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# Children's Rights Are Human Rights and Why Canadian Implementation Lags Behind

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## Abstract

*Child rights scholarship is increasingly calling for further theorization of children's rights, and research using the Convention on the Rights of the Child as a framework is being criticized. This paper discusses children's rights as a legal concept that is part of wider international human rights law. It recognizes the importance of critical studies and the contribution of other disciplines, but it makes a plea for not rejecting a legal reality. Children do have rights, and these are legal norms. The paper refers to Canadian practice as an example of how the lack of recognition of children's rights as human rights can adversely affect the place of children in a country that is known for its respect for human rights.*

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The existence and desirability of children's rights have been debated for decades. While research since the 1990s has focussed on implementation of the *Convention on the Rights of the Child* (CRC), theoretical discussions have continued. In fact, these discussions have seen a resurgence in the past years, showing a willingness to detach children's rights from law and from other human rights. This paper addresses children's rights theory and sounds the alarm about the separate treatment of these rights outside the ambit of human rights. The paper discusses the concepts of children's rights and human rights, situating children's rights within international human rights law. It tackles critical theories of children's rights within the larger framework of human rights. While calls for critical analysis are well received, sustained criticism regarding the lack of theorization around children's rights can lead to a dangerous path, where relativism trumps the recognition of human dignity that lies at the basis of human rights protection.

The paper's main message is that children's rights are human rights. There cannot be categories of human beings who are denied protection of their rights due to some of their characteristics. Such an approach is inherently discriminatory and would be met with an uproar if the group under scrutiny were women, immigrants or persons with disabilities, for example. Thus, the first part of the paper sheds light on the concept of children's rights and responds to calls for critical analysis of child rights. The second part of this paper looks at the Canadian context, focussing on selected legislation, and judgments by the Supreme Court of Canada (SCC). Canada is a prime example of a jurisdiction that has not embraced children's rights. It does not recognize children's rights as human rights, and applies its legally and constitutionally protected fundamental rights and freedoms to children selectively and with difficulty. A clearer recognition of children's rights as human rights would reduce the resistance to the application of these rights, and improve Canada's implementation of the CRC.

## **The Importance of Children's Rights as Human Rights**

### **Children's Rights in Law**

Theoretical discussions about the nature of children's rights tend to disregard legal considerations and particularly international law. Yet, to understand children's rights, it is important to understand the role of law and the nature of international law more specifically. This is crucial because human rights are not only a moral consideration and a philosophical notion, but they are also legally protected norms. Of course, human rights are not simply a legal concept. They are first and foremost a philosophical concept related to ethics. Even within the legal sphere, human rights remain intimately connected with philosophical and moral considerations, as human rights are initially based on natural law. In natural law, rules are founded on human nature, a common sense of justice shared by all, and they are universal by nature. Natural law is opposed to legal positivism, which sees legal norms as a human construct and not imposed by moral considerations, as exemplified by Austin's work (1995). Some authors have gone far in distinguishing law from morality, given that one could argue that there is an expectation that moral considerations guide the lawmaker.<sup>i</sup> Indeed, modern democracies have put safeguards in place to ensure that a certain morality of laws is upheld, be it through parliamentary mechanisms or constitutions that impose morally grounded norms. Thus, the connection between law and morality remains, particularly in the case of human rights. However, the force of law that protects human rights does not derive from the moral tenets of norms, but from the inclusion in a system of law (and from the institutional process that led to their adoption).<sup>ii</sup> Whatever angle one might want to take when examining legal norms – realist, positivist, critical, naturalist or other – there is no denying that modern societies are governed by laws that have been adopted by a predetermined process and enforced through governmental institutions. Some of these laws protect human rights, and this is called human rights law.

International law is also a system of norms adopted in conformity with law-making rules at the international level, and it is there that human rights have found their fullest expression. While enforcement mechanisms are not at a par with those available at the domestic level, all states agree that the international norms they have subscribed to

bind them legally. International norms must thus be implemented through domestic legislation and other measures, and the creation of international monitoring mechanisms speaks to this obligation. Thus, when we talk about human rights today, it is impossible to discuss these rights without reference to or acknowledgement of the international human rights protection system instituted after the Second World War. The *Universal Declaration of Human Rights* (UDHR) adopted in 1948 serves as a basis for a great number of international instruments that afford human rights legal protection. The main treaties containing legally protected human rights are the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The rights contained in these treaties apply to everyone, or more precisely to people from states that have ratified them. The preambles to the Covenants talk about “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” and “that these rights derive from the inherent dignity of the human person”. There is no limitation based on age, gender, ethnicity or capacity. In fact, human rights treaties contain a non-discrimination clause, prohibiting discrimination in the application of human rights. For instance, the ICCPR states undertake to “ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2.1). Thus, there is no doubt that these human rights treaties apply to children.

While they apply to all, it is clear that not all human rights are relevant to children. For example, children cannot generally exercise their right to work or their right to universal suffrage because of their limited legal capacity in domestic legislation. The international treaties expressly limit some rights to adults. For instance, the ICCPR recognizes “the right of men and women of marriageable age to marry and to found a family” (art. 23.2). Meanwhile, some rights apply specifically to children. For example, in article 24, the ICCPR recognizes children's right to protection as minors, their right to birth registration, name and nationality. The fact that children are excluded from the

exercise of certain rights because of their legal status, and the fact that specific rights are recognized to them does not mean that general human rights do not apply to them. This concerns other groups as well. For example, there is no right for non-nationals to take part in elections of the country they live in, or for people who are legally incarcerated to enjoy the right to freedom of movement. This does not mean that human rights do not apply to these people, but that states can reasonably restrict the application of certain rights to certain groups of people based on their legal status. Other groups have specific rights as well. For example, the ICCPR provides that the death sentence shall not be carried out against pregnant women (art. 6), and the ICESCR provides for special protection to mothers before and after childbirth (art. 10.2). The fact that these rights only apply to women does not diminish women's enjoyment of other human rights, nor does it reduce other groups' entitlement to rights.

The fact that some groups are entitled to special protection and a different recognition of human rights has become increasingly clear in international law. While initially the ICESCR and the ICCPR were to suffice for the protection of all human beings, it gradually became obvious that the expression of rights in those general instruments did not take into account the reality of certain groups. Consequently, other human rights instruments were adopted to respond to the special situation of groups that are not adequately protected by the Covenants. Today, within the core group of United Nations human rights treaties, specialized treaties concern women, children, migrant workers and persons with disabilities.<sup>iii</sup> Thus, the CRC is part of the general human rights framework in international law. It is a treaty on children's human rights; its implementation is monitored by the Committee on the Rights of the Child. While all general human rights treaties apply to children, the CRC addresses children's special position in the family and society. It recognizes that at the domestic level, children are considered as minors with reduced legal competence. It also recognizes that children are developing beings who have ensuing needs related to their development, education, and relations with their family on whom they generally depend. The CRC contains general human rights that apply to children, such as the right to life, the right to freedom of religion, the right to health, and the right to social security. It also contains rights that apply to children particularly, such as the right to birth registration, and the right not to be

separated from parents. Thus, children's rights, as included in the CRC, are the expression of human rights that specifically apply to children. In addition to being moral considerations that may be debated, they are legal norms that exist in domestic and international contexts.

### **Calls for Critical Analysis**

Scholarly discussion about children's rights has been through different phases. Prior to the adoption of the CRC, as well as in the years following its adoption, debates about the need for children's rights and the nature of children's rights were common. Many authors were critical of the adoption of the CRC, or some of its "liberty rights", such as the right to freedom of expression, and the right to freedom of assembly (e.g. O'Neill 1988; Théry 1992; Purdy 1994; Hafen & Hafen 1996). Common arguments that are still present in literature are those opposing a rights-based approach and a needs-based approach, and assertions that children's limited legal capacity makes legally recognized rights meaningless. Other authors sought to explain why children's rights were important (e.g. Wringe 1981; Freeman 1987; Veerman 1992; Campbell 1992; Federle 1994). After the dust settled, and the CRC became the most widely ratified treaty (more than the UN Charter), research focused mainly on examining the implementation of the CRC (Reynaert et al. 2009). The treaty and its principles were rarely questioned. It became the bible of child rights activists, and activism often went hand-in-hand with scholarly research. While this trend continues, some voices have raised questions not only in relation to CRC's efficiency in protecting children's rights, but also in relation to the rights protected in the Convention. CRC provisions need to be recognized as a compromise that was reached at a certain point in time through long negotiations; they are not absolute truths. Long-time advocates of child rights, such as Freeman (2000) and Veerman (2010), have pointed to the weaknesses of the Convention, especially in light of new societal developments. In a complementary manner, Poretta et al. (2014) have revealed the political side of child rights protection; why and when certain topics appeal, and then disappear. Boyden (1997), Pupavac (2002) and others have criticized the CRC for its Western-centric view of childhood that fails to recognize the diversity of childhoods in different social, cultural, economic, and religious contexts. Certainly,

research on children's rights also needs to adopt a critical stance when examining the current contents of rights, obligations, mechanism, and implementation, especially in light of changing societies and current concerns including in relation to the environment, the role of non-state actors, technology, and globalization. The world has greatly evolved since the development of the CRC in the 1980s.

In addition to such constructive criticism of the CRC and its monitoring mechanism, the last few years have also seen a resurgence of criticism of the very idea of children's rights. A number of authors lament the lack of theorization around children's rights. Reynaert, Bouverne-de-Bie and Vandeveldde's (2009) research on child rights literature may have launched this renewed interest in theory. Quennerstedt (2013) refers to this research to critique the fact that the Convention has defined rights for children. She argues that children's rights should be examined from different disciplines, allowing for a bottom-up approach, and emphasizes that the CRC should not be a substitute for theory. I agree with her analysis in many respects, especially regarding the need for contextualization, and for research that is not only advocacy-driven. However, I would argue that children's rights studies cannot ignore the CRC, which serves as a basis for many domestic laws that affect our lives. One needs to acknowledge this legal fact, while deepening the understanding of children's rights, and contexts in which these rights come to play. Hopman (2017) recognizes the legal nature of rights but suggests that in the case of children, rights should be considered as legal privileges instead. Referring to Kant, she argues that children cannot have rights in the same way as adults, as theirs are only based on adults' choices to give them legal privileges. I disagree that there is any difference legally between general human rights and children's rights, as all are the outcome of a legislative process. The legislator being an adult makes no difference to the nature of children's rights. In fact, the legislator is also generally a male, and never represents all sectors of the population. Ferguson (2013) notches up the criticism. She highlights the theoretical difficulties with assigning rights to children. In her analysis, children's rights are dissociated from human rights that apply to all. Ferguson recognizes that children have some human rights, but opines that there is no theory that fully justifies their specific *children's rights*, whether one resorts to the interest-theory, will-theory, welfare or duty-based frameworks. Most importantly, she argues that the use of children's rights

in courts does not lead to improved outcomes for children. I would respond that, as human rights, children's rights are but a tool that may be used to improve lives. The recognition of human rights does not preclude the use of other tools and approaches that may be effective and respect people's dignity. Human rights are not divine commands, but legally protected norms. As such, they do not require theoretical backing once inserted into a binding legal instrument. What matters in our everyday lives is that there has been enough consensus to formulate and adopt these norms, and we can put them to work as life-improving tools. Whether they are effective or not does not take away from their existence. In fact, if human rights were only built upon theoretical foundations, we would have no human rights norms. Human rights, however fundamental, would be at the mercy of theories that come and go out of fashion, and contradict each other.

Finally, I find that the criticism about lack of theorization is not justified. While publications examining implementation and monitoring of the CRC greatly outnumber theoretical works, the latter have been published regularly throughout the years. Authors include children's rights sceptics (e.g. Simon 2000; Guggenheim 2005) and proponents (e.g. Coady 2005; Tobin 2013), some of whom are new to the discussion (e.g. Fernando 2001; Arneil 2002; Dixon & Nussbaum 2012), while others are experienced children's rights scholars (e.g. Archard 2004; Freeman 2007).

### **A Rights-Respecting Critical Stance**

As stated earlier, this paper is about human rights law which includes children's rights. Human rights have a strong legal component which cannot be ignored. This emphasis on law is not to denigrate or sideline other disciplines and their place in child rights discourse. On the contrary, other disciplines are essential to understanding children, their lives, and needs. They allow for a contextualized approach. Considering how societies view children, how children are social actors, how families evolve, acknowledging new theories in child development and psychology, and new findings in medicine help to adapt human rights for children, and apply an evolving interpretation to CRC articles. Knowledge from other disciplines is required to critique the CRC. Critique is a good thing, as it can lead to changes to international law through the adoption of

optional protocols, guidelines, resolutions, general comments, and other binding and non-binding legal documents.

It is not necessary to question child rights *per se* to adopt a critical approach and to distinguish research from advocacy. Questioning child rights is even harmful, and can lead to not recognizing children's rights as human rights. Theorizing about children's rights separately from human rights contributes to considering children as "the other," and encouraging debate about whether they are worthy of human rights protection. I suspect that part of the problem is that people want to see in children's rights something more than human rights. The CRC becomes a treaty that supersedes other human rights treaties, and rights that are specific to children (i.e. "children's rights" as opposed to human rights of children) are disconnected from human rights. This should not be the case. Children's rights are not more important than other human rights, and the CRC does not have a special status in relation to other treaties. It is simply an expression of human rights applied to children, and it is a legally binding document as are, for example, the ICESCR, the Convention against Torture, and the *Convention against all forms of Discrimination against Women* (CEDAW).

Theorizing about human rights is important whether it includes discussing universality and relativism or adapting feminist, Third World, queer or crip lenses, or whether it includes introducing new concepts such as intersectionality, capacitism, or ageism. Such theoretical approaches help to advance our understanding of human rights in light of the many realities that international instruments mask. They also help better understand how to implement rights that seem abstract, disconnected from real contexts, and that can be read narrowly. Child-focused angles can add to human rights theoretical frameworks. Notions of evolving capacities and best interests of the child enrich existing human rights discourses. Critical analyses regarding the pros and cons of using child rights-based terminology, such as the protection/participation dichotomy or the classification of rights as "3 Ps" (protection, provision and participation), advance discussion on human rights (see e.g. Quennerstedt 2010; Liebel 2012; Saunders 2013). It is curious that the academic community is calling for placing children's rights on the operating table, not as a way to enrich discourse and to advance human rights and

people's well-being, but to question the idea that children may have rights, rehashing the will theory and the interest theory. Thus, instead of endangering the existence of children's rights with such debates, consider Alanan's (2010) call to build on human rights research: child rights should be theorized within human rights and a child-focused lens could add to other theories and approaches applied to human rights. Particularly, I suggest examining the CEDAW and feminist approaches to international law to gain a better understanding of children's rights and the potential of children's rights research, and to engage in critical analysis of the CRC. A disability lens also helps to shed light on theoretical underpinnings of children's rights.

Feminist analysis provides useful insight into children's rights as well. The initial calls for human rights (i.e. civil rights and fundamental freedoms) at the domestic level did not include women or other powerless segments of society. While language used in the political documents stemming from French and American revolutions seemed universal in reach, they excluded many in their notion of citizenship and humanity. The UDHR, while using language inspired from the older national declarations, extends the protection to all by addressing "all human beings," "everyone," and "equal rights of men and women." The UDHR thus seemed like a feminist declaration in 1948. However, feminist analyses of international law, a few decades later, helped to show how international law and human rights instruments were imbued with male bias. Thus, they did not correctly protect women against human rights abuses that mainly concerned them, especially those occurring in the private sphere. For example, it is only in the 1990s that violence against women started being recognized as a human rights violation (Edwards 2010). The discussions around the public/private spheres in human rights law are useful when discussing children's rights. The latter are also essentially situated in the private sphere, which was initially ignored by human rights that focused on the relation between the autonomous human being and the State. Similarly, a feminist lens illuminates the power imbalance that affects children, and that has affected the recognition of their rights. Initially, children's rights were purely protective, keeping them "in their place" in society. Acknowledging children's place in society and their lack of power is first necessary to extend recognition of all human rights to them. Otherwise human rights become adults' rights, as much as they were men's rights initially.<sup>iv</sup> A feminist lens also

helps to recognize that a group-specific treaty does not obstruct human rights protection. Children should benefit from the assertion that women's rights are human rights and not a separate set of rights,<sup>v</sup> which would reinforce the idea of women as second-class citizens (see Bunch 1990). Building on the feminist movement, we can affirm today that children's rights are human rights. Finally, feminist theories on relational rights and ethics of care can be applied to children's rights to emphasize that people who are not autonomous can be holders of rights, that dependency is universal, and that relationships matter not only between the individual and the State, but also between individuals (see Minow 1986; Lim & Roche 2000).

A disability lens is also useful in discussing children's rights. Examining disability rights and the *Convention on the Rights of Persons with Disabilities* (CRPD) helps respond to critiques about the lack of solid justification for children's rights. Most criticisms stem from children's minority status in domestic legal spheres and their ensuing limited legal capacity. According to traditional human rights theories, and their modern adaptations, an individual needs will power, rationality and capacity to claim rights. By following Rawls' (1999) theory, those who are incapable of claiming rights could not be rights-holders. This reasoning does not stand in the face of international human rights law, as no person is excluded from human rights protection because of physical, mental or legal capacity. People, including children, can be holders of rights, without necessarily being able to exercise all their rights by themselves. Rules governing legal capacity are determined by domestic legislation. Even infants can be holders of rights, but their guardians exercise rights for them, and bring claims on their behalf. Children's legal status domestically is thus not an obstacle to their being rights-holders, as being a rights-holder does not require being able to claim rights.<sup>vi</sup> Legal capacity also affects other people whose capacity to exercise rights has been legally restricted, including some persons with disabilities. The CRPD protects the rights of all persons with disabilities, regardless of abilities, and addresses the issue of legal capacity in article 12. Its approach is not to distinguish between legal capacity to be a holder of rights and legal capacity to exercise rights; instead, it focuses on assistance provided to those who need it. Thus, in international law, capacity is related to legal status as a person, not age

or capacity to make personal choices. Such an approach could be adopted for children as well (Paré 2011).

Children's legal status is what makes them children in relation to human rights protection. Much has been written about the definition of childhood. With regard to the human rights protection regime, there is no need to agree on whether childhood is a social construct or a biological stage, as it is simply related to the concept of legal minority. The CRC makes this clear: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Article 1). This explains the fact that children's human rights need to be adapted, because in domestic legislation the legal status of minors prevents them from exercising certain human rights. As children gain capacity in domestic law, so they gain the capacity to exercise these rights. In fact, nothing prevents States from adopting legislation that extends rights from the ICCPR and ICESCR to children; the CRC simply ensures that every child receives special protection - for example from exploitation and abuse - until the child has reached majority. Thus, the Convention does not prohibit children from exercising the right to work, but it does require States to protect children from economic exploitation and hazardous work. The next section illustrates how these theoretical considerations may play out in practice, looking at how children are treated in Canadian human rights protection regimes.

### **Children's Rights and Human Rights in the Canadian Context**

#### **Children's Rights Are Not Recognized as Human Rights**

Canada does not recognize children's rights as human rights. There is no legislation at the federal or provincial levels that includes a comprehensive list of human rights that apply to children. The main laws protecting human rights are the *Canadian Charter of Rights and Freedoms*, as well as provincial human rights acts, which prohibit discrimination. Only the Quebec *Charter of Human Rights and Freedoms* includes a wider recognition of human rights protected at the provincial level. It is also the only one that mentions children, albeit in very vague terms: "Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing" (art. 39).

Although the main human rights laws do not contain child rights *per se*, children's rights is not an alien concept in Canadian law. Some legal concepts apply to children specifically and have become synonymous with children's rights. These are the principle of the best interests of the child (BIC), and the need to protect children due to their inherent vulnerability. The BIC principle originates from family law, but is found today, with varying strength, in different areas of law. For example, it is an important principle in child welfare laws across provinces and territories; it is sometimes, yet minimally, present in education laws; it has a secondary place in child criminal justice law, and a small place in immigration law. For instance, at the federal level, the *Immigration and Refugee Protection Act* includes the BIC only in relation to humanitarian and compassionate considerations. It does not apply to the rest of the immigration regime. The *Youth Criminal Justice Act* (YCJA) includes the BIC as a consideration to help determine a limited number of decisions, for example those related to the choice of the facility where young persons will serve their sentences, and parents' place in the proceedings. Some provisions place the BIC in conjunction or in competition with the interests of society. Judges thus have a great deal of discretion in applying the BIC. These laws are in contrast with the *Divorce Act*, which requires that orders for custody be only based on the BIC. At the provincial level, one can note the quasi-absence of the BIC principle in education acts. For example, the *Education Act* of Ontario does not mention the BIC at all; the Manitoba *Public Schools Act* mentions the "best educational interests of students" in its preamble; the *Education Act* of Quebec requires schools' governing boards to make decisions in the best interests of students, and refers to the principle as a consideration in actions related to bullying incidents. These laws contrast with child welfare and family laws, where the BIC principle is dominant. For example, the paramount purpose of the child welfare law in Ontario is "to promote the best interests, protection and well being of children" (s. 1 *Child and Family Services Act*). It is also part of the guiding principles of, *inter alia*, child welfare legislation in Yukon, New Brunswick, Nunavut, and Quebec. However, not all provinces make it a guiding principle (e.g. British Columbia, Alberta, Saskatchewan) even if all do include it in their legislation. Seeing how the principle is treated differently depending on the area of law and the jurisdiction, it is no wonder that the Committee on the Rights of the Child (2012)

has criticized Canada for the lack of uniformity with regard to knowledge of and application of this BIC.

Canadian case law shows the difficulty in understanding the BIC principle, and the variations of application in different areas of law. The SCC has attempted to make several clarifications regarding the principle. In *Young v. Young* (SCC 1993 a), a family law case, the BIC's constitutionality was challenged due to its vagueness. The Court upheld the principle's constitutionality, noting that it is a "legal norm capable of meaningful application", and referred to the CRC to point to its broad recognition (see also SCC 1993 b). In other family law cases, the SCC helped better define the principle, and in *W.(V.) v. S.(D.)* went as far as stating that "the interests of the child are central to any decision concerning the child," pointing to a "universal recognition that the interests of the child must prevail" (SCC 1996 b, para. 75&76). In *Baker* (SCC 1996 a); concerning immigration and refugee law, the SCC recognized the BIC as an international law principle that can be used to interpret domestic legislation, and that must be part of humanitarian and compassionate considerations in immigration procedures. The Court further emphasized BIC's importance with regard to humanitarian and compassionate grounds in *Kanthisamy* (SCC 2015 a). However, the SCC (2015 b) clarified in *M.M.* that the principle does not apply to extradition procedures. In a case challenging the constitutionality of the *Criminal Code*'s s. 43, the SCC (2004) ruled that the BIC principle is not a principle of fundamental justice. Thus, not only is the principle unequally applied throughout case law, by detaching it from the application of Canadian Charter s.7, the 2004 decision contributes to considering the BIC separately from human rights law in Canada.

The role of the SCC has been even greater in recognizing the need to protect children due to their inherent vulnerability as a legal principle. This is not a principle that is generally expressly stated in laws, but it is implicit in many of them, including child welfare and criminal justice legislation. For example, in *Sharpe* (SCC 2001), where the constitutionality of the criminalization of child pornography was challenged, the SCC recognized that some sections of the *Criminal Code* have been enacted to protect children who are a vulnerable group in society. The Court noted that children deserve a

heightened form of protection because the power imbalance between adults and children make children more vulnerable (para.170). It also pointed to a number of international instruments that emphasize the importance of protecting children (para. 178). In a child protection case, the SCC (2000) highlighted that children are vulnerable and that protecting children from harm is a “universally accepted goal” (para. 73). Similarly, in *D.B.*, dealing with youth criminal justice, the SCC (2008) recognized that because of the heightened vulnerability of young people, they require further protection. In this case it meant recognizing “a *presumption* of diminished moral blameworthiness or culpability” (para. 41) as a principle of fundamental justice. The Court reviewed current and past legislation to demonstrate that Canada has always acknowledged the distinctive vulnerability of young persons in the context of criminal justice. In *A.C.* (SCC 2012 a), regarding consent to health care, the Court reiterated the fact that children are a vulnerable group that needs to be protected, sometimes at the expense of their autonomy rights. The same year, concerning the right to privacy, the SCC stated that “[r]ecognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law”, and that heightened vulnerability is based on chronology, not temperament (SCC 2012 b, para. 17). Thus, the principle of protection applies to all minors, and children do not need to prove their vulnerability. It is noteworthy that in this case, as in many others, the principle of vulnerability is discussed together with the BIC, as the child’s interest in being protected from harm is often considered as the preponderant interest (see also SCC 2000).

When discussing the BIC, or applying the principle of protection due to vulnerability, the SCC often refers to the CRC. Hence, there is clear recognition that these are child rights principles even when there is no such explicit recognition in the law. The YCJA preamble links the fact that Canada is party to the CRC, and recognition that young persons have rights and freedoms. Yet, the two main child rights principles that are recognized in Canada have been applied mostly outside the framework of human rights protection. Moreover, case law shows that legally protected human rights have been applied to children with some difficulty, further reinforcing the disconnection between human rights and children’s rights.

## Difficult Application of Human Rights to Children

Human rights apply to children in Canada, as nothing in the Canadian Charter or other human rights acts limit their application to adults. Yet, while the Supreme Court has expressed itself strongly to recognize the importance of the BIC as a legal concept and to highlight children's vulnerability that must guide legislative efforts and the application of the law, it has been less eager to protect children's human rights. The number of SCC cases that deal with the application of the Canadian Charter to children is surprisingly low. Some cases concern the rights of children in the youth criminal justice system, such as *D.B.* (SCC 2008) and *R.C.* (SCC 2005). Rare ones concern freedom of religion, like *Multani* (SCC 2006), and few cases deal with discrimination and equality rights, like *Eaton* (1999 b) and *Moore* (SCC 2012 c).

In many cases, the approach is that of indirect protection of children through the limitation of the rights of adults. As such, the case of *Sharp* (SCC 2001) recognizes that the right of freedom of expression of adults (in this case child pornography) must be limited to protect children. Another example is *Ross* (SCC 1996 c), where the freedom of expression and freedom of religion of a schoolteacher were opposed to children's rights in the school. The tendency to limit adults' rights to protect children's interest is even clearer in the area of family law and child welfare. *(B.) R.* (SCC 1995) provides a perfect illustration. In this case, the right of the child to life and security was at stake, as the infant needed a blood transfusion. However, the majority refused to apply the Charter to protect the child's constitutional rights:

While children undeniably benefit from the Charter, most notably in its protection of their rights to life and to the security of their person, they are unable to assert these rights, and our society accordingly presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children. (...) The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold, but in doing so it is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children (p. 318)

Thus, the majority preferred to limit the parents' rights to liberty and freedom of religion, in order to protect the child from harm. This approach was confirmed in *K.L.W.* – also a child protection case – where the SCC (2000), only discussed the child's interests (and not rights) in the context of the parents' Charter rights claim. Yet, in child welfare and family law cases children may also benefit from parents' rights. In *G. (J.)*, the SCC (1999 b) recognized that child protection proceedings pose a threat to the parent's *and* the child's right to security. Granting the parent legal rights in this case helped to also protect the child's right to security. Clearly, the SCC does not like to consider children's rights independently from those of adults. Children end up either benefiting from their parents' rights, if their interests coincide, or from the reduction of their parents' rights, if the interests are at odds. The view that children cannot claim their Charter rights is shared within and outside courts (see e.g. Bala 2004).

### **Implications of Canada's Practice**

In view of the above, human rights are not recognized as children's rights in Canada, and the main legal principles that are applied to children specifically are the BIC and children's vulnerability requiring protection. These two principles are applied separately from human rights, thus creating a divide between children's rights and human rights. This has disadvantages for children on at least two accounts. First, the separation from human rights means that courts can apply such potentially subjective notions as the BIC separately from children's rights. Therefore, the BIC does not have to be constrained by rights, and can even be applied in contradiction with rights. Including the BIC in a child rights framework would help counter indeterminacy and give some certainty to the principle's content (Alston 1994, p.19). Second, it is unfortunate that children's rights in Canada only boil down to two principles, when the CRC is much more comprehensive. The SCC refers to the CRC only in relation to these two principles, and not, for example in relation to the principle of respect of children's views. While the Court sometimes discusses the importance of children's views, especially in determining their best interests (see SCC 1999 a; SCC 2012 a), it does so without reference to CRC art. 12. Children's autonomy rights or interests have not gained legal principle status in Canada. This has implications for Canada's implementation of the CRC as an international treaty. In the

SCC's discourse, the CRC is reduced to an instrument of children's protection, when the CRC is a comprehensive instrument including fundamental freedoms, and civil and political rights adapted to children. Canada's interpretation of the CRC, application of child rights principles, and focus on children's interests instead of rights, contribute to seeing children as objects of protection, and not subjects of rights. If we were to recognize children's rights as human rights, we would have to take steps to ensure effective protection of children's human rights, and limit children's dependency on adults' goodwill to protect their rights. This could include the creation of institutions that are charged with protecting and defining children's rights, such as child advocate and ombudsman's offices, the inclusion of children's rights education in schools, as well as the practice of class action suits for children. Such steps would be beneficial to children, fostering a more comprehensive protection of their rights, and would ensure that Canada complies with its own legal obligations.

### **Conclusion**

Children's rights are mainly associated with children's protection in Canada, where children's rights principles are divorced from human rights, and where protecting children's interests is considered better than protecting children's rights. Canada's practice corresponds with a narrow view of children's rights within academia, where they are too often treated as separate from human rights. This is also in line with children's rights theories that question the existence and usefulness of children's rights. Yet, it is important to recognize that children's rights are human rights, and that human rights protect children's rights. The CRC, as all human rights instruments, embeds the values of autonomy/freedom and vulnerability/protection. As with other groups, human rights require applying general rights to children and examining children's special situation and status. This leads to adapting rights to their reality and applying rights that are specific to them. Rights protect all, regardless of age, status, capacity, or theory.

Notes

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<sup>i</sup> Many legal philosophers have discussed this link, e.g. Hans Kelsen, H.L.A. Hart, and Joseph Raz.

<sup>ii</sup> This is not limited to parliamentary mechanisms, but also the judicial process in common law.

<sup>iii</sup> See “The Core International Human Rights Instruments and their monitoring bodies”, online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

<sup>iv</sup> This was also recognized by child liberationists in the 1970s (especially John Holt and Richard Farson). While they went much too far and rejected the protection side to rights, the contribution of these theories to the recognition of child rights as embodied by the CRC is undeniable.

<sup>v</sup> Statement made by Hillary Clinton at the 4th World Conference on Women in Beijing.

<sup>vi</sup> For example, the *Civil Code of Quebec* recognizes that “1. Every human being possesses juridical personality and has the full enjoyment of civil rights. [...] 4. Every person is fully able to exercise his civil rights. In certain cases, the law provides for representation or assistance”. The same can be applied to all types of rights.

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