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Parents and the Rights of the Child

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On the Rights of the Child

Introduction

The UN Convention on the Rights of the Child (hereafter: the CRC) is a unique document of international law. For instance: it is the most comprehensive single treaty in the human rights field and is ratified almost universally; that is by 192 States out of the existing 194.

It is also the only human rights treaty that explicitly requires States Parties to respect the responsibilities, rights and duties of parents (art. 5 CRC) and contains various provisions in which the role of parents is further elaborated.

In this contribution I shall present an elaborated description and interpretation of the provisions relevant for the work of the Council of Europe's Committee of Experts on Children and Families (CS-EF).

2. The CRC, Parents and the State Party

2a. Some general observations

The most important effect of the CRC is that it explicitly acknowledges the child as a subject of rights, as a rights holder. Some people are afraid that this will result in the undermining of parental right and that children are abandoned to their autonomy (1).

I like to underscore that the CRC does not see the child as a stand-alone individual and does not intend to serve only the self-interest of that stand-alone person.

The preamble of the CRC clearly states that one of the most important conditions for the realization of the rights of the child is that the child grows up in a family environment and in an atmosphere of happiness, love and understanding, because that condition is crucial for the full and harmonious development of the child's personality.

Given this important role of the family, it should be afforded the necessary assistance so that it can fully assume its responsibilities within the community. An important feature of these responsibilities is that it provides the natural environment for the growth and well being of all its members and particularly children.

These guiding principles are reflected not only in articles concerning the role of parents (more about those in para 2b.), but also in other articles. Just some examples:

Requests for family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner (art. 10, para 1 CRC).

A child who is temporarily or permanently deprived of his or her family environment shall be entitled to special protection and care provided by the State (art. 20, para 1 CRC). It is also clear from that article 20 that in case alternative care is needed, priority should be given to the provision of family-type of care (foster care, kafalah, adoption (art. 21)).

That the CRC is not only about the self-interest of the child as a stand-alone rights holder is reflected in various articles. Just some examples:

- art. 23: States Parties shall take measures to facilitate the active participation in the community of the child with disabilities and (para 3) measures conducive for the disabled child's fullest possible social integration;

- art.29: education should be aimed at – inter alia – the preparation of the child for responsible life in a free society;

- art.39: measures have to be taken to promote the social reintegration of a child victim of neglect or violence;

- art. 40: treatment of children in conflict with the law should be such that the child can assume a constructive role in society;

In short: the CRC is not only a “child friendly” human rights document, but also parent friendly, family friendly and community/society friendly.

With these observations I also like to illustrate that provisions of the CRC should not be seen in isolation, but as part of the wider context of that Convention and its overall purpose and objectives. This means inter alia that States Parties recognize and ensure all the rights discussed hereafter to each child within their jurisdiction, including e.g. children of illegal immigrants (art. 2) and that in all decisions regarding children their best interest has to be a primary consideration.

The role and/or position of parents (or other caretakers or persons legally responsible) (2) can be found in quite a number of articles e.g. art. 9 and 37, both mentioning the right of the child to maintain contact with the parents/family; art. 7 the right the right to know and to be cared for by her/his parents and art. 3 (+ Beijing Rules) about the role of parents in the penal law procedures.

I shall focus on the responsibilities of parents in the context of the CRC and discuss in particular art. 5,18 and 27.

2b. The CRC and Parental Responsibilities

Article 5, 18 and 27 of the CRC are the ones in which parental responsibilities are explicitly mentioned. The core message of these provisions is that States Parties to the CRC shall respect and/or recognize these responsibilities, a recognition that should have consequences for the States Parties in terms of positive and concrete actions (more in this respect in para 2c. At the same time, these articles (and some others like a rt. 23 and 24) contain some information on the nature/content of these responsibilities.

The central provision is art. 18, para 1 where as the articles 5 and 27 can be considered as elaborations of this provision. The following provisions of the CRC are particularly relevant for the nature and content of parental responsibilities.

Article 18, para 1

1. States Parties shall use their best efforts to ensure recognition of the principles that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 5

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 directions and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 27, para 1 and 2

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

Some comment at each of these provisions:

Article 18, para 1

The drafting history does not give the meaning of "common" but the same phrase "common responsibility" (of men and women) can be found in art. 5 under b of the CEDAW Convention and like in art. 18 CRC in relation to the "upbringing and development of their children".

A suggestion to replace "common" by "equal" did not result in a change of the text.

It seems fair to assume that "common" means "shared" responsibility. It is also in line with article 16, para 1 under d. CEDAW to assume that men and women (fathers and mothers) do have the same rights and responsibilities as parents. But this equality does not concern the daily routine parental responsibilities. During the drafting it was observed that families allocate parental responsibilities differently and that it was of no concern to the State how this was one, except in child support or other extreme cases. It is not clear what was meant with "other extreme cases". But it should be noted that article 18, para 1 does not mention divorce or separation of parents as a reason for the termination of the common/shared responsibilities. This also applies for the equality of men and women in this regard. As art. 16, para 1 under d. states that men and women do have "the same rights as parents, irrespective of their marital status".

The best efforts to ensure the recognition of this principle means that all members of the council of Europe (all being States Parties to the CRC) have to take legislative and other

appropriate measures necessary to make common and equal rights and responsibilities a reality. Various measures can be mentioned (e.g.)

- awareness raising campaigns to underscore that fathers and mothers should share their parental responsibilities (3) and this may be strengthened with financial and/or other measures to facilitate not only maternity, but also paternity leave;

- divorce or separation of parents should not automatically result in assigning parental rights and responsibilities exclusively to one of the parents (e.g. the parent charged with the daily care). Joint legal custody of parents should in principle be maintained despite divorce/separation. In principle means: except in cases where the best interests of the child require sole parental custody. “Evidence” to that effect should be presented by the requesting parent and the decision should be taken by a court;

- legislative and other measures to encourage/facilitate the change of single parent custody to shared and equal responsibilities and rights of both parents of the child.

Para 1 of article 18 also clearly states that parents do have the primary responsibility. Sometimes the extended family or the tribe or community takes over. The CRC Committee has expressed concern e.g. at the fact that community leaders assume parental responsibilities and are replacing parents which has a negative impact on the children (Congo Concluding Observations CRC/C/15 Add. 143, para 36) or recommended a State Party to place greater emphasis in its policies on the primary responsibilities of parents (...) reducing the role of the State to a subsidiary and not a primary one (Concl. Observations Democratic People’s Republic of Korea, CRC/C/15/Add. 239, para 45 and 44).

This provision (art.18 para 1) is not only meant to protect parents against excessive intervention by the State (even if that intervention takes place with the best intentions), but also to indicate that parents cannot expect the State to always intervene if a problem occurs. Upbringing and development of children is primarily the responsibility of their parents. “The best interests of the child will be their basic concern”. It may be somewhat “strange” to find such a parental obligation in a human rights treaty that is addressed to States. But it at least implicitly requires States Parties to the CRC to take legislative, social and other measures that can encourage and facilitate that parents act in accordance with this principle.

Parents may have different views of the best interests of the child depending on the circumstances, the nature of decisions to be made for the child. But the suggestion that “the best interest” is a completely subjective concept is an exaggeration and in the light of the CRC not correct. There are some provisions in the CRC which clearly indicate what parents should do in the best interest of the child, in particular art. 5 and 27.

Some remarks about these articles.

Article 5

Although the start of this article is rather broad (“shall respect the responsibilities, rights and duties of parents ... etc.”), it is not a comprehensive recognition of all the rights, duties and responsibilities (...etc.) per se.

The second part gives a further qualification by stating that it is about the provision to the child of “appropriate direction and guidance in the exercise by the child of the rights

recognized in the present Convention”. Despite this qualification (“limitation” if you want) the article is very important.

First: it is based on the assumption that children should be given the opportunity to exercise their rights by themselves.

Secondly: States Parties shall respect the role of parents (and if they are not available the extended family or the community) in this exercise by the child of her/his rights.

Thirdly: the word “appropriate” indicates that the parents (and others if applicable) do not have a carte blanche to provide any kind of direction or guidance. More importantly: guidance and direction should be provided “in a manner consistent with the evolving capacities of the child”. What this means is clear from e.g. a proposal by the delegation of Denmark in relation to art. 12 (respect for the views of the child): “As the child gets older, the parents or the guardian should give him more and more responsibility for personal matters with the aim of preparing the child for the life of a grown-up.

It should be noted that a similar provision can be found in art. 14, para 2 regarding the exercise by the child of her/his right to freedom of thought, conscience and religion (see also art. 13).

Fourthly: the article assumes that parents should allow the child to exercise her/his rights in a rather independent way if he/she has the capacities to do so. But it can be argued, that it also implies that the States Parties should take appropriate measures to facilitate this transition from childhood to adulthood. This could be done e.g. by explicitly providing the child with a growing degree of autonomy linked e.g. to minimum ages for decision in the areas of education, medical treatment, membership of associations etc.

Art. 27 is another article that provides indications of what is in the best interests of the child and should therefore be a basic concern of parents. Some Comments:

Article 27, para 1 and 2

Every child has the right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. Or in the terminology of the preamble: the full and harmonious development of her or his personality.

Parents have the primary responsibility to secure the conditions of living necessary for the child’s development. The drafting history does not explain the different wording in para 2. I assume that “conditions of living necessary” is the same as the “standard of living adequate for the child’s development” as mentioned in para 1 (4).

But the responsibility of parents (or others responsible for the child) is limited to their abilities and financial capacities. This implies – as does the word “primary” – that the State has the secondary responsibility to assist parents where necessary. This is elaborated in para 3 of article 27 (to be discussed in more details in para 2c. hereafter).

In conclusion: the CRC requires that States Parties recognize the responsibilities of parents for the upbringing and development of their children. These responsibilities should be shared by both parents in an equal manner and they include more specifically the provision of guidance and directions to their children in their exercise of the rights enshrined in the CRC in a manner consistent with their evolving capacities and the responsibility to secure within the

parents' abilities and financial capacities a standard of living for their children adequate for their healthy development.

2c. The CRC and the responsibilities of States-Parties.

But the CRC does not limit the States Parties' obligation to just the recognition of the primary responsibility of parents. It is not enough that States Parties do not interfere in this responsibility. They have to take various positive measures to support parents in the performance of their responsibility as is clear from in particular art. 18 and 27. The relevant paragraphs are:

Article 18

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 27

3. States Parties in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Some comments

Article 18 para 2

It is important to note that the appropriate assistance States Parties are obliged to provide ("shall render") has a special purpose: guaranteeing and promoting the rights of the child as enshrined in the CRC.

This indicates that the parents' performance of their child-rearing responsibilities is not limited to e.g. the articles 5 and 27 discussed above.

The responsibilities are covering the wide scope of all the articles of the CRC and the assistance provided by the State should therefore help parents in all their activities concerning the implementation of the rights of their child e.g. in the areas of birth registration (art. 7), of maintaining the contacts between child-parent (art. 9 and 10), of upbringing a child with disabilities (art. 23), of social security and insurance (art. 26) of protecting the child against all forms of violence and exploitation (art. 19, 32-36 CRC).

In quite a number of these articles specific actions are required from States Parties in terms of support for parents (provide them with information, art. 9, para 4; support programmes for parents to prevent abuse art. 19, para 2; special care and assistance for parents of a disabled child art. 23, para 2 + 3 etc.) and art. 18 para. 2 can be seen as the umbrella provision.

The appropriate assistance is made concrete in the last part of para 2. The obligation to ensure the development institutions, facilities and services (5) for the care of children does not mean that a State has to establish these services. Private organizations can establish and run these services but the State is under the obligation to provide financial and other support. At the same time, the State has to ensure that these services conform with standards set by the

competent authority, particularly in the areas of safety, health, the number and suitability of the staff and competent supervision (art. 3, para 3 CRC).

Article 18 para 3

This paragraph focuses on care services for children of working parents and was the result of some lengthy debates and different proposals (6). For instance: limiting the services to day care facilities for children till they reach school age; or limiting it to children until they have completed their schooling and to public day care facilities for which they are eligible.

The final text is quite general: The State has to do everything appropriate to ensure that children of working parents (both working or a sole provider) have the right to benefit from care services and facilities. The qualification “for which they are eligible” allows a State Party to develop a policy and practice that responds to the needs of these children. It provides them with some discretionary power in terms of determining which children (pre-school age and/or primary school age) can qualify for which kind of services. There is no obligation to provide the services for free, but the State has to prevent any kind of discrimination (art. 2 CRC) and to use their available resources to the maximum extent possible (art. 4 CRC). Compare in this regard art. 23 about the special care for the eligible child with disabilities which shall be provided free of charge whenever possible and taking into account the financial resources of the parents.

Article 27, para 3

This paragraph is another and important recognition of the State’s subsidiary or secondary responsibility for the implementation of the right of the child to an adequate standard of living.

The assistance for parents (and others responsible) shall be in case of need very concrete: material assistance and support programmes, particularly with regard to nutrition, clothing and housing. In this regard it should be noted that art. 11 ICESCR deals with the right of everyone to an adequate standard of living, which includes the right to adequate food, clothing and housing.

In addition to what article 18 and 27 tell us about the (secondary) responsibility of the State to support parents in the performance of their child raising responsibilities I can refer not only to art. 23 (see above), but also to art. 24 (health) and 28 (education).

art. 24. For the full implementation of the right of the child to the enjoyment of the highest attainable standard of health the States Parties shall take inter alia the appropriate measures

- to ensure that (...) in particular parents and children are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantage of breast feeding, hygiene and environmental sanitation and the prevention of accidents;
- to develop preventive health care, guidance for parents and family planning and services.

art. 28. Primary education has to be compulsory and free of charge. But in accordance with art. 28 States Parties shall encourage the development of different forms of secondary education and vocational training, make it accessible free of charge (if possible) but offer at least in case of need financial assistance (to parents). It should finally be noted that all 192 States agree that education of the child should be directed inter alia at the development of respect for the child’s parents (art. 29).

3. Some concluding observations

The Convention on the Rights of the Child is the human rights treaty with the most elaborated set of rules for the responsibilities, rights and duties of parents (and where applicable of others

responsible for the child, including members of the extended family and the community if provided for by local custom).

It is also clear that the parental responsibility is not a goal in itself, but a function – and the primary one – in the full and harmonious development of the child (e.g. art. 27). The exercise of this function means that parents shall act with the best interests of their child as their basic concern (art. 18) and shall take into account the child's evolving capacities (art. 5) or the child's age and maturity (art. 12).

Furthermore, it is clear that parents in the performance of their responsibilities are not left to their own devices.

First and as I just said: the CRC provides some guiding principles and the overall purpose of the parental actions should be guaranteeing and promoting the rights of the child set forth in the CRC (art. 18, para 2).

Secondly: 192 States Parties have taken upon themselves the obligation to support the parents, a support which is spelled out in various articles of the CRC. Some of them are rather concrete (art. 27, para 3), but the variety and accessibility of child care services and other support programmes for parents most likely will depend on the State Party's human and financial resources. But they have committed themselves to using the available resources to the maximum extent possible (art. 4 CRC). The CRC Committee is aware that quite a number of States Parties struggle with a lack of resources that hampers the implementation of the CRC. But at the same time: States Parties need to be able to demonstrate that they have implemented the CRC "to the maximum extent of the available resources". The Committee has expressed its concern that almost no State Party can provide a fully accurate picture of the amount of money (% of national budget) that is spent on activities (by the State, NGO's etc.) directed at/meant for the implementation of the CRC.

The CRC Committee, joining the Committee on Economic Social and Cultural Rights, is of the opinion that "even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ..." (7)

In this respect it is important to mention the fact that the CRC is the only Convention (again) in which States Parties are required to encourage and promote international cooperation and to take account of in particular the needs of developing countries in general (art. 4) and in particular in the areas of health care and of assistance and care for disabled children (art. 23, 24) and education (art. 28). This feature of the CRC is important not only for actions within the Council of Europe, but also for an active support by members of this Council for, in particular, developing countries.

It is my sincere hope and wish that the results of the work of this Committee of experts will be inspired by and contribute to the progressive and full implementation of the CRC.

NOTES

1. See in particular the concerns in the USA which (partly) explains that they have not ratified the CRC and for instance: Bruce C. and Jonathan O. Hagen, Abandoning children to their Autonomy: the United Nations Convention on the Rights of the Child 37 Harvard International Law Journal, p. 449 e.a. (1996) and Richard G. Wilkins e.a. Why the United

States should not ratify the Convention on the Rights of the Child, Saint Louis University Public Law Review Vol. XXII, no. 2 (2003), p. 411 e.a.

2. I shall for pragmatic reasons focus on parents and not repeat that most of the articles relevant for them are also applicable to others legally responsible like guardians or other caretakers.

3. The CRC Committee has regularly recommended to States Parties to promote the principle of equal/shared responsibilities of both parents and to pay special attention to the role of fathers.

See e.g. the Concluding Observations of the Committee regarding Denmark, Norway, Germany, New Zealand and South Africa (UN Doc. CRC/C/15 Add. 33, para 26; Add. 23, para 18; Add. 43, para 31; Add. 71, para 27 and Add. 122, para 22 respectively).

4. The right to an adequate standard of living is also recognized in art. 25, para 1 UDHR and in art.11 ICESCR.

5. Facilities and services were added to the text at the proposal of Finland because “in situations” was too narrow Detrick (1992), p. 269.

6. See Detrick (1992) p. 266, 267.

7. See the CRC Committee’s General Comment nr.5 (2003). General Measures of Implementation of the Convention on the Rights of the Child, para 9 and see also General Comment nr. 3 (1990) of the Committee on Economic Social and Cultural Rights: The nature of States Parties’ obligations (art. 2 para 1 of the Covenant) and nr. 9 (1998) The domestic application of the Covenant.

Resources

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