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Critical Analysis of the Best Interest of Child Theory

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ABSTRACT

The idea of the Best Interests of the Child is a novel term adopted by the United Nations Convention on the Rights of the Child. It is a fundamental component of the Convention and has been established as one of the Convention's four general principles by the Committee on the Rights of the Child. The issues and instances which are not mentioned in the Convention are also focussed on and are considered by the best interests principle. If a specific issue is not dealt with by the Convention, the principle of best interests should be considered for guidance. The goal of this paper is to define the term "best interests of the child". It is claimed that its application has always muddled instead of helped discourse on child care and family work, raising the misconception that "the best interests of the child" are obvious facts. This paper addresses using the "best interests of the child" as a driving philosophy when making decisions. The widely held belief is that the theory requires decision-makers to achieve the best result for the children involved, but that this must be balanced against other concerns. As a result, the mechanism is very wide. This theory's implementation has been criticised for undermining legal protections for children and parents and culminating in unreasonable and irrational actions. The paper contributes significantly to this explanatory debate through the use of a theoretical and literal overview of the theory, as well as its relationship to other articles of the Convention and brings out the various drawbacks of the UN CRC and provides suggestions on how these difficult situations can be prevented.

Keywords: *Child welfare, CWC, CRC, Juvenile Justice.*

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I. INTRODUCTION

Children are needed to be protected against exploitation, abuse, brutality, and abandonment as these practices impact the mental health of the children. The principle of the best interest of the child was introduced by the UN Convention on the Rights of the Child³⁴ and is mentioned in the Article 3(1)⁵ of the UN CRC. Article 3(1) states that- “*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.*” The decision makers take decisions which they think are in the best interest of the child after weighing all the possible outcomes. The Convention is an instrument of the UN which was setup to protect the rights of minors. The framing of CRC was considered as an important and groundbreaking enhancement over the previous UN instruments.⁶ The provisions of the CRC are to be enforced as a legal requirement once it is adopted by the State. The best interests of the child are governed according to the CRC. The idea of the Best Interests of the Child is a novel term adopted by the United Nations Convention on the Rights of the Child. It is a fundamental component of the Convention and has been established as one of the Convention's four general principles by the Committee on the Rights of the Child. The issues and instances which are not mentioned in the Convention are also focussed on and are considered by the best interests principle. If a specific issue is not dealt with by the Convention, the principle of best interests should be considered for guidance. In case, various rights collide, the decision should be taken considering the best interest of a minor. Juvenile justice is considered to be an important part of the rights of the children by the Convention and defines acceptable requirements in the area of juvenile justice.⁷ According to Article 43⁸ of the CRC, a Committee on the Rights of the Child is arranged by the UN which guarantees that minors have access to their civil rights and flourish in peace, security, and justice. Article 43⁹ also dictates the structure and operation of the committee.

Custody of the child is amongst the most important additional complications arising in court as partners file a suit. In all marriage statutes, regulations are in place to issue temporary orders affecting the guardianship, education and preservation of children when marriage hearings are

³ Hereinafter referred to as CRC.

⁴ United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.C. 3.

⁵ *id.*, art. 3(1).

⁶ Jean Zermatten, *The Best Interests of the Child Principle: Literal Analysis and Function*, 18 Int'l J. Child. Rts. 483, 483 (2010).

⁷ Khatia Shekiladze, *The Substance of the Best Interests of the Child*, 2 J. Law 205, 208 (2016).

⁸ *Supra* note 4, at 1, art. 43.

⁹ *id.*

ongoing in court.¹⁰ The Guardians and Wards Act, 1890¹¹ is one such statute dealing with the appointment of guardians and issues relating to the same. Another such act dealing with the custody of children and guardianship of minors is the Hindu Minority and Guardianship Act, 1956¹². Section 13¹³ of this Act states that welfare of the child is of supreme importance and different circumstances are to be considered before making a decision.

II. THE CONCEPT AND ANALYSIS OF THE THEORY

The principle of the best interest of the child does not contain any rules or duties which have to be followed. It just states that “*The best interests of the child shall be a primary consideration*”. This principle considers all the impacts a decision will have on the child and will be applied whenever a decision that concerns a child has to be made. The decisions are made on the behalf of the child in his best interest only when a child is not capable of judging what’s best for him/her. The guardian cannot claim custody of the child just because he/she has a legal right, it should also be in the best interest of the child.¹⁴ The best interests of the child are not known by anyone and are estimated by the decision-maker assigned for the purpose.¹⁵ The “best interests of the child” is a basic moral theory designed to restrict the scope of adult jurisdiction over children. The approach is built on an understanding that an adult should only make choices on behalf of children due to the children's lack of understanding and reasoning. Various people of the family are involved in the process of custody evaluation and miscommunication or misunderstandings between these people can interrupt the whole procedure. This process can also place the child in a very difficult situation when asked for his/her preference. This theory stems from the Welfare Framework (or Protective Framework) that emerged at the turn of the twentieth century and has been modified by the UN CRC into a law that can be used to decide if a State, via its judgement, operated correspondingly and reasonably when evaluating the child's best interests.¹⁶ This, in particular, puts focus on the child's ability to express herself or himself freely and to have their desires noticed and addressed, as was done in the case of the *State of U.P. and Ors. v. Rudra Pratap Pandey*¹⁷. The theory of the child's best interests is a basic theory that must be

¹⁰ KUMUD DESAI, INDIAN LAW OF MARRIAGE AND DIVORCE 187 (10 ed., LexisNexis 2017).

¹¹ The Guardians and Wards Act, No. 8 of 1890.

¹² The Hindu Minority and Guardianship Act, No. 32 of 1956.

¹³ *id.*, § 13.

¹⁴ Tarun Ranjan Majumdar and Anr. v. Siddhartha Datta, AIR 1991 Calcutta 76.

¹⁵ *Supra* note 6, at 1.

¹⁶ Beth K. Clark, *Acting in the Best Interest of the Child: Essential Components of a Child Custody Evaluation*, 29 Fam. L. Q. 19, 19 (1995).

¹⁷ *State of U.P. and Ors. v. Rudra Pratap Pandey*, (2010) 1 All JL 349.

implemented in all actions relevant to the Convention's enforcement. It must, however, be enforced in a precise way where an anomaly to a recognised right is required, such as when modifying alleged "natural" relationships amongst children and their families. When separating or terminating these relations, the judgement to separate a child from their residence and/or family still must adhere to this theory. In these situations, the child's private interests must take precedence over the interests of the parents and the State¹⁸.

The theory of the best interests of the child has 2 major functions¹⁹:

(A) The role of control

The best interests of the child theory is used in this criteria to ensure that children's privileges and responsibilities have been allowed and upheld. This monitoring principle is only used in family law, child welfare programmes, alternative care circumstances, and relocation cases. It is important to decide whether the best interest concern has been weighed in each of these cases or outcomes.

(B) The role of solution

In this category, the definition of the child's best interests will aid in making the right decision in situations involving minors. While making this type of choice, the decision-maker must explore options that have the most favourable, or least adverse effect on the children in concern. In the vast amount of situations there will be a number of options. The remedy should then be preferred because it is in the "best interests of the child." This is an important feature in evaluation because it serves as a link between the theoretical principle and its immediate implementation in practice.

III. LEGAL FRAMEWORK

(A) The Juvenile Justice (Care and Protection of Children) Act, 2015

The act of 2000 was substituted with the 2015²⁰ act after being approved on December 31, 2015. The government released the Model Rules, 2016, in September 2016, outlining some of the processes for putting the Act into effect. This act helps the children who need support and safety.²¹ The law was passed to strengthen and modify the law pertaining to minors suspected in violation of the law, as well as children in need of support and assistance, by meeting their

¹⁸ Tejaswini Gaud and Ors. v. Shekhar Jagdish Prasad Tewari and Ors., AIR 2019 SC 2318.

¹⁹ *Supra* note 6, at 1.

²⁰ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016.

²¹ Asha Bajpai, *The Juvenile Justice (Care and Protection of Children) Act, 2015*, 2 Indian L. Rev. 191, 194 (2018).

essential requirements by adequate care, security, recovery, and psychosocial support, as well as by pursuing a child-friendly method in the legal ruling and dismissal of subjects in the best interests of children. The Child Welfare Committees²² are required to be formed in all the regions and should comprise “a chairperson and four other members who have experience in dealing with children. One of the four members must be a woman.”²³ According to section 29(1) of this Act, the CWCs “shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.”²⁴ The CWCs' roles and duties are outlined in Section 30²⁵ of the Act. One of the significant purposes is to make a move in case of the rehabilitative care of children who have been sexually assaulted and have been referred by the Special Juvenile Police Unit (SJPU), or the municipal police to the CWC. The government also started the Integrated Child Protection Scheme in the year 2009, which is “a centrally sponsored scheme aimed at building a protective environment for children in difficult circumstances, as well as other vulnerable children, through Government-Civil Society Partnership.”²⁶ According to Article 40 of UN CRC “children accused of, or recognised as having committed an offence have the right to respect for their human rights and in particular to benefit from all aspects of the due process of law, including legal or other assistance in preparing and presenting their defence. States have an obligation to promote alternative procedures and measures so as to ensure that recourse to judicial proceedings and institutional placements can be avoided wherever possible and appropriate.”²⁷

(B) The Commissions for Protection of Child Rights (CPCR) Act, 2005

The CPCR Act, 2005²⁸ authorises the central and state governments to establish their commissions, accordingly. These Commissions are tasked with investigating allegations of violations of rights of children by the State or private citizens or agencies. Their role also involves monitoring children's custodial facilities, investigating conditions that impair children's possession of rights and reviewing legislation to determine conformity with the UN CRC and proposing corrective steps. The Commission is also intended to act as a platform for children where they can conveniently gain admission or approach in order to obtain remedies

²² Hereinafter referred to as CWCs.

²³ ASHA BAJPAI, *CHILD RIGHTS IN INDIA* 195 (3 ed. Oxford University Press 2018).

²⁴ *Supra* note 20, at 4, §29, cl. 1.

²⁵ *Supra* note 20, at 4, §30.

²⁶ Vibha Sharma, *Exploratory Study of Integrated Child Protection Scheme in Haryana*, 2 *IJELLH* 316 (2014).

²⁷ *Supra* note 4, at 1, art. 40.

²⁸ The Commissions for Protection of Child Rights Act, 2005, No. 4 of 2006.

for infringement of their rights. Article 4²⁹ of the UN CRC instructs States Parties to take effective constitutional, institutional, and other steps to enforce the rights enshrined in the Convention. Based on annual documents presented by national governments, the UN CRC oversees the treaty's compliance at the international level. In its final document, this Committee proposed that India create a statutory, autonomous Commission for Children to oversee the enforcement of the Convention and investigate allegations of child rights abuses in reaction to the first India Country report presented by the Indian government in 1997.

(C) The Hindu Minority and Guardianship Act, 1956

The Hindu Minority and Guardianship Act of 1956³⁰, which recognized women's progress in all realms, granted them the freedom to be named as guardians. “The custody of a child aged less than five years should usually be given to the mother unless the father proves that it would not be in the welfare of the child. This burden of proving mother as not fit for the custody of the child remains with the father. Court is not bound to give custody of a child of less than five years to the mother if it is proven that doing so would not be in the interests of the child” according to the judgement in the case of *Roxann Sharma v. Arun Sharma*³¹. It also rendered the minor's wellbeing the most important factor in choosing a guardian which is mentioned in the section 13³² of the Act. It was also stated in the case of *Saraswatibai Shripad Ved v. Shripad Vasanji Ved*³³ that “it is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration”.

(D) The Guardians and Wards Act, 1890

The Guardians and Wards Act of 1890³⁴ is a detailed piece of regulation that deals with the selection of an individual as a guardian of a child, both for the person and for their belongings. The Act allows anybody to appeal to be considered as a guardian for a child. It also allows for the creation of joint guardians for the child's person as well as property. Section 17³⁵ of this Act, which is a central clause governing the selection of a guardian, states that a court must be directed as to what seems to be in the best interests of the child in each situation. It was held in the case of *Nil Ratan Kundu v. Abhijit Kundu*³⁶ that “the opinions of the child would be of

²⁹ *Supra* note 4, at 1, art. 4.

³⁰ *Supra* note 12, at 2.

³¹ *Roxann Sharma v. Arun Sharma*, 2015 8 SCC 318.

³² *Supra* note 12, at 2.

³³ *Saraswatibai Shripad Ved v. Shripad Vasanji Ved*, AIR 1941 Bom 103.

³⁴ *Supra* note 11, at 2.

³⁵ *id.*, § 17.

³⁶ *Nil Ratan Kundu & Anr v. Abhijit Kundu*, (2008) 9 SCC 413.

critical significance to the judgement, depending on his or her maturity level but the final judgement lies with the court". This Act governs the eligibility, selection, and dismissal of guardians by the courts and applies to all children, regardless of religion. When it comes to separation, there is some disagreement as to who the child can live with. If a parent has failed to take care of the child and living with the other parent is in the best interest of the child, the custody can be given to that parent as stated in the case of *Jijabai Vithalrao Gajre v. Pathankhan*³⁷. The child's wishes are the priority of the court; there may be pressures on the children because of their age, and so following the parties' pleadings, the court reaches a decision in which the court guarantees the child's safety.

IV. DRAWBACKS AND WEAKNESSES OF THE CRC

The CRC is an UN instrument which was setup to protect the rights of the children. The framing of CRC was considered as an important and groundbreaking enhancement over the previous UN instruments. The provisions of the CRC are to be enforced as a legal requirement once it is adopted by the State. According to Article 43³⁸ of the CRC, a Committee on the Rights of the Child is arranged by the UN. A report to this committee has to be submitted by the government disclosing the steps taken and results achieved in promoting child rights in respective countries. The states have to submit a report in two years of the ratification of the Convention and then in every five years. But many states have failed in submitting the reports and some states submit false reports to the committee containing insufficient information.³⁹ The most significant disadvantage to current CWC processes is the discontinuity of parent-child interaction even though there is no obvious violence or negligence or a direct danger to the child's safety. Furthermore, rather than an actual increase in protections, the CWC process results in a rollback of children's rights. For example, when children were formerly being provided with education prior to entry to the Children's Home, institutionalisation culminated in discontinuation of schooling, a serious issue since if a child is withdrawn from schooling, re - admission and maintaining education become a difficult challenge for parents from poorer backgrounds. Secondly, parents from lower-income families were being held accountable often for being disadvantaged. The issue in the case of *Surabhai Ravikumar Minawala v. State of Gujarat*⁴⁰ was the parties' monetary condition and it was held that "no amount of wealth and mother-like-love can take the place of mother's

³⁷ *Jijabai Vithalrao Gajre v. Pathankhan*, 1971 AIR 315.

³⁸ *Supra* note 4, at 1, art. 43.

³⁹ Abhinaya Ramesh, *UN Convention on Rights of the Child: Inherent Weaknesses*, 36 Econ. Polit. Wkly. 1948, 1948 (2001).

⁴⁰ *Surabhai Ravikumar Minawala v. State of Gujarat*, AIR 2005 Guj 149.

care and love for the child". The researchers believe that the criteria for determining "neglect," or "inability to care for the child," are often removed from the actual challenges that these parents encounter. On a functional scale, the incorporation of programmes that will improve the standard of living for families is vital to the child's well-being. It is also important that, before finding dysfunctional homes unfit due to neglect, efforts to improve the parents' conditions should be pursued before the child is split from the family members.

V. CONCLUSION AND RECOMMENDATIONS

Based on the preceding discussion, it is clear that the concept of the child's best interests is one of the most relevant provisions of the CRC. It's also one of the trickiest to describe. In practise, however, it is difficult to communicate with the CRC without a strong understanding of this theory of interpretation or code of protocol, or to necessarily assume that someone is doing what's best for the minor. Children have requirements and privileges that are separate from those of adults. It is important to make sure that the particular needs, capacities, and rights of children of all ages and cultures are interpreted, recognised, and addressed. CRC does not clearly specify how a decision-maker must act in deciding the best interests of the child. But one thing is certain. The decision-maker owes it to the child to listen whether she or he is worthy of shaping and expressing her or his own opinions on issues that concern her or him. This is a requirement for the decision-maker. As previously said, the child's viewpoints are unlikely to be the only conflicting elements at stake when determining the child's best interests. Nonetheless, they play a crucial role in making the final decision. The opinions of the child would be of critical significance to the judgement, depending on his or her maturity level.

Nonetheless, difficult situations will continue to occur under current requirements, owing to system delays. The key to preventing these incidents is not to abandon existing practises, but to reconsider the context under which these incidents occur. To begin, it must be understood that litigation is a lose-lose situation. Substitutes to full-fledged legal battles must be promoted so that those with an engagement in and experience of children can be helped in making child-centered decisions. Secondly, more adaptable ways of identifying and preserving families must be created, both within and outside of court. Third, adoption legislation should be drafted for minors rather than adults. These provisions could promote rational decision - making on the parts of both biological parents and adoptive families, offer exposure to and sufficient support for families interested in adopting the millions of foster kids who need families, and provide structures for adults to develop and implement mutual adoptions in which a child's existing and growing needs can be met with the help of all adults in the adoption. Finally, even when legal

cases are needed, the setbacks must be minimised. Children must be recognised as complete and individual entities that enter this universe with a specific collection of meaningful relations and will keep creating relations in their life. Adoption could only be turned into a genuinely flexible and child-centered approach when we understand that children are worthy of and strengthened by forming and sustaining various relations.
