical treatment. As a general rule, an adult aged 18 can provide effective consent to his or her medical treatment. In the American case of *Schloendorff v. Society of New York Hospital* 211 N.Y. 125, 105 N.E. 92 (1914), Justice Benjamin Cardozo stated that, "...every human being of adult years and sound mind has a right to determine what shall be done with his own body." Non-consensual medical treatment of the said adult may be a crime amounting to battery. A child normally requires the consent of his parent or guardian in order for the doctor to proceed with the medical treatment of the child. Generally, children are deemed to be not as competent and mature as adults and accordingly unable to give valid consent to his medical treatment. Parents or persons who have parental responsibility for the child would therefore have the right to make decisions for the child in relation to his medical treatment. A child's parent or legal guardian has the right in law to give consent or to refuse to give consent on behalf of the child. However, children may not want to consult their parents on all matters regarding their health. There is also a dilemma where the child and the parents have differing opinions as to the whether the medical treatment is necessary or as to the choice of the type of medical treatment required. The law in England and Wales in relation to the medical treatment of the child will be examined. It is highlighted that section 8 of the Family Law Reform Act 1969 and the case of *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) 2 All ER 402 are legislation and case law that pre-dates the signing and ratification of the CRC. This paper lays out some parts of English law relating to the child's right to consent to his own medical treatment and argues that this law is sustainable and justifiable using the framework in the CRC.

### **THE CHILD'S POTENTIAL AUTONOMY RIGHTS IN MEDICAL TREATMENT**

In England and Wales there is a lowered age of majority in relation to the medical treatment of the child. Section 8(1) of the Family Law Reform Act 1969 states that a child aged 16 and above can provide effective consent to therapeutic medical treatment. Thus, in a situation pertaining to medical treatment of a 16-year-old child, the parents' consent to the treatment is not needed by a doctor. Even though the age of majority is 18, in this instance the child has the capacity to consent to medical treatment. It is suggested that this embraces the concept of the 'evolving capacities' but uses age as a demarcation of the ability of the child to enter into the domain of independent decision making.

Where the child has not yet attained the age of 16 but is assessed as a 'mature minor' or a 'Gillick competent child' medical treatment of the child may take place with the consent of that 'mature minor.' The concept of a mature minor was used in the seminal case of *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) 2 All ER 402. The impact of the decision in *Gillick* is seen in the fact that the case law applies in many of the 54 British Commonwealth countries (Diduck et al, 2015, p.

215). This concept under English common law accepts that children may have sufficient understanding and intelligence to understand the nature of the proposed treatment and accordingly are able to give consent to medical treatment. The case of *R (on the application of Sue Axon) v Secretary of State for Health (Family Planning Association: Intervening)* (2006) EWCA 37(Admin) has affirmed the concept of the mature minor.

Once again the essence of the 'evolving capacities' of the child and the participatory rights of the child is seen in the concept of a Gillick competent child in claiming his right to health under Article 24(1) of the CRC. This therefore captures the realities of the differential stages of development and maturity that occur during childhood and empowers the child to make independent decisions provided the doctor using his discretion comes to the decision that the child is able to do so. However, Section 8 of the Family Law Reform Act 1969 and the case of Gillick may have limited application in situations where the child refuses to consent to medical treatment in which case the doctor may rely on the consent of the child's parents to proceed with the treatment as seen for example in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (1993) Fam. 64 and in *Re R (A Minor) (Wardship: Consent to Medical Treatment)* (1992) 1 FLR 190.

Parental authority is no longer an absolute concept in relation to provision of consent for the child's medical treatment. Thus, the parameters of parental responsibility have a co-relationship with the age and maturity of the child. In the case of *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (1993) Fam. 64 L.J Balcombe stated that:

...as children approach the age of majority they are increasingly able to take their own decisions concerning their medical treatment... It will normally be in the best interest of the child of sufficient age and understanding to make an informed decision that the court should respect its integrity as a human being and not lightly override its decision on such a personal matter as medical treatment. More if the treatment is invasive (1993, at p.88).

This line of thinking resonates with the concepts of the evolving child and child participation and provides the child with the possibility of independent access to medical treatment and his right to health.

## CONCLUSION

Article 1 of the CRC states that children are below the age of 18 and this includes children of all ages and stages of development and maturity. The recognition of the principle of the evolving capacities of the child within Article 5 of the CRC embraces the notion that childhood is not static setting but an evolving saga.

Children are viewed as minors and dependants-depending on their parent or guardian or other person with parental responsibility to make decisions for them. There should be a recognition that parental responsibility exists for the benefit of the child. Parental rights has been described as a dwindling right (Lord Scarman in *Gillick v West Norfolk Wisbech Area Health Authority and Department of Health and Social Security* [1985] 3 All ER 402 at p. 424) and as the child reaches the age of majority, the child may be able to take on the responsibility of making decisions about his life (*Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (1993) Fam. 64 per L.J Balcombe at p. 88) and making some autonomous decisions independent of his parent or his guardian.

According to Federle:

...rights have a transformative aspect because they have the potential to reduce victimization and dependence by changing the rights holder into a powerful individual who commands the respect of those in the legal system...rights create mutual zones of respect, challenging those who want to act in the best interest of children to promote the empowerment of children instead (2009, p.329).

Article 3 of the CRC works on the premise that a primary consideration in all matters affecting the child shall be the best interests of the child. The empowerment of the child could be viewed as being in the child's best interest. As a signatory to the CRC, Malaysia should consider how to increase the incorporation of the concept of the evolving capacities of the child and the participatory rights of the child in the law in general and in relation to the medical treatment of the child in particular and may look to the concept of the mature minor as expressed in the case of *Gillick* as a starting point.

The emphasis on the development and the evolving capacities of the child highlights that the CRC is more than rights based on a child protectionism and child welfare model. An alternative rights framework voiced in the CRC is the right of the child to the realisation of his rights in line with his evolving capacities and the right of the child to be involved in the decision-making processes of issues affecting his life in line with the child's evolving capacities as seen in Article 12 and Article 5 of the CRC. The child's right to health under Article 24 and the child's right to autonomous decision making in the area of medical treatment is highlighted to demonstrate the principles in Article 5 and 12.

This paper contributes to the understanding of Articles 5 and 12 and how these Articles can pave the way towards the empowerment of the evolving child, thereby creating a potential for the autonomy rights for the child. This framework is sustainable in theory and in practice. This paper submits that the visibility of these concepts in these Articles deserve the attention of policy makers and legislators alike for the benefit of the child, the family and society. The visibility of Articles 5 and 12 of the CRC increases the visibility of child rights and the child. The CRC can be regarded as providing a framework of rights for the evolving child who is moving steadily towards maturity and empowerment.

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**LIST OF TREATIES**

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