



Art. 3 and art. 12 of the CRC Protection vs Participation ?

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Plan of the presentation

- The child from object of protection to subject of rights
- The two articles **3 and 12**, as general principles of the CRC, along with 2 and 6
- Importance of « **evolving capacities** »
- The best interests of the child
- The right of the child to be heard
- Opposition or complementarity ?

A new child is born : 1989

- The Convention on the Rights of the Child is not a neutral text that merely enumerates a list of rights.
- Without any doubt, the Convention outlines the rights to which every child is entitled, **but it is much more than this.**
- The CRC creates a new status of the child based on the recognition that s/he is a person and has the right to live a life of dignity.
- In the past, the child, as described by the Geneva Declaration (1924) and the Declaration on the Rights of the Child (1959) was seen as an object in need of attention and protection. Since the promulgation of the CRC in 1989, however, the child has been understood to be a **subject of rights.**

Protection

- It is a well-established fact that the CRC dedicates particular attention to the **protection** of children. This is linked to the vulnerability of the children
- It primarily does this by articulating principles such as **protection from abuse, forced labour and sexual exploitation.**
- The Convention develops some of these existing principles while also extending protection to children in domains like protection against **torture**, involvement of children in **armed conflict**, involvement in the illicit production, **trafficking and use of narcotics**, unjustified deprivation of freedom, and separation from parents without just cause.
- The adoption of **2 Optional Protocols** on children in **armed conflict and the sale of children, child pornography and child prostitution** in 2000, further reinforce the protective aspects of the Convention.

Assistance

- The other traditional ideas are related to the necessity for the States to ensure **assistance and services** to children, (issue of a **dependant and incompetent child**),
- These services are related to Food, Shelter, access to Health, access to Education, Social security, social services...
- It's what we call now (in the juridical terminology of human rights) the **social, economical and cultural rights**.

But the novelty : Participation

- Where the CRC questions all preconceptions held by adults is in relation to **participation**. Even if CRC does use the term participation, we have here the main novelty of this text
- The issue of participation, (art.12), conveys **a new status to the child** who is no longer only seen as a beneficiary of assistance or protection, but as someone whose views must be **heard and considered** as an active **participant** in the decisions that concern her/him + social life in general.
- It is this concept that represents the most outstanding innovation of the CRC, since it introduces the concept that the child, in accordance with her/his development, age and maturity, is entitled to participate in the life of her/his family, school, training centre and in community in general.
- **The child is no longer a passive member who needs to be taken care of; s/he is recognized as an active player in her/his life.**

The new status is based on 2 articles

- The bedrock of this new juridical position lies in 2 of the CRC articles; **Article 3** (the best interests of the child) and **Article 12** (the views of the child), which recognize the right of the individual child to express her/his opinions in all matters affecting her/him.
- Traditionally, these two articles are considered general principles of the Convention. Yet above all, they are **two essential rights**:
 - 1)The right to have her/his best interests evaluated;
 - 2)The right to be heard and to have her/his opinion taken into account

Art 3 and 12 : unique

- These rights are available to every individual child, but their particular **uniqueness lies in the fact that they are also applicable to children as a group of human beings who are defined according to their age.**
- Together, Articles 3 and 12 represent the **“cornerstone”** of this innovative and challenging posture.

Art. 3 and 12 in the context

- Art. 3 and 12 are closely linked with the concept of **the evolving capacity of the child** and are related to **civil rights and freedoms** :
- Art. **13** (right of freedom of expression),
- Art. **14** (right to freedom of thought, conscience +religion),
- Art. **15** (right to association + peaceful assembly)
- Art. **17** (right to information).
- Art. 12 is also connected to art. **7** (right to a name + nationality), Art. **8** (right to an identity), Art. **16** (right to privacy), Art. **19** (protection from all forms of violence) and Art. **37** (prohibition of torture).

Art 5 : evolving capacities

- Another “forgotten principle” : **Article 5** recognizes that the child is not simply a miniature adult, but is a **developing human being with needs that change** along with age and evolving capacities, requiring varying degrees of guidance, protection, provision and participation.
- Article 5 stresses that the child has a **right to direction and the guidance of her/his parents or legal guardians**. Direction and guidance are necessary to compensate for the child’s lack of knowledge, experience and understanding and should be adapted to their evolving capacities.
- As the child gains experience, knowledge and understanding, parents or legal guardians must limit their directions and guidance.
- What is most interesting here is the child’s curve of dependency in relation to the inverse curve of autonomy and the practical adaptations that must occur in response to their developmental evolution.

The question ?

- Some scholars and practitioners consider **art. 3** as the concretisation of the “old” conception of the child as beneficiary of services (food, shelter, health and education) and protection against all forms of exploitation. In this sense, the obligation of the State is to **provide and protect** , because the child is dependant and vulnerable. S-he deserves a specific attention (here the meaning of interests) .
- At the contrary, **art. 12** would be the recognition of a competent child, able to take part in decisions, or to influence the future, according to his/her evolving capacities, in his family, communities and the society. The obligation of the State is to listen to him-her
- ***Are these 2 ideas in conflict ?***
protection vs participation ?
Dependency + vulnerability vs competency ?

Art. 3 par. 1

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

- In addition, numerous other provisions of the CRC make reference to this article, outlining obligations to consider the best interests of individual children, particularly in relation to questions of family law:
- Article **9**: separation from parents;
- Article **18**: parental responsibilities for their children;
- Article **20**: deprivation of family environment; and
- Article **21**: adoption;
- Or in Juvenile justice (art **37 and 40**)

Art 3. par. 1 : 3 elements

- If we analyse the best interests principle as a whole, there is no particular explanation of its application: it does not outline any particular duties, nor does it state precise rules. It instead posits a principle that "***The best interests of the child shall be a primary consideration.***"

There are **3 elements** to this expression.

- **First**, it is a **rule of procedure**: whenever a decision is to be taken that will affect a specific child / group of children, the decision-maker must consider the possible impacts of the decision (positive or negative) on the child/children concerned and must give due importance to these impacts when considering the different interests involved.

It is also a procedural rule in the sense that art. 3 (1) **requires the inclusion of this step in the decision-making process, but it does not impose a solution.**

Art 3. par. 1 : 3 elements

- **Second**, the best interests of the child is **the foundation for a substantive right**:
- the guarantee that this principle will be applied whenever a decision is to be taken concerning a child or a group of children, or the right of the child to have his/her best interests assessed.
- States have an **obligation** to put in place the mechanisms necessary to consider the best interests of the child. For instance, appropriate legislation must be enacted to underscore the legal obligation of decision-makers (e.g. judges) to consider the “best interests” rule of procedure in the decision-making process.

Art 3. par. 1 : implementation

When giving full effect to this principle, the following parameters should be borne in mind:

- The BiC can be determined by a case by case process taking into account age, maturity, environment, personal circumstances, and experience
- The **global spirit** of the CRC;
- The short-, medium- and long-term perspective of the child as a developing human being; and
- Its interpretation **cannot be “culturally relativist”** while denying the other rights of the CRC. For ex. CCR Com. has specified that the best interests principle **cannot be used to justify a particular behaviour**, such as corporal punishment. (GC No. 8 (2006))
- See also **UNHCR Guideline, May 2008**

Art 12

Article 12 of the Convention on the Rights of the Child provides:

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

*2. For this purpose the child shall in particular be provided the opportunity to be heard **in any judicial and administrative proceedings** affecting the child, either **directly**, or through a **representative** or an appropriate body, in a manner consistent with the procedural rules of national law.”*

Art 12 : elements

- A right of the child, not an obligation
- An obligation for the State to put in place the mechanism to listen to the child and to give due weight to the views of the child
- To adopt rules of procedure (limitation of the audition, specialisation for the interviewer)
- To listen directly or through a representative
- To « interpret » the views
- The training of professionals
- To take into consideration the expressions of the child

Art. 12 : the steps : preparation

(a)The preparation = information

(b)The hearing = technical

(c)Assessment of the capacity of the child (age, maturity...)

(d)The decision : responsibility of the adult

(e)The feed-back : information about the weight given to the views

Art 3 et art 12 : the duo

For me, the similarities between art. 3 (1) and art. 12, are so various that I often refer to these articles as “**the duo.**”

- The two provisions share the **same structure** and each recognizes the same competencies of authorities charged with the responsibility for making a decision regarding a child or group of children,
- either in accordance with the best interests principle,
- or to enable the child or group of children to express an opinion.

Art 3 et art 12 : complementarities

For me, there is no tension between arts. 3 and 12, or rather, the protective approach of art. 3 and the participative approach of art. 12.

- Both 3 and 12 are **complementary**. If art. 3 represents a sort of “ideal” we wish to achieve (the well-being of the child), art. 12 provides a method to help determine what are the best interests by enabling the affected child to express her/his opinion about this ideal.
- Indeed, how could a decision-maker determine the best interests of a child, **without first asking the child in question about her/his opinion** on the matter at hand?

Art 3 et art 12 : opposition or complementarities ?

- Likewise, **Article 3 reinforces the functionality of Article 12** and facilitates the participative role of children in all decisions affecting their lives.
- In this way, **Article 3 needs Article 12 just as Article 12 serves the interests of Article 3.**

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