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THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD – WHAT IT MEANS AND WHAT IT DEMANDS FROM ADULTS

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It is a particular honour to be rewarded in this city – the home of such extraordinary personalities as Janusz Korczak and Irene Sendler who gave us ideals which we now should feel obliged to bring forward to coming generations.

This very institution, the Academy for Special Education, gives a significant contribution to the realisation of such endeavours. In my work as Commissioner for Human Rights I have often been reminded about the utmost importance of inclusive education – that every child, also those with a difficult background or disability, be given a genuine chance to meaningful learning on our schools. This in turn requires teachers of special; pedagogic skills.

Janusz Korczak once wrote: ‘To reform the world means to reform the methods of bringing up children’. At the same time he stressed the fact that the child lives today and deserves respect today. The child’s right to *respect* is one of the major themes in his writings.

‘There appears to be two lives’ he pointed out. ‘One serious and respectable, the other indulgently tolerated, less valuable. We say: a future person, a future worker, a future citizen. That children will be, that they will really begin to be serious only in the future.’

He not only exposed these attitudes, he saw them as the basis for the injustices against children – many of them abandoned, neglected, exploited and maltreated. He questioned the minimal resources allocated to the wellbeing of children. Referring to the emerging affluence he proposed a calculation of how much of the total resources belonged to children - if they had their fair share. This he wanted to be compared with the actual budget shares allocated for the needs of children.

What he requested was more respect for the interests of children, not as charity or a favour, but as a right.

The idea that society should respect the *best interests of the child* is seen as fundamental in all cultures. After all, children do symbolize the survival of the family, the group, the nation and even humanity

itself. Going beyond rhetoric, however, we must ask – as Janusz Korczak did – whether this idea is respected in reality.

From the very first draft of the UN Convention on the Rights of the Child, put forward by the Polish Government in 1978, it was clear that the principle of the ‘best interests’ should be included and given a prominent position.

The 1959 Declaration of the Rights of the Child had in fact already evoked the principle, stating that ‘the best interests of the child shall be the paramount consideration’ in the enactment of laws relating to children, as well as ‘the guiding principle of those responsible for (the child’s) education and guidance’.

Several international conventions had also subsequently incorporated this provision. One of them was the 1979 Convention on the Elimination of All Forms of Discrimination against Women. At the national level, the best interests principle had long been included in the legal systems of a number of countries, although its scope was generally limited to family law matters on individual situations, mainly divorce, custody and adoption cases. Less frequently, the principle was also applied to school and childcare issues.

The Convention on the Rights of the Child extends the principle to cover *all* decisions affecting the child. This is a radical departure. The best interests of the child shall now be a primary consideration in all actions concerning children – not just actions taken by the state authorities, parliamentary assemblies and judicial bodies but also those taken by relevant private institutions.

The drafters of the Convention not only widened the scope of the principle, but they also made it one of the ‘umbrella’ provisions and thereby important for the overall framework of the Convention. The UN Committee on the Rights of the Child has taken the principle one step further, defining the best interests of the child as a ‘general principle’ guiding the interpretation of the entire Convention.

ARTICLE 3

The ‘best interests of the child’ is mentioned in several articles of the Convention: relating to the separation of the child from the family (Art. 9); parental responsibility (Art. 18); foster placement (Art. 20); adoption (Art. 21); deprivation of liberty (Art. 37); and juvenile justice (Art. 40). The key formulation, however, is found in the first paragraph of Article 3:

‘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.’

Article 3 can only be fully understood by studying its precise formulation. It refers to executive authorities, law-makers (parliaments) and judicial bodies. It applies to *all* actions by these authorities as well as by relevant private institutions. Importantly, it also concerns ‘children’ in the plural. The Committee on the Rights of the Child has interpreted this wording to mean that the article is applicable in both individual cases and in relation to groups of children or children in general – which makes it even more relevant political and policy terms.

The broad scope of Article 3 naturally had a price in the drafting process. There was considerable discussion on whether the formulation should be ‘a’ or ‘the’ primary consideration. In the end it was recognized that given the widened scope of Article 3, situations would arise when other legitimate and competing interests could not be ignored. The conclusion was to settle for the somewhat less decisive wording ‘a primary consideration’.

Thus, the best interests of the child cannot normally be the only consideration, but should be among the first aspects to be considered and should be given considerable weight in all decisions affecting children.

On family issues such as parental visitation, foster placement and adoption, the interests of the child, however, will be the paramount consideration, as made clear in the substantive articles of the Convention as well as in earlier standards. The 1979 Convention on the Elimination of All Forms of Discrimination against Women, for instance, states in relation to family education that the best interests of the child should be ‘the primordial consideration’(Art. 5.b); and in relation to guardianship, that the child’s interests should be ‘paramount’(Art. 16). The Convention on the Rights of the Child does not, of course, dilute those standards.

The recognition that there are other interests besides children’s in decision-making processes has not, as might be assumed, weakened the force of Article 3. On the contrary, its broader scope makes Article 3 more politically relevant. The ‘best interests’ principle has accordingly been the starting point for discussions on a number of significant policy issues (some of which I will examine later). It is clear, however, that the principle’s full policy potential has not yet been fully understood or utilized. Only a few governments have taken the ‘best interests’ principle seriously outside the area of family affairs, an omission that continues to be a major concern.

A guide

The Committee has often referred to Article 3 in its Concluding Observations on State Parties’ reports. It has noted that the article, by virtue of its status as a general principle, can be seen as a guide to both the interpretation and the implementation of the Convention.

A guide to the interpretation of other articles. It is significant that in its Concluding Observations the Committee seldom refers only to one article. It has instead tended to see the Convention as a comprehensive set of interdependent rules with the best interests of the child as an overarching principle.

By being linked to the ‘best interests’ principle, the substantive articles gain in clarity and depth. The principle also provides guidance on problems and situations not specifically mentioned in the Convention. For instance, although the Convention requires States to establish a minimum age of criminal responsibility (Art. 40.3), it makes no mention of what exactly that age should be. When that decision is taken, the best interests of the child should be a primary consideration.

The principle also guides the interpretation of the Convention when articles might appear to contradict each other. In some unfortunate cases a conflict may arise between the right to have access to both parents and the right to be protected against abuse. In such situations, the best interests of the child must determine the course of action.

A guide to the overall implementation. The principle of the best interests of the child should influence lawmaking, administrative decisions and all other actions affecting the child. In addition, the principle can be a useful tool when laws or policies are to be evaluated. How is this principle reflected in the legislation? Are there policy documents reflecting the principle? Are there routine procedures ensuring that the best interests of the child are considered in decision-making?

Laws and policy documents are of course not sufficient to ensure the effective implementation of the Convention. The Committee also monitors the legal and practical application of the principle. One example was its discussion with a government delegation from Colombia. Though the report from that State emphasized an unusual constitutional provision giving the rights of the child precedence over the rights of other persons, the Committee found reason to be concerned about the gap between legislation and the reality of many children in the country.

WHAT IS MEANT BY THE 'BEST INTERESTS OF THE CHILD'?

Governments – or individual adults – have sometimes misused the 'best interests of the child' to justify actions that in reality have violated the rights of the child. Corporal punishment has been defended with the argument that it teaches children necessary limits and is therefore for their own good in the long run. Adopted children have been prevented from knowing their biological family 'in their own interests'. Children of indigenous peoples have been forcefully removed from their families and placed in boarding schools so that they could be introduced to 'civilization', again in the name of their 'best interests'. I heard recently from a government representative a similar suggestion in a discussion about Roma children.

Such actions are based on extreme patronizing and not on any genuine concern for children's interests; they have no support in the Convention on the Rights of the Child. Excuses for violations of children's rights are clearly not what the principle of the best interests is about.

The definition of the child's best interests, however, is not always obvious, especially in a long-term perspective. Consequently, there have been heated debates about the interpretation of Article 3 and the best interests principle. The article has been criticized as being too vague and general. Furthermore, it has been argued that what is in the best interests of the child varies from one era to another and also depends on the resources, the developmental level and the culture of the country in which the child lives.

Child labour is one example of a controversial application of the best interests principle. In developing countries, families do in many cases depend for their survival on income earned by all productive family members, including children. Attitudes towards education provide another example. Girls are deprived of schooling in some societies with the argument that, given their future needs, it is more important for them to learn how to manage a household than to receive an academic instruction. A more sophisticated international interpretation on these issues is gradually emerging, however. Work that is hazardous to a child can never be in his or her best interests. The right to education on the basis of equal opportunity is fundamental.

Thus, the Convention does not offer any definite statement of what is in the best interests of an individual child in a given situation. It does, however, provide a normative framework that defines these interests to some extent. Since Article 3 is one of the general principles and an 'umbrella'

provision, it should always be linked to other articles in the Convention. The substantive articles of the Convention give clear directions and limits on how children should and should not be treated.

Though necessarily general and incomplete, a reasonable first building block towards the definition of what is in the best interests of the child is the sum total of the norms in the Convention. This means, for example, that it is in the best interests of the child to: receive education (Art. 28); have family relations (Art. 8); know and be cared for by his or her parents (Art. 7); be heard in matters concerning him or her (Art. 12), and to be respected and seen as an individual person (Art. 16). In the same way, the Convention states what is not in the best interests of the child: for instance, to be exposed to any form of violence (Art. 19); to be wrongly separated from his or her parents (Art. 9); to be subjected to any traditional practices prejudicial to the child's health (Art. 24); to perform any work that is hazardous or harmful (Art. 32), or to be otherwise exploited or abused (Arts. 33-36).

Such a definition has the advantage of providing a universal interpretation of what is in the best interests of the child. Differences will inevitably arise of course during actual practice, requiring the delicate balancing of competing interests or the child's interests over time.

A 'relativism' that suggests that the rights themselves should be compromised should not be accepted. There may, however, be cultural differences that justify different approaches and strategies to information and education about children's rights. In addition, different family structures, education levels and standards of living are factors that cannot be ignored. It is essential to consider these differences when an effective strategy for implementation of the Convention is planned. Naturally the Convention itself is universal. Indeed, one of its greatest strengths is that it defines rights that cut across cultural, religious and other frontiers.

The views of the child

There is another important aspect of the Convention that is relevant to this discussion: the emphasis on respecting the evolving capacities of the child. For the best interests of the child to be determined, it is important that the child himself or herself be heard. With increased age and maturity, the child should be able to influence and decide more. This obvious point is often forgotten. Adults tend to discuss what is best for children without seeking their opinions or even listening to them.

The interplay between Articles 3 and 12 is one of the most interesting aspects of the Convention. Article 12 states that the child who is capable of forming an opinion on matters affecting him or her has the right to express that opinion freely and that the child's opinion should be given due weight in accordance with his or her age and maturity.

This approach does not necessarily mean that the child can take complete responsibility for the decision. The spirit of Article 12 is rather to ensure consultation and growing participation than to relinquish all power to the child.

THE INTERESTS OF THE CHILD VERSUS THE INTERESTS OF OTHERS

The first step in this analysis was to seek an approach to defining the interests of the child. Two aspects were considered to be especially important: looking at the substantive articles of the Convention itself, and seeking the views of the child. The next step is to clarify what is meant by giving these interests 'a primary consideration'.

It is often necessary in the real world to balance various 'interests' against each other. When a child's interests compete with other children's or with adults' interests, how should one strike a fair balance? That is, of course, where the real difficulty lies.

The discussions within the UN Committee have highlighted three types of conflicts, either perceived or real, that can occur:

- the interests of a child or a group of children stand against those of other children;
- the interests of a child clashes with the wishes of one or both parents or guardians;
- the interests of a child or a group of children contradict a broader societal interest (for instance, of an economic character).

a) How to balance the interests of one child against those of others? Such dilemmas are common in schools, pre-schools or other community activities for children. One example is when a country does not have sufficient resources to build more schoolrooms for a growing number of children. Would it be better to adopt a two-shift system, which would cut down the school hours for some children, but provide education for all children? In other words, would it be better to educate all children for a half day or half the number of children for a full day?

A similar dilemma arise in the discussion about private schools. These could bring more creative approaches to learning but also exclude pupils without means to pay the fees. Faced with such choices, decision makers must balance various considerations, such as those expressed in the Convention that no child should be discriminated against and that the needs of disadvantaged children should be attended to and given special attention.

b) How to balance the interests of the child versus those of the parents? First, it has to be recognized that there can be conflicts, hidden or open, between children's and parents' interests. It is sometimes argued that what is good for the family by definition is good for the child, and that only the parents can know what is good for the family. This position is contrary to the very spirit of the Convention, which is clearly family-supportive but ultimately stands on the side of the child, for instance in cases of parental abuse and neglect.

The Convention assumes that parental responsibility will be exercised in the best interests of the child (Art. 18). When the child's survival or development is threatened by her or his parents or guardians, however, it is obviously in the child's best interests to be separated from them (Art. 9). Such separations are often highly traumatic and require an approach that will not cause further damage, but that will instead create conditions for the healthy development of the child. A general lesson is the importance of early detection of problems and preventive action. This, in turn, requires a willingness to listen to the individual child, for instance, in schools and in health centres, and appropriate training for teachers and health care providers who work with children on a daily basis.

c) How to balance the interests of the child versus the whole society? What is good for an individual child or for children in general may well clash with what is seen as important for other groups or for the community as a whole. Such contradictions or competing interests are often about resources. Given all other needs, the costs of responding to the very best interests of a child can be unacceptably high,

especially in low-income countries. One example could be when a child needs advanced, and therefore expensive, hospital care. In such cases, it will sometimes be necessary, however painful this may be, to seek the fairest possible solution, within the given constraints, though still respecting the principle that the best interests of the child should be a primary consideration.

The Convention does give some guidance on the issue of resources. Article 4 asserts that States should allocate the maximum extent of their available resources for the implementation of the rights of the child. A serious decision maker would therefore have to determine what reasonably should be regarded as the 'maximum extent' possible.

Another, somewhat more indirect example can be cited from Sweden. The Swedish immigration authorities had at one stage decided to expel some child refugees in spite of there being strong humanitarian reasons for their staying. The argument was that generosity towards these children would undermine the overall asylum policy with its strict requirements. After public discussion, this decision was reversed. It was concluded, first, that each child had the right to have his or her individual case considered on its own merits; and, second, that it was more important to respect each child's best interests by allowing the child to remain in Sweden than it was to avoid misunderstandings of the general refugee policy.

The Convention does not give concrete answers on how conflicts of interest should be resolved, except for the most obvious cases. The weighing of legitimate but different interests is naturally delicate and difficult. Often it is a question of assessing and comparing degrees of benefit and damage. If the interests of a child or group of children would be less infringed by a certain proposed action, there would naturally be more room to accommodate the interests of others, and vice versa.

The important point is that the 'best interests' principle must remain present in such processes: that the interests of the child have to be an important consideration in all decision-making that has a significant impact on the child's well-being and the fulfilment of her or his rights.

THE PROCESS IS THE KEY

The Convention implicitly admits that other interests besides the child's must also be considered. Still, the principle of the best interests will, as intended, lead to changes. The challenge is to develop a policy that will give real substance to the phrase 'a primary consideration' in different situations.

Working with flexible norms is of course not the same as being unprincipled. But can human rights standards that are somewhat relative be of any use? This is a key question in relation to the Convention on the Rights of the Child, which to a large extent is built on principles whose application will have to depend on various considerations and actual circumstances.

There is of course a risk that empty rhetoric, so usual when it comes to children and their welfare, will prevail. The experience so far, however, seems to indicate that the complexity and the general nature of the basic principles of the Convention can be an important asset. These characteristics make the Convention more 'real' in political discussions, more flexible in changing circumstances, more interesting intellectually and thus a more effective instrument.

Crossing the line between empty rhetoric and genuine change depends largely on how decisions are taken. As indicated above, there are two major stages in the implementation of Article 3: to assess what is best for the child, and to balance her or his best interests against competing claims.

Regarding the first stage, the Convention as a whole gives pointers as to what is good for the child. It also requires that the child be heard and that his or her opinions be taken seriously. As for the second stage, it is important to remember that the basic idea is that priority should be given to the child, although the interests of others should also be considered as relevant. Impact analyses will facilitate the assessment and balancing of competing interests.

When considering decisions that are likely to affect a child or children considerably, decision makers should always systematically attempt to assess and evaluate the consequences of the proposed action. Again, in the second stage of the process as in the first, it is important that children be heard whenever possible, and that their opinions be sought before the final decision is taken.

The purpose, of course, is to encourage decision makers to give serious consideration to possible consequences for children before they proceed. They should not only undertake a *child-impact assessment* before taking a decision; they should also eventually be able to show that they have done so. In other words, they must be able to show that they have indeed considered how children would be affected. This means, in effect, that the burden of proof will be placed on those who move against children's interests. One outcome might be that a search for alternatives to the original proposal will be encouraged when it is made clear that the impact on children was – or is likely to be – unfavourable.

Such a serious process is what the Committee on the Rights of the Child has asked for. In its General Comment No. 5 (CRC/GC/2003/5 paras.45-47) it states that the best interests principle 'requires active measures throughout Government, parliament and the judiciary.'

'Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children'.

The Committee goes on to demand a continuous process of child impact assessments and child impact evaluations. The first is defined as predicting the impact of any proposed law, policy or budgetary allocation; the second as evaluating the actual impact of implementation. The Committee states that the process needs to be built into government at all levels and as early as possible in the development of policy and affirms: 'Self-monitoring and evaluation is an obligation for Governments.'

Progress so far

The Convention's approach to the principle of the best interests of the child represents a major departure from most established routines in national and local politics and administration in all countries of the world. So far, such procedures have only been established in situations related to the previous, more limited, definition of the best interests principle, for instance, in regard to decisions about custody in divorce cases or sanctions on young law offenders. The broader scope of the principle has very rarely been implemented anywhere.

Some experiments have been made, however. In Norway, there have been attempts to assess the impact of the national budget on children, which could be the first step towards clarifying government accountability in this regard. The Swedish parliament adopted a National Strategy for the Implementation of the Convention on the Rights of the Child, which, inter alia, prescribes that child impact analyses should be included and documented in relevant decision-making. In both countries, efforts are being made to introduce the best interests principle into relevant legislation. The momentum gained has already brought about some changes – for instance, changes in the way the Swedish asylum law has been applied in specific cases.

In Belgium, the Flemish Parliament has passed legislation requiring that ‘all proposed decrees when laid before the Flemish Parliament shall be accompanied by a report on their impact on children, to the extent that the proposed decision directly affects the rights of the child’. In Scotland a system for ‘child-proofing’ policy proposals and new legislation is being developed.

In local politics, the problems tend to be specific, which may make it easier to consider a child dimension. In the United Kingdom, many local Councils have adopted the Convention on the Rights of the Child to guide their activities. This is an interesting first step and would, if pursued, mean that a child-impact analysis would generally be undertaken before decisions are made on such matters as school policy, social security, local policing, city planning and environmental protection – not to mention the local budget itself.

The intention is not to introduce new bureaucratic elements into child-related decisions for the sake of form; rather it is to compensate for the fact that children have little political power, even indirectly through parents or other representatives. The new procedures may be seen as an unusual display of adult ‘self-discipline’ to force our decision-making systems to take steps to bridge that gap. The procedures clearly require discussions on methodology in order to be made ‘real’. But if consciously used, they may one day contribute to what is really intended: a genuine attitudinal change leading to children being fully respected as human beings endowed with rights.

CONCLUSION

The Convention on the Rights of the Child has a progressive approach to the ‘best interests’ of the child. It deals with the concept as a general principle and an umbrella provision for the whole Convention. The definition of what is indeed in the best interests of the child is rooted in the substantive articles of the Convention itself.

However, the Convention does not give precise norms on how the best interests should be assessed – that would not have been possible. Instead the principle should be understood to define a procedural requirement: that decision-makers examine before decisions are taken which affect a child or a group of children whether the proposed solution is consistent with the best interests of the child or the children.

In any assessment of what is best for the child, it is essential that the child herself or himself be allowed to express an opinion and that that opinion is taken seriously. When interests clash, it is of course also necessary to consider other interests than those of the individual child or children as a group, as may be relevant. Such assessments and the balancing between the various interests will be facilitated by impact analyses. The consequences of proposed actions should be analysed and evaluated.

The intention of this process is to encourage decision makers to consider the child dimension seriously and routinely – *before* decisions are taken. They should not only undertake an assessment; they should also be able to demonstrate that they have done so. All this should be seen as an obligation dictated by the Convention.

The next step in this evolution of the ‘best interests’ approach is to develop models for how impact assessments and evaluations could be designed. When and how should they be carried out? What areas should be given first priority? How should these analyses be linked to ordinary political processes? What kinds of questions should be asked – and to whom? What training needs to be provided to decision makers and others in order to make all this meaningful?

These are urgent questions as children cannot wait too long. To quote Janusz Korczak once again:

‘Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they were meant to be – the unknown person inside each of them is our hope for the future.’

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