

DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN

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Empowering Children, Caregivers and Communities

Edited by
JAN C.M. WILLEMS

2nd revised edition



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Jan C.M. Willems (ed.)

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FOREWORD

Adapted from the first edition

(...) The [chapters] that make up this volume (...) all share a common inspiration derived from the concept of the *Trias pedagogica* defined and developed by Jan Willems in his scholarly works. This concept has its basis in a rights approach to ‘the best interests of the child’ and underlines in imperative terms the respective duties of caregivers, notably the parents, and the public authorities.

The adoption in 1989 of the Convention on the Rights of the Child and the nearly universal ratification of this comprehensive instrument is an essential part of a global process to develop and consolidate a legal framework with a view to realising ‘in a manner consistent with the evolving capacities of the child’ (Article 5) the basic principles of Provision-Prevention-Protection and Participation. The Convention creates its own dynamics with its monitoring body, the Committee on the Rights of the Child, and mobilises other organs of national and international society that act and inter-act for the implementation of the Convention. Nevertheless, these legal and institutional means and mechanisms, while potentially important tools for devising effective policies to promote and protect the rights of the child, will fall short of their purpose if not vigorously supported by the States Parties, including public and private welfare institutions, courts of law, administrative authorities and legislative bodies (Article 3).

Pronouncements and solemn statements made in the name of the international community by such global gatherings as the World Conference on Human Rights (Vienna, 1993) and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001) do not fail to draw urgent attention to widespread practices of ill-treatment, neglect, exploitation and abuse of children. In many instances these practices affect young people who at the same time are victimised by deeply rooted patterns of discrimination based on race, descent, ethnic or national origin. Many generations have failed to offer hope and a future with prospects for a better life in security to all those who are born in conditions of distress, poverty and violence or who are suffering from transgenerational parental neglect and abuse.

In order to remedy and repair the sufferings and the wrongs many people, in particular the young are facing, root causes have to be addressed and ambitious policies have to be devised, at national and international levels. Human rights instruments, notably the Convention on the Rights of the Child, are not simply solemn and verbal statements but they must be taken seriously as undertakings and commitments. It is the responsibility of all sectors of society, notably the political forces of government, academic and educational institutions, and the legal profession to give content and meaning to these undertakings and commitments. The present book seeks to make, in academic terms but also in a spirit of advocacy, a modest contribution to this end.

Theo van Boven

Maastricht, spring 2002/summer 2007

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LIST OF ABBREVIATIONS

ACE	Adverse Childhood Experience(s)
CAN	Child Abuse and Neglect
CANE	Child Abuse, Neglect and Exploitation
CEDC	Children living in Exceptionally Difficult Conditions (11 th preambular paragraph CRC)
CRC	Convention on the Rights of the Child
DCE	(school) Democratic Citizenship Education
DCI	Defence for Children International (NGO)
ECD	(preschool) Early Childhood Development
PTE	Pervasive Traumatic Experience(s)

PREFACE

to the second edition

On November 20, 1989, the General Assembly of the United Nations (UN) unanimously adopted the Convention on the Rights of the Child (CRC). With the exception of Somalia and the United States of America, which have not yet become parties to the Convention, this treaty is now binding upon all states. November 20, international day of the rights of the child, has become a date that signals the recognition by the international community that children have developmental and autonomy rights. Children have rights as persons before the law; and they have rights to enable and empower them, from the earliest possible moment, to become optimal persons in a psychological and pedagogical sense. *Developmental and autonomy rights* refers to indivisible and interconnected sets – or rather dimensions – of rights which include civil rights, socioeconomic rights and socioemotional rights (the CRC being the only UN human rights treaty containing the word love; affection being at the same time one of the core elements making up the best interests of the child), as essential benchmarks for children themselves and for those responsible for their healthy physical, emotional, social, moral and intellectual (in one word: holistic) development.

Unfortunately, the near-universal recognition of developmental and autonomy rights of children does not mean that such rights, or even the most fundamental of children's rights, have been fully implemented in all states parties to the Convention. Most children's rights are still, to a large degree, no more than nominal rights in most if not all states. This is especially the case for all very young children, as well as for 'children living in exceptionally difficult conditions' (CEDC, 11th preambular paragraph CRC): conditions of public or domestic violence, poverty, intolerance, hatred, discrimination, ignorance, exploitation, abuse and neglect, children with addicted, mentally disabled or psychiatrically afflicted caregivers, bullied children, traumatised children, and so on.

Children living in social or private conditions of deprivation, exploitation and oppression, as well as all very young children, have 'rights' in a comparable sense to slaves and women at the time when the concept of *égalité* was written into the legal fabric of part of humankind. It was then – solemnly proclaimed in 1789 – that the *beginning* of liberation, emancipation, inclusion and democracy began. The world stood at the dawn of the transformation of the principle of equality in national constitutions, and

its implementation and gradual expansion in national legislation and policies. International human rights treaties reinforced and, in many states, accelerated this process after the Second World War.

Today, another principle, the moral, political and legal force of which is as yet untapped, holds enormous promise for the transformation and implementation of developmental and autonomy rights of children in national constitutions and national legislation and policies. The international treaty which is to reinforce this process already exists, an impressively successful treaty in terms of the near-universal acceptance of its binding principles and provisions: the Convention on the Rights of the Child. The principle to which I refer, is the principle of the *right of the child to become an optimal person*, i.e. the right to adequate care for a healthy holistic development towards responsible democratic citizenship for every child in the world. Early child development and rehabilitation programmes, education, information and empowerment of caregivers and communities, national community building programmes and international solidarity and cooperation are part and parcel of this fundamental principle. This principle, albeit not explicitly referred to in the text of the Convention, governs the very foundation of the Convention on the Rights of the Child, and breathes life into each and every one of its principles and provisions.

As long as preschool early childhood development (ECD), school democratic citizenship education (DCE), rehabilitation of traumatised children *and* caregivers, and other forms of empowerment of children, caregivers and communities, as well as international solidarity and cooperation with respect to the international rights of the child are only good intentions, the developmental and autonomy rights of all children, and especially the rights of young children and children living in exceptionally difficult conditions, are nominal rights only. As long as the principle of the right of the child to become an optimal person shares the same fate as happened with the principle of equality for so many decades after 1789, the emancipation of the young child and the rehabilitation and emancipation of the deprived, exploited and oppressed child remain in a legal shadow land.

This book intends to explore this shadow land, and to shed some light on different intricacies thereof. This is done from the perspective of the children's law of nations, which carries the principle of the right of the child to become an optimal person as its main paradigm. The authors of this book are fully aware of the fact that some parts of the shadow land are very dark indeed. Every state of the world, rich or poor, 'developed' or developing, has its own shadow land – often kept 'behind closed doors' – which in effect overshadows and obscures the principle of the right of the child to become an optimal person.

The socioeconomic and (transgenerational) socioemotional root causes of violence, hatred and suffering are no longer unknown. But their relation to the violation of developmental and autonomy rights of children is still far from being fully recognised or appreciated. This can only change if these rights are taken out of the darkness of the shadow land, and state obligations, as well as state violations, are brought into the full light of day. Only then will adults, and children alike, be morally empowered and legally equipped to contribute to the personal, political, social, and legal empowerment of children, caregivers and communities – all over the world.

Let me add a few words on the concept of developmental and autonomy rights of children. ‘*Autonomy*’ refers to the legal subjectivity of children, which is a legal fact in international law but resembles a legal fiction in state practice of most if not all states. For adults, it seems very difficult to see a child, especially ‘their’ child, as a subject of rights. Children’s rights seem to dissolve in most adults’ perception of privacy. States do not seem very eager to take effective measures with a view to abolishing this – according to statistics on child abuse, neglect and exploitation – extremely harmful traditional perception (Article 24, para 3 CRC). Of course, the world does not know yet a generation of parents – and politicians – who have been raised as children possessing international children’s rights from birth onwards. Only young parents – and politicians – in Sweden are to a certain degree an exception to this fact, since they have been raised as children empowered by the national legal right, created in Swedish law in 1979, not to be hit. Negotiations on the CRC started in the same year, and the right not to be hit by one’s parents today is considered to be implied by its provisions.

‘*Developmental*’ refers to the principle of the right of the child to become an optimal person. This principle combines developmental and autonomy aspects or dimensions in a somewhat different meaning. An infant is born as a subject of rights, in a legal sense, but not as an autonomous person, in a psychological sense (if anywhere such a person exists). From a strict legal perspective, one could argue that all children’s rights are autonomy rights: the rights of a legal subject. Children may exercise their rights – directed and guided by their (well-informed) parents – in a manner consistent with their evolving capacities (Articles 5 *juncto* 12 and 18, para 1 and para 2 CRC). From a psychological perspective, however, all children’s rights are developmental rights: rights that contribute to their evolving capacities, that is, to the development of the child’s personal or psychological autonomy. At the same time, personal or psychological autonomy, although arguably the central aim of children’s rights, is not the only developmental aim. From a combined psychological and human rights perspective, there are three additional aims: development of competence, of connectedness, and of cosmopolitanism. All four aims are interconnected and mutually

reinforcing. Autonomy as a developmental aim refers to the development of authenticity, integrity (honesty and modesty), and identity ('to be' on the basis of morality and rationality); in other words, to the development of 'personality' (Article 29, para 1 sub a CRC). Competence ('to create and contribute') refers to the development of 'talents and abilities' (*ibidem*). Connectedness and cosmopolitanism refer to the development of 'social appetite' – as Grotius, in his famous book of 1625, calls this positive aspect of the social nature of man – for one's fellow man and ultimately for mankind; in other words, to the development of respect for parents, community and country ('the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own': Article 29, para 1 sub c CRC), and the development of democratic (world) citizenship (Article 29, para 1 sub b, d, and e CRC). All of this falls within the prosocial human rights ideals of inclusion and emancipation *vis-à-vis* anti-social realities of exclusion and discrimination caused by, *inter alia*, moral corruption (versus personal autonomy), kleptocracy and excessive competition or capitalism ('to have' versus 'to create and contribute'), consumerism and cynicism (versus connectedness and cosmopolitanism). After all, if I may be permitted to comment on the last one only, cynicism means to disdain, to disrespect, and ultimately to discriminate.

Children's rights remedies to these personal and social flaws and evils include, as this book tries to illustrate:

- *Provision* through (1) democratic citizenship education (DCE) in schools, which includes human rights education, children's rights education and, accordingly, responsible parenthood education (Article 29, para 1 CRC); (2) professionalisation of parent and child care institutions, services and facilities (Article 3, para 3 CRC); and (3) pre- and postnatal parenting education, especially in relation to ECD: early childhood development (Articles 18, para 2, and 24, para 2 sub d, e, and f CRC).
- *Provision-Prevention-Protection* through a care continuum of all institutions, services and facilities referred to or implied in, *inter alia*, Articles 3, para 2; 18, para 2; 18, para 3; 19, para 2; 20; 23, para 2 and para 3; 24, para 2 sub d, e, and f; 24, para 3; 25; 26; 27, para 3; 28 and 29; 31; 32, para 1; 37; 39; 40 and 42 CRC.
- All of these, of course, on the basis of *Participation* of all concerned, first of all parents and children themselves (see, *inter alia*, Articles 2; 3, para 1; 5; 6, para 2; 7, para 1; 9; 12–17; 18, para 1; 23, para 1; 27, para 2; and 30 CRC). Article 4 CRC puts the state under a 'maximum extent' obligation as far as its investments in all four – interconnected – P's (*Provision, Prevention, Protection, Participation*) are concerned.

Since minor variations and some overlap in terminology and definitions are not always fully avoidable, it is important to keep the scheme above in mind when studying (chapters of) this book.

Jan C. M. Willems
Maastricht, summer 2007

ABSTRACTS OF CHAPTERS

Chapter 1: Children's Rights are Human Rights; Current Issues and Developments

by *Theo van Boven*, pp. 1–10

A major mission for the United Nations is the fostering of the process from dependence to emancipation. This process also applies to children's rights. In this introductory chapter, a number of important goals and concerns identified by the UN General Assembly and the Commission on Human Rights, will be linked to the overall notions of Provision, Protection and Participation. The question will also be raised whether a right of individual petition should be attached to the Convention on the Rights of the Child.

Chapter 2: Children's Rights and Universality

by *Eva Brems*, pp. 11–37

The first part of this chapter examines how children's particularities (i.e. their 'childness') shape the formulation and the interpretation of international human rights for children, thus promoting an inclusivist concept of the universality of human rights. In the second part, the same concern with 'inclusive universality' supports an analysis of how international children's human rights deal with other particularities that account for diversity among children, in particular gender, and non-western economic and cultural context.

Chapter 3: The Developmental Damage to Children as a Result of the Violation of Their Rights

by *Martine F. Delfos*, pp. 39–64

Developmental damage has pervasive, long-lasting, life-long consequences. A child who has been damaged in his or her development, will have to bear the consequences throughout life. During each phase of his or her life these consequences will be felt and will have to be dealt with. As adults we often make the mistake that a child who does not talk about his or her problems, does not have any. We assume that, if a child can laugh and play, he or she was not too badly hurt inside. The true voice of the child

is seldom heard. At the core of the system of care, though, is the child. Since the Convention on the Rights of the Child, the challenge is how to transform that core into a living, beating heart. We need to find a way to have children voice their pain and participate in the process of decision making about their future. Communication with children, however, proves to be very difficult. It demands not only special techniques but especially a change of attitude. The most powerful weapon in empowering the child is adult modesty.

Chapter 4: The Children's Law of Nations: The International Rights of the Child in the Trias Pedagogica

by *Jan C. M. Willems*, pp. 65–106

In this chapter general concepts and related terminology will be defined and placed within a general framework, and related to the Convention on the Rights of the Child. Concepts and terms discussed include: (1) The children's law of nations and the core concept of the *Trias pedagogica*. (2) The inherent right of every child to become an optimal person, i.e. to adequate care for a healthy holistic development. (3) The developmental and autonomy rights of the child, based on this inherent right. (4) Transism, or transgenerational discrimination, i.e. large-scale transgenerational transmission of developmental damage due to a lack of empowerment of children, caregivers and communities. (5) The proposed paradigm shift in children's rights theory and practice from Protection towards Provision and Participation, and the related twin concept of empowerment and 'responsibilisation.' What do these concepts mean for both industrialised and developing countries?

Chapter 5: Children's Rights and the Prevention of Child Abuse and Neglect: The Quest for a Trias Pedagogica of Children, Parents and Society (A View from the Low Countries)

by *Jan C. M. Willems*, pp. 107–141

International law is involved with domestic violence against women for some time now, but only very recently the social and political taboo on child abuse, neglect and exploitation within the family seems to be breaking down. A more interdisciplinary look at the Convention on the Rights of the Child and other human rights instruments may help to address the very complex and sensitive social problem of child maltreatment and preventable developmental damage to children, to begin with in the industrialised world, where so much knowledge and wealth is accumulated. In this chapter, the concept of the *Trias pedagogica* – and its opposite: transism (shorthand

for transgenerational discrimination) – is further explored in an attempt to open new – multidisciplinary – horizons for the human rights movement to come to grips with one of the most serious root causes of so many evils of today’s world.

Chapter 6: The Convention on the Rights of the Child: Orientation and Conceptualization of Children’s Rights (Trias Pedagogica versus Transism)

by *Jan C. M. Willems*, pp. 143–186

In this chapter, the CRC’s development-of-personality dimension to human rights is examined. In order to do so, several preliminary questions are addressed. For instance, how do children’s rights relate to the human rights project? When did they come in? How do they fit in? The proposed answers to these questions form the orientation part of this chapter. To further explore the CRC’s new dimension to human rights, two new concepts are (re-)introduced: the concept of transgenerational discrimination (or transism) and the concept of the Trias pedagogica. If transism is our world’s reality, both in the developed and the developing world: we are not doing what we can do to stop this discrimination (‘thesis’), then children’s rights: the things we can do and must do, are the ‘antithesis,’ and the Trias pedagogica: the world as it can be and should be, for children, caregivers and societies, is the ‘synthesis.’ The explanation and elaboration of this ‘dialectics’ form the conceptualisation part of this chapter. The content of the CRC is discussed throughout this chapter.

Chapter 7: Children’s Rights at a Dignitarian Horizon of Responsible Parenthood

by *Jan C. M. Willems*, pp. 187–210

All over the world, children, especially infants and pre-school children, are treated as the property of their parents rather than as legal subjects, entitled to the empowerment of their parents, to healthy development and to preparation for responsible life, including responsible parenthood. A strong libertarian tradition of formal parental autonomy (that is, autonomy as a legal fiat or fiction, as opposed to real or psychological autonomy) does not seem to leave much room for a child rights based evolution towards a more dignitarian construct of reproductive rights and parental responsibilities. In this chapter, this theme is preliminarily explored and attempts are made for its further development.
