

CBA Child Rights Toolkit

Background Paper on Article 6, *UN Convention on the Rights of the Child*

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Draft Outline: Article 6 of the UNCRC and holistic development

Section 1: Summary

Article 6 of the 1989 UNCRC (“A6”) states that:

1. States Parties recognize that every child has the inherent right to life
2. States Parties shall ensure to the maximum extent possible the survival and development of the child

In General Comment no. 5, the Committee on the Rights of the Child state that “The committee expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.

Implementation measures should be aimed at achieving the optimal development for all children”. This outline will address the issue of child development in its broadest sense, arguing that taking a holistic approach requires meaningfully situating the child as social actor centrally in policy and practice.

Section 2: Developmentalism and a holistic view of childhood: centering the child

2.1 What is Child Development and what is the problem with a developmental approach?

Child development usually refers to theories from the psychological paradigm (commonly related to the work of Jean Piaget, discussed later) which see the child in progression through a

set of age-linked stages to adulthood. Further, according to this theory, all children progress through these stages in the same order at broadly the same ages, with implications should one be seen to sit outside of a 'normal curve' of this perceived universal childhood. Hence, developmental theory describes a universal childhood in which the child not meeting the correct developmental stage for their age is positioned outside of the normal curve and is thus seen as in need of professional intervention.

This model for understanding the child provides a measure through which the legal system has commonly come to assess competence. The consequence of this view is that as a non-competent person in progress to adulthood, the rights of the child – for example, the right to participate (Article 12 of the Convention), become subsumed under a set of protection and provision rights, based on universal assumptions about childhood. Although the Committee on the Rights of the Child has attempted to address this in General Comment Number 12 (2009) and General Comment Number 14 (2013), the position remains that children's protection and provision rights come before participation rights.

The authors of this outline situate their work within the 'new' paradigm of the social study of childhood, which rejects the developmental approach and focuses instead on children's perspectives, experiences, rights, and participation. A growing body of work in a variety of disciplines during the 1970's increasingly challenged the restricted way in which understandings of children were presented as 'fact'. Even within Piaget's own discipline questions were asked about the way in which the 'social dimension' might impact or shape children's responses. Vygotsky provided a bridge between traditional developmental models and the new paradigm by recognising that meaning making must be seen to reflect a coming together of interaction with the wider social and cultural themes that are part of children's everyday lives. The culmination of a range of academic musing in this area was a conceptual revolution or 'new paradigm' that argued that understandings of the child must extend beyond adults assumptions and must recognize children as active social agents operating within the wider web of social structures.

Broadly, the differences between the two approaches can be seen in the table below:

Key themes of a developmental approach	Key themes of a 'new' paradigm approach	Implications
universalism	diversity	The child's experience of the childhood recognized within a cultural context
child as 'becoming' adult	child as human 'being' in world now	Children's rights become a feature of their present and not of their future (place in society).
progress through stages to reach eventual adult competence	child as competent meaning maker	Understandings of the child not based on adult assumption but engagement with the individual child.
child as in need of the adult's supplying their protection and provision needs	child as participating actor in their own right	Children are seen as valid contributors in shaping the social world they are part of.

2.2.What is a holistic approach to child development?

If a holistic approach to child development is to be seriously engaged with, then the child as a potentially active participant within a network of relationships (for example, family, school, community, society) must be placed centrally in the discussion. It is not sufficient to simply focus on those aspects of biological/ cognitive development which are individual to the child.

We advocate that a truly holistic approach to child development, as discussed in the General Comment on A6 of the UNCRC should reflect the themes and values above *alongside* the cognitive and biological development framework.

2.3.Towards addressing A6 in Law

It is in the holistic sense, outlined above, that we can bring together developmentalism and the child-centered approach by focusing on children's agency and competence. In practice this means if are taking the holistic approach seriously then we must prioritize children capacity as participants, in order to generate effective engagement with their rights and the law more widely.

Section 3: The law and opportunities to help or hinder holistic child development

The adoption of the document 'A world fit for children' (UN 2002), reiterated in point 4 the importance of the survival and development of the child as indicated in A6 of the UNCRC. Further, it explains that children should be 'physically healthy, mentally alert, emotionally secure, socially competent and able to learn'. The Canadian document 'A Canada fit for children' published in 2004 follows up on the 2002 UN document, stressing the same outcomes for children as indicated above. It is however a focus on themes of biology and cognition that have dominated the application of these documents and reflect a sense in which developmentalism (as defined by its focus on biology and cognition) can be regarded as central to both the UNCRC and in Canadian law and policy. In our view this limits opportunities to implement a truly holistic notion of development in relation to the child.

Following the holistic view set out above provides adults with increased opportunities to engage with children, although for this to happen certain themes need to be recognized.

- We propose that the most important opportunities the legal system can offer for children and for childhood would be to engage with children in dialogue about the issues that concern them as per A12 of the Convention. Below we suggest a possible framework within which those working with children in a legal setting could advance meaningful dialogue with children. We argue that for any toolkit to be effective in a holistic sense, children's input into the discussion is essential.

- We need to reflect on the ingrained way in which developmentalism has defined the legal systems thinking on children over a considerable period of time. A significant illustration of this can be seen relation to the way in which the 'system' has regarded children's ability to reason.
 - The need to question reason in relation to the child's place within the legal process is well rooted in English common law (the foundation of Canadian law). An example of this was the setting of special protection for children in relation to criminal offences back in the 14th Century known as *doli incapax* - in which the court was asked to ensure an additional burden of proof as they asked the question of whether a child had sufficient *mens rea* (here the court had to show that the individual knew the act to be seriously wrong rather than just wrong).
 - Theorists such as Immanuel Kant continued to reinforce an approach to thinking on reason that separated the capacity of the child from that of the adult. This was made more explicit in a range of practical ways by Jean Piaget. Piaget's research, included a focus on children's moral thinking in which it was not until around the age of 12 years that children could be regarded as having a capacity to reason (Kohlberg extended this later). Such thinking became dominant in defining when children were seen as capable of engaging in certain 'moral' issues. This can be seen as having implications both within home, school and legal settings.
- An extension of this discussion on reason is reflected in the way in which age has been arbitrarily used to define when the legal system regarded children as competent in relation to a range of civil and criminal procedures. These remain entrenched within the system today as age continues to be used as a proxy for competence without any real understanding of cultural and social differences.

- Rather than the system being driven by adult assumptions of what children's protection and provision needs are, the argument here is that by engaging directly with the child through a model of participation, a more relevant program of protection and provision can be established based on children's voices.

For more

<http://journals.carleton.ca/cjcr/index.php/cjcr/article/view/64>

Section 4: Case Law Summaries

Case law has reflected an evolving attitude within the system to recognize children's holistic development.

- Most recent Child Welfare Case that impacts all aboriginal children made by the Human Rights Tribunal

<http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do>

<https://fncaringsociety.com/sites/default/files/Information%20Sheet%20re%20CHRT%20Decision.pdf>

<http://www.oacas.org/2016/02/landmark-decision-by-canadian-human-rights-tribunal-a-chance-to-begin-righting-past-wrongs-against-first-nations-children-and-families/>

In England, the *Gillick v. West Norfolk and Wisbech Area Health Authority* decision in 1986, considered a teenagers right to consent to medical treatment.

- *B.J.G. v. D.L.G.*, 2010 YKSC 44, per Martinson J. A well known family law case

<http://www.canlii.org/en/yk/yksc/doc/2010/2010yksc33/2010yksc33.html?searchUrlHash=AAA-AAQAeQi5KLkcuIHYuIEQuTC5HLiwgMjAxMCBZS1NDIDQ0AAAAAAE&resultIndex=1>

“ The Convention is very clear; all children have these legal rights to be heard... It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both... Obtaining information of all sorts from children,

including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully.... Children have legal rights to be heard during all parts of the judicial process... If the child does wish to participate then there must be a determination of the method by which the child will participate.”

- There have been extensive changes in separation and divorce proceedings with regard to children’s participation see - Birnbaum, R. The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review Her Majesty the Queen in Right of Canada, represented by the Minister of Justice and Attorney General of Canada, 2009-06-01 - <http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vcsdm-pvem/p3a.html>
- Other relevant cases include
 - *Eldridge v. British Columbia* (Attorney General) 1977 - <http://www.canlii.org/en/ca/scc/doc/1997/1997canlii327/1997canlii327.html>
 - The Canada Health Act (Government of Canada, 2015) - <http://www.canlii.org/en/ca/fct/doc/2013/2013fc342/2013fc342.htmlsearchUrlHash=AAAQASam9yZGFuJ3MgcHJpbmNpcGxlAAAAAAE&resultIndex=1>
 - *Auton v. British Columbia* - <http://www.canlii.org/en/ca/scc/doc/2004/2004scc78/2004scc78.html>

Section 5: Practice tips

As many organizations have discovered over the past few decades, it is easier to conceptualize child participation than to practice it. This is especially true if the goal is to involve children in collaborative decision making with adult professionals in existing justice, education, social assistance, and community settings. However, one should not underestimate the difficulties associated with achieving meaningful child participation even with when objectives such as consultation and information feedback are sought. Difficulties arise around issues of power

distribution as well as miscommunications and misunderstanding around the meaning of obligations, rights and expectations. Given the difficulty and the associated risk of failure there has to be a compelling rationale and reasonably specific practice pathways to justify making efforts to involve children. Fortunately, the past decade and a half has witnessed numerous organizations tackle this challenge. From these efforts a few key insights emerged.

1. participation is an emerging activity. Although both past and suggested (ideal) practices exist in abundance, participants must respond to setting specific factors as well note general standards and guidelines.
2. participation is basically a struggle for recognition on the part of all involved for their respective positions to be understood by others.
3. the setting's features have to be negotiated in addition to the dealing with the issues that initially brought the participants together. In effect, a settings constitution has to be established before, or along with, discussions of the substantive issues.
4. in establishing participatory settings, one starting commitment is to try to establish a participatory environment that takes into account how different participants understand participation. Children in particular, given their subordinate structural situation, are likely to have different understandings of responsibility, rights, expectations, relationships, trust, and abuse (among others items) than do adult professionals (who may also have divergent understandings of key notions).

Engaging with children's voices

Based on a model that is having an impact in educational settings these 5 headings; Ethos, Community, Lead, Speak and Act, offer a starting point.

Ethos: Children as partners - how does the way in which we think about children (the assumptions that we hold) influence how children come to be positioned within the legal system.

Community: The spaces the legal system provides are key to the way in which children are able to participate. Placing participation ahead of protection and provision, the challenge for the justice system is to reflect on the nature of the spaces within which opportunities are provided for children to participate.

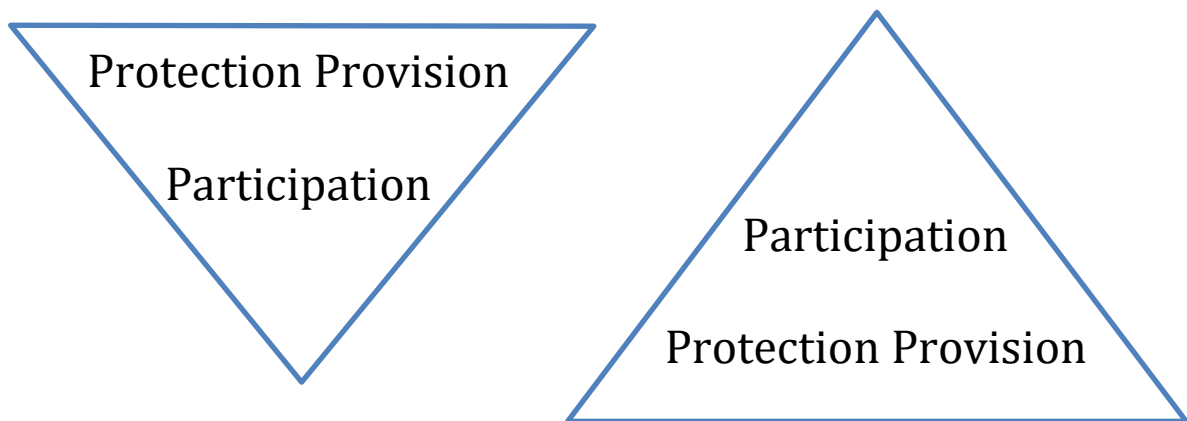
Lead: Relates to the extent to which adults and children can learn from each other through a desire to establish effective knowledge. Leadership is therefore about knowledge acquisition and knowledge management. It places a responsibility on key decisions makers (which should include children) to develop ways in which thinking can evolve to create sustainable measures that link knowledge with effective practices.

Speak: establishing a language for justice practices that children, as well as adults can engage with. It is about creating a shared language for engagement in all aspects of the legal system.

Act: ‘real’ opportunities through which all can feel partners in a shared project for justice which meaningfully engages with children in a holistic sense.

See Frankel and Fowler, 2013 - http://works.bepress.com/sam_frankel/1/

In conclusion: the dominance of protection and provision can be challenged through an inverted triangle, that places, for the first time, participation ahead of protection and provision as the key theme in pursuing those goals demanded by article 6 of the UNCRC. By acknowledging a holistic approach to children, the child takes on a meaningful role in shaping the development of effective policy and practice within the legal system.



Section 6: Resources

Susan Clark of the Orton Family Foundation has posted an above average and brief discussion of the role of power considerations when involving previously excluded groups in decision making can be found at - <https://www.orton.org/blog/60>

Plan International has developed a set of specific practices for involving children in decision making - <https://plan-international.org/childrens-participation-decision-making>

Alison Clark's *mosaic approach* offers a number of very specific suggestion embedded in a comprehensible framework for individual and collective child institutional engagement for a diversity of purposes and goals - http://www.sagepub.com/sites/default/files/upm-binaries/43997_9781446207529.pdf

Finally, Save the Children lists standards or guidelines for establishing, using and evaluating settings that promote child participation - [https://www.savethechildren.org.uk/sites/default/files/docs/Putting_Children_at_the_Centre_final_\(2\)_1.pdf](https://www.savethechildren.org.uk/sites/default/files/docs/Putting_Children_at_the_Centre_final_(2)_1.pdf)

Canadian Charter of Rights and Freedoms

<http://laws-lois.justice.gc.ca/eng/const/page-15.html>

Committee on the Rights of the Child, General Comment No. 5

http://www.unicefirc.org/portfolios/general_comments/GC5_en.doc.html

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<http://www.unicef.org/earlychildhood/files/programming%20experiences%20in%20early%20childhood.pdf>

Government of Canada (2005) 'A Canada fit for children'

http://canadiancrc.com/PDFs/Canadas_Plan_Action_April2004-EN.pdf