CHAPTER 7

Five Problems with Children's Participation Rights

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1 Introduction

One of the perennial tensions in human rights scholarship is that between critique and activism. Many of us working on questions of human rights have been drawn to these out of personal conviction. Much like scholars of theology, we find the strength and motivation to engage with the endless stream of UN documents, court cases, empirical case studies, juridical doctrine, and conceptual analyses in hopes for a more just and humane world. Still, as scholars, we cannot let our critical mind go to rest, even when it comes to fundamental values. Although it is pointless to strive for objectivity, we are nonetheless called to engage critically with our chosen topics and to question even the most self-evident truths guiding our fields of study.

In the case of children’s rights, this means – at the very least – to constantly remind ourselves and our readers of the most basic questions at play: What is a child? Why do we find it meaningful to speak of children as a special class of human beings? Why is the distinction between childhood and adulthood of moral, legal, and political relevance? Do children have rights? If so, is it for the same reason as other humans have rights?

I also think that the position of a student or scholar is one where we are called to be mindful of the fact that all attempts to codify the proper meaning of a concept like children’s rights, including the UN Convention on the Rights of the Child (CRC), are conditioned by factors such as time, place, rules of procedure, power arrangements, expertise, and ideologies. The CRC was composed of fragments of earlier international instruments on children’s rights, as well as bits and pieces of human rights law, humanitarian law, refugee law, labour law, and development policy, along with some novel ideas (such as the right to play) that surfaced in the course of the drafting process between 1978–1989. The Convention was not, in other words, a set of divine principles carved into stone by an impersonal world conscience. It was a work of political negotiation.

In his dissertation on children’s rights in Swedish asylum procedures, Jonathan Josefsson notes that there is a tendency among child rights scholars to think of the CRC not just as a historically specific statement on what
children’s rights could be about, but as a self-evident, analytical framework of what children’s rights essentially are. At worst, this creates a deafening feedback loop as child rights scholars attempt to shed light on norms and practices that stem from the CRC, using the Convention itself as their analytical lens.1

Breaking that feedback loop and taking more external – to some extent more detached – viewpoints on children’s rights is one of the main challenges facing students and scholars of children’s rights today.2 This is not just for the sake of child rights studies as a sub-field of interdisciplinary human rights and childhood studies. The reason we need to let go of the CRC as our analytical framework is not just that doing so will likely improve the quality of our scholarly output. It is also likely to make that output more relevant outside academia. Child rights studies can never be cutting edge if the field merely echoes the way that children’s rights are discussed among politicians, lawyers, activists, and practitioners. I do not think that our primary responsibility as scholars is to offer expertise and advice to decision-makers – even if I think that we should be free to do so as well. Rather, I think our job is to stimulate new ways of thinking, sometimes just by pointing to the limits and perplexities of rights activism and how this sometimes reinforces (or at least fails) to challenge wider social, economic, and political conjectures.3

As we attempt to stimulate this new thinking, however, we must first dare to become critics of ideas in which believe very deeply. Here, I think we have much to learn from theologians and scholars of religion, at least those of whom have come to see their scholarship as a struggle with their own traditions – as a struggle with the exclusionary aspects and troublesome effectual history of ideas and texts that they nonetheless may regard on a personal level as sacred.4

In this chapter, my struggle is what has become a particularly sacred aspect of contemporary child rights discourse: the rights of participation. Participation rights are frequently cited as being among the most innovative aspects that the CRC brought to the field of children’s rights. Especially Article 12 – which concern’s the child’s right to have a say in matters of his or her concern – is frequently held forth as a symbol of an enlightened understanding of the child as an active social agent, not just in future days when he or she reaches the

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1 Josefsson, J., *Children at the Borders* (Linköping University, 2016).
Five Problems with Children’s Participation Rights

age of majority, but in the here and now. Children’s participation rights in general, and Article 12 in particular, have given rise since the mid-1990s to a whole corpus of material, from practical handbooks and workshops to serious scholarship. While this literature escapes an easy overview, it is made up to a large degree by works that offer practical advice on how to implement and monitor these rights in various social, political, and juridical settings, from schools to courtrooms.5

Let me first be clear that I think there are good reasons for holding that children should have rights that are typically associated with the concept of participation. After all, children are human beings. To the extent that rights such as freedom of expression, freedom of religion, freedom of assembly, freedom of information, and the right to a fair trial can be defended as human rights, they ought to apply to young people as well. It is also evident that initiatives aimed at advancing children’s participation rights can be valuable in making public and private institutions more child-focused and child-inclusive. Children’s participation rights can serve as reminders that even very young children are often more capable of expressing their own needs and interests than is commonly assumed, and that we must always meet children with at least the same amount of dignity and respect that we owe to other human beings.6

That said, the topic of children’s participation rights also gives rise to a set of conceptual and practical issues that child rights scholars and activists need to bear in mind and grapple with in their work. The challenges ahead are not just about improving implementation, enforcement, and evaluation of these ideals. We must think about the relationship between children’s rights and the broader social, economic, and political conditions in which such rights are articulated and institutionalized. Moreover, I think we have reason to be wary of the more fundamental conceptual issues that either comprise attempts to advance children’s participation rights or arise as unintended consequences of such attempts.

I have structured this chapter as a list of five such problems or issues that I think are attached to the idea and practice of children’s participation rights. This list is not exhaustive; nor do I think that the list itself reflects a coherent,

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alternative idea of children’s rights. These problems are not visible when we use only one specific, theoretical standpoint. Rather, they involve both the idea of child participation as it is generally articulated, as well as the unintended consequences of trying to move from idea to practice.

2 Children’s Participation Rights Are Often Confused with Participation as Such

A common way of describing the concept of a ‘right’ in moral and political philosophy is to say that it refers to claims that persons have to certain rights objects (e.g. bodily integrity, due process, the right to vote) and against a certain duty bearer (e.g. the state). When we say that children have a right to participation, participation becomes the object of that right. However, participation is only one component of the equation. We must also pin down the identity of the rights-bearing subject, this subject’s claims (e.g. moral, political, or legal), and against whom such claims can legitimately be addressed. When we talk about rights, the idea at work is not just the quality or the character of the rights object, but the general status of the rights-bearing subject in society.7

Another crucial aspect is that the rights bearer does not have to make use of his/her right in order to have it realized. I can have a right to vote in an election, for instance, but may choose not to make use of that right. This means that if you want to know whether I have a right to vote, you cannot take my actual voting – or not voting – as your indicator. The same goes for the right to freedom of expression, which includes a right to speak up, but also a right to be silent. You might also think of the right to freedom of religion, which includes a right to worship in private or public, but also a right to keep one's beliefs to oneself.

These may seem like rather obvious points. Nonetheless, I think the distinction between participation rights and participation as such is often overlooked by child rights scholars and practitioners. We tend to think that any instance where children successfully take part in decision-making is a sign that their rights are being realized.

A telling example is Roger Hart’s 1992 essay on children’s participation in community projects. Hart’s text counts as one of the founding texts for the post-1989 child rights movement, especially because it contains what has


If we take a close look at Hart's essay, we see that he begins by citing the CRC and its Article 12 on the right to be heard. This is one of the few occasions in his text, however, where the concept of rights appears. The remainder is devoted to descriptions of more or less successful attempts of getting children involved in cooperative projects with adults, which Hart views as essential for assuring not only children's status as social agents in the present moment but their development towards becoming active and responsible citizens in the future.\footnote{Hart, R. (1992).} The goal is not to create a right to participation, but to get children to participate.

What is lacking, therefore, not just in Hart's analysis but in so much of the related literature on children's participation rights, is an analysis of the institutional framework that is needed to make participation into a right rather than a mere act of goodwill that state representatives, community organizers, social workers, and parents can withdraw at will. I am aware of how much has been written in criticism of Hart's participation ladder, including by Hart himself, who recently declared that the participation ladder was obsolete. Still, I think the point is of broader relevance. Just getting children involved in particular processes does not mean that we have actually realized their \textit{rights}.

3 There Is No Clear Definition of What Counts as Participation

The concept of participation rarely appeared in the drafting of the CRC. It is mentioned in only a few passages of the final text, such as in Article 23 on the rights of children with disabilities. Indeed, the word \textit{participation} does not feature in Article 12, although this article subsequently came to be viewed as the Convention's most central statement on precisely this topic.

From a historical standpoint, it is curious that Article 12 has become so significant to child rights scholars and activists. Article 12 was one of the earliest articles to be adopted by the Working Group that drafted the CRC. It emerged from a series of debates in the early 1980s that principally revolved around the responsibility of the state vis-à-vis the child and his or her family. Whereas state-socialist delegates like Poland and the Soviet Union argued that states had a far-reaching responsibility for the child's welfare, a group of Western
delegates (headed by the United States) insisted that the state mainly had a negative responsibility to respect basic liberties of speech, assembly, and religion. From the Western standpoint, the principal concern was not to advance a particular understanding of childhood, but to make sure that the Convention would not compromise already existing international standards on civil and political rights. It was through these Cold War-infected tensions around the relationship between the state's positive and negative duties and the relationship of economic, social, and cultural rights on the one hand, and civil and political rights on the other that Articles 12–16 of the CRC emerged.10

According to Nigel Cantwell, who followed the debates up close as a representative of Defence for Children International, Article 12 was crafted to address individual cases which involved some kind of formal decision that was of immediate relevance to a particular child, for instance in court or administrative proceedings or with regards to medical treatments. It was an article with a very specific area of application. It was not intended as a means of recognizing children as political subjects.11

It was only in the late 1980s that a group of NGOs and UNICEF officials began to speak of Article 12 and the ensuing clauses on civil rights in reference to the concept of participation. The aim at that time was simply to develop a heuristic device that would explain the Convention's principal message to international development experts, especially within UNICEF and the World Health Organization. The decision to group Article 12 with the other 'participation rights' of Articles 13–16 did not, in other words, represent a coherent philosophy of children's human rights, but merely a haphazard attempt to explain the Convention to a very specific audience.12

Therefore, the extent to which the concept of participation provides a fair description of the normative content in CRC Articles 12–16 is not clear. Article 12(1) evidently lends itself to a broad range of interpretations, but still seems to indicate that children's participation rights are mainly relevant to situations that involve some form of choice or decision by an adult or public institution on behalf of the child. It assumes the presence of an adult who is capable

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of 1) hearing the child and 2) making and implementing decisions that are informed by the child’s views. In short, Article 12 is a list of conditions that must be fulfilled when adults intervene in children’s lives.

The literature on children’s participation rights has been overly concerned with a view of child participation as being involved in decisions made by adults, insisting that many children and adolescents have the capacity to influence the process and outcome of such decisions. The most radical view then becomes that children sometimes have the right and capacity to make such decisions for themselves.\textsuperscript{13}

If we also consider the other rights that are usually categorized as participation rights – such as freedom of expression and freedom of assembly – we see that they also apply to situations where children occupy a place in public life, without necessarily being heard and without becoming subjected to adult action. These rights do not require the presence of adults who actively create safe spaces, act as an audience, or take action.\textsuperscript{14} Instead, they mainly require that adults do not arbitrarily interfere when children express themselves. The problem, however, is that these rights do not fit with models of ‘genuine participation’, which are usually based on interpretations of Article 12.

4 Participation Indicates Peaceful Collaboration Rather than Protest

In a fascinating book on child participation in Swedish preschools, Klara Dolk highlights cases of non-participation and more or less outspoken protests of young children in organized activities as examples of social agency and rights-claiming. I think this is an excellent example of how children’s participation rights can serve a critical purpose of challenging an established order and create space for children to develop their own sense of agency and selfhood.\textsuperscript{15}

Nonetheless, this is not the standard view in the literature on children’s participation rights, which instead tends to focus on examples when children act in ways that adults register as a constructive role in collaborative projects with

\textsuperscript{15} Dolk, K., \textit{Bångstyriga barn: makt, normer och delaktighet i förskolan} (Stockholm: Ordfront, 2013).
adults, such as the building of a new playground or the successful organizing of some event.

Ann Quennerstedt has shown how one problem with the so-called ‘3 P’s’ model (provision, protection and participation) is that it is not clear how it aligns with the typical categories in human rights law: civil and political on the one hand, and economic and social and cultural rights on the other. Quennerstedt claims that by using concepts such as participation instead of civil and political rights, child rights scholars and activists inadvertently help to sharpen the distinction between children’s rights and the wider framework of human rights. This in turn risks creating situations where children are offered weaker protection than other human beings and are given only ‘light’ versions of adult rights.16

Such differences are obvious if we look at the CRC text; for instance, Article 14 is substantially weaker than corresponding articles on religious freedom in international human rights law. However, the concept of participation is also problematic because it gives rights such as the freedom of expression and religious freedom an almost serene character. Following Hart, the ‘genuine’ exercise of such rights becomes those moments when children collaborate with adults in a spirit of mutual respect and understanding. This completely strips the rights in Articles 13–16 of their revolutionary and democratic origins. Freedom of expression, religious freedom, and freedom of assembly have traditionally been rights of dissent and resistance, not rights of participation.

From a wider human rights perspective, the only true rights of participation are precisely those that are typically denied to children: the right to take part in the governing of one’s polity through elections or holding of public office. This is not the place to argue that children and adolescents should have such rights, but when considered in a broader perspective, it is misleading to say that children are entitled to participate in democratic life if they do not have the right to vote.17

5 Children’s Participation Rights Privilege Certain Forms of Subjectivity

That Article 12 of the CRC speaks of the child’s right to have a say in decisions pertaining to his or her life as conditioned by ‘age and maturity’. This is a

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16 Quennerstedt, A. (2010).
17 Wall, J., Give Children the Vote: On Democratizing Democracy (New York: Bloomsbury Academic, 2021).
troubling addition to international human rights law, which before 1989 had made no explicit link between the person's capacity and enjoyment of rights. It is true that the Universal Declaration of Human Rights (1948) conjures up a notion of an idealized rights-bearer as a person of ‘reason and conscience’ and that when children are mentioned in earlier documents, it is usually in reference to their ‘physical and mental immaturity’. Still, general human rights law includes nothing to indicate that one’s personal capacity is relevant when assessing the degree of rights protection. As far as I can tell, this focus on natural competence (maturity) is unique to the CRC, and becomes all the more troubling when compared to an instrument such as the Convention on the Rights of Persons with Disabilities CRPD, which sees human capabilities as arising from an interaction between the person and his or her surroundings.

E. Kay M. Tisdall and others working on child participation in court proceedings and other administrative processes have shown that the degree to which children are able to have an impact in individual cases greatly depends on their ability to adapt to outside expectations on behaviour and style of argumentation. Sometimes this means presenting oneself as adult-like in terms of composure, factual accuracy, and reasoning. On other occasions, the key is to come across as more infantile and vulnerable. In other words, in cases where the child’s right to have a say and be heard are put to the test, the children who tend to be privileged that succeed in adapting to outside circumstances, those who successfully play the parts assigned to them.

This issue is, of course, not exclusive to children. But children’s rights are the only field where the question of natural capacity is spelled out as a criterion that courts and administrative bodies should take into account when assessing the weight to be given to the subject’s personal views.

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Children's Participation Rights Can Distract from Wider, More Pressing Issues

In a recent piece on the principle of non-discrimination in the CRC, Rebecca Stern notes how the scholarship and practice on children's rights, at least in a Swedish context, have focused on two of CRC's so-called guiding principles: the best interest of the child and the rights of participation. An unintended consequence of this, Stern notes, is that child rights scholars and practitioners often overlook other aspects of children's rights, most notably the right to life and development and the principle of non-discrimination, which have also been included among the CRC's guiding principles.21

In a broader sense, I think it is essential to avoid thinking of children's rights as an isolated issue. We cannot fully safeguard the rights of children unless we also safeguard the rights of other persons in the communities to which they belong. For instance, we cannot address the child's right to adequate housing without simultaneously addressing the social and economic rights of their caregivers. The same goes for the rights that we associate with participation. If we are serious about seeking to promote children's rights of participation, we must also think hard about such general challenges to democratic life as shrinking civil space, the normalization of disinformation and hate speech, structural racism, and so on. In addition, if we are serious about trying to improve the opportunities for children's participation in society, we must also be alert to the general decline in areas such as party membership and the dwindling faith in democratic institutions in many liberal democracies.

It is difficult to see how developing more sophisticated theories and assessment models for children's participation rights could provide any solution of value. Rather, such models generally crystallize the view that children's participation rights form a separate issue, requiring specific techniques of implementation and that children must be approached differently from other human beings. A crucial challenge for child rights scholars and activists alike, in other words, is to link their pursuits to wider struggles for social and economic justice and inclusion, and thus dare to make children's rights into a matter not only of law and ethics, but of politics as well.

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Conclusion

In this chapter, I have suggested that the topic of children's participation rights gives rise to a host of conceptual and practical problems concerning the relationship between children's rights and the wider fields of human rights and democracy. Again, my point is not to suggest that we ought to abandon the rights laid down in the CRC. As several of the chapters in this volume confirm, the Convention – including its enigmatic Article 12 on the right to be heard – can sometimes serve as potent tools for challenging situations when children are stereotyped and excluded from processes and decisions of their concern. Nevertheless, I also think there are strong reasons to look beyond the CRC and its commentary, if we are serious about the truism that children's rights are human rights. This looking beyond involves becoming acquainted with other parts of international human rights law and policy, such as the CRPD, which in sharp contrast to the CRC rejects the very idea that one's perceived maturity and mental capacity should determine the degree to which one is allowed to exercise fundamental rights. I also think this looking beyond can involve becoming more aware of the social and political conditions under which rights are either realized or compromised. Personally, I have become increasingly convinced that the most pressing challenges to children's active participation in society today are not just the prevailing negative attitudes toward children and their capacities. The more existential challenges to children's rights, I think, are tied to the much wider crises of human rights and democratic life that have become manifest in recent years, and which have been fuelled by right-wing populism, increased surveillance, shrinking civil space, and rising social and economic inequality. In taking such a broader view, we see how children's rights cannot be addressed in isolation. Only in a just and democratic society can children's rights become real and meaningful.

References


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