

THE BEST INTEREST PRINCIPLE WITHIN ARTICLE 3(1) OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Mary George
Noor Aziah Mohd Awal

ABSTRACT

The 'best interest' principle is prevalent in medical law, family law and is used in the United Nations Convention on the Rights of the Child (CRC) in relation to the child. The CRC is an international treaty on child rights which has close to universal ratification. Article 3(1) of the CRC is one of the four foundational principles within the CRC, alongside Articles 2, 6 and 12. This paper focuses on Article 3(1) of the CRC which 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 best interest principle has often been criticised as being vague, indeterminate and subjective. These observations have warranted the need to analyse Article 3(1) of the CRC. This paper looks into the 'weightage' of best interests of the child within Article 3(1) and further considers the usefulness of having a 'check-list' of factors in facilitating the 'finding' of the child's best interests. The varied approaches among States Parties to issues involving the custody of children in family matters, immigration and deportation of families with children, child marriage and corporal punishment demonstrate that what is in the best interests of the child is a value-laden, subjective concept which reflects different cultural perspectives and contexts. However, where there is a violation of the child's rights within the CRC, this is interpreted by the United Nations Committee on the Rights of the Child as not being in the child's best interests. The paper concludes that while there may be diverse opinions among States Parties about what lies in the child's best interests, the rights embedded within the CRC itself provide a cohesive structural framework to Article 3(1) and guide the way towards an outcome which is deemed to be in the child's best interest.

Keywords: Best Interests, a Primary Consideration, Indeterminacy, Child Rights

INTRODUCTION

The 'best interest' principle is prevalent in medical law, family law and is used in the United Nations Convention on the Rights of the Child (CRC) in relation to the child. The CRC is an international treaty on child rights with close to universal ratification (Detrick, 1999, p. 1). Article 1 of the CRC states that a child is below the age of eighteen unless the age of majority is acquired earlier. The CRC covers civil, political, economic, social and cultural rights and stresses the indivisibility and importance of all rights (Detrick, 1999, p. 27). The CRC was created with the best interests of the child in mind. Article 3(1) of the CRC reads as follows:

...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 of the CRC is one of the four foundational principles within the CRC. Other Articles which utilise the phrase 'best interests' are Articles 9, 10, 18, 20, 21, 37 and 40, with Article 21 of the CRC stating that in adoption issues, the best interests of the child is of paramount consideration. This paper focuses on Article 3(1) of the CRC. Even before the inception of Article 3(1) of the CRC, several versions of the best interest principle had been in use in multiple jurisdictions in domestic law and has often been criticised and labelled as being vague and indeterminate (Mnookin, 1975, p. 229). After more than four decades, the best interest principle is still said to be vague (Kilkelly, 2016, p. 83). Fortin points out that, "...family lawyers, have for years debated the utility of the 'best interests' or 'welfare principle', with its extreme indeterminacy being a constant source of criticism" (Fortin, 2011, p. 957). Two further problems with the best interest principle are the subjective nature of the principle (Eekelaar, 1991) and the determination of 'best interests' normally being in the hands of the parents of the child (Freeman, 2007). The 2018 Revision of the United Nations Refugee Agency's (UNHCR) 'Guidelines for Determining the Best Interests of the Child' highlights the need for precision of the understanding of the principle in theory and in practice (UNHCR, 2018). The best interest principle in general, and within Article 3(1) of the CRC, in particular, has attracted criticism that the principle itself is vague and indeterminate thereby giving rise to the need to examine the content and context of Article 3(1). This paper does not attempt to look into the detailed operationalisation of Article 3. This paper analyses whether the right 'weightage' was accorded to the best interest principle within Article 3(1) of the CRC and whether the principle benefits from reliance on a best-interest 'check-list'. This paper further examines some of the problems associated with the subjectivity involved in the process of determining what lies in the 'best interests' of the child.

In seeking to evaluate the issues raised above, this paper adopted traditional legal research methods which involve the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships (Pearce, 1987, paras 9.10 - 9.15). This is often referred to as the doctrinal approach to legal research (McConville, 2017). The methods of doctrinal research are characterised by the study of legal texts and, for this reason, it is often described colloquially as 'black-letter law' (Chynoweth, 2008, p. 29).

The following section of the paper examines the subtleties and complexities of the phrase 'best interests' of the child. Subsequently, the paper considers the weightage accorded to 'best interests' of the child within Article 3(1) of the CRC. The

paper then explores the challenges in determining what exactly is in the best interest of the child and whether the use of a 'check-list' would aid in developing an enhanced understanding of what lies in the child's best interests. The paper subsequently examines the subjective determination of what lies in the best interest of the child with regard to the issues involving children. The issue of corporal punishment and the stance of the CRC and the United Nations Committee on the Rights of the Child (the Committee) on this issue is also examined. Conclusions drawn from the discussion of the phrase 'best interests' of the child are considered at the end of the paper.

THE BEST INTERESTS OF THE CHILD

Article 3(1) has been described as an umbrella provision which prescribes the approach to be followed, "...in all actions concerning children" (Detrick, 1999, p.92). However, Article 3(1) has been said to be more than an umbrella provision as it is an aid to construction, a mediating principle that can aid in resolving conflicts between rights and an evaluative principle (Alston and Gilmour-Walsh, 1996, p. 37). The Committee has interpreted Article 3(1) of the CRC as a substantive right, a fundamental interpretative legal principle and a rule of procedure (United Nations Committee on the Rights of the Child, 2013, para 46). Article 3(1) of the CRC sits alongside three other key foundational provisions in the CRC namely Article 2 (the right to non-discrimination), Article 6 (the right to life, survival and development) and Article 12 (the right to participation). Article 3 states that the best interest principle is to be applied in all actions concerning children and thus it has a very wide reach (Alston & Gilmour-Walsh, 1996, p.9). Despite the inconsistencies in the language, the drafting history and intentions of the drafters suggest that Article 3 should apply to private and public bodies and persons (Alston and Gilmour-Walsh, 1996, p.10). Hammarberg suggests that, "...the primary focus of the Convention is the best interests of the child" (1990, p. 99). The phrase 'best interests' is undefined in the CRC. The meaning ascribed to the phrase best interests is 'well-being' which is used in Article 3(2) of the CRC. The word 'welfare' is also another word that can describe interests. In referring to the word 'welfare' in Section 1(1) of the *Children Act 1989*, Munby L.J in *Re G (children) (Education: Religious upbringing)* [2012] EWCA Civ. 1233 stated that:

... 'welfare', which in this context is synonymous with 'well-being' and 'interests'...extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. ([2012] EWCA Civ. 1233 at para 26).

However, Alston points out that there might be a difference between best interests and 'welfare', where, in interpreting 'best interests', "...it is appropriate to place some emphasis on the term 'best' so as to exclude other factors which could arguably be in the child's overall interests but not his or her 'best' interests" (Alston, 1994, p.11).

Another aspect that should be looked into is the weightage given to this principle in Article 3 namely 'the best interests of the child shall be a primary consideration'.

Article 3(1) uses the phrase 'a' primary consideration and not 'the' primary consideration which is considered as significant as, "...the term 'a' suggests that the best interest of the child are to be considered but that a number of other factors can also be considered. On the other hand, the term 'the' suggests that the best interests principle should be the overriding factor" (Alston and Gilmour-Walsh, 1996, p.11). The use of the word 'primary' suggests that the best interests of the child should be an important factor, but not the only factor (Alston and Gilmour-Walsh, 1996).

Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* also pointed out the distinctions in language used in Article 3(1) of the CRC where 'a' primary and not 'the' primary consideration was utilised (2 All ER at p.795 para 25(f)). Lady Hale interpreted primary consideration to mean that the best interests of the child "...must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations" (2 All ER at p. 798 para 33(e)). However, Fortin is of the view that these distinctions between the use of the words 'a' primary and 'the' primary consideration, "...are subtle and may be difficult to maintain" (Fortin, 2011, p. 956).

Alston reviews the word 'consideration' and states that it, "...has the same meaning as 'element' or 'factor.' It also has the additional significance of emphasizing that the child's best interests must actually be considered. There should be genuine consideration of the child's interests ,ensuring that all aspects of the child's best interests are factored into the equation rather than a mere token gesture of such consideration (Alston, 1994, p. 13).

ARTICLE 3(1): FROM PRIMARY TO PARAMOUNT CONSIDERATION?

Article 3(1) utilises the concept of primary consideration and not 'the higher standard' (Van Bueren, 2007, p. 32), of paramount consideration. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 All ER 783, Lady Hale contrasted 'primary consideration' with the formulation of 'paramount consideration' which is utilised in England and Wales in section 1(1) of the *Children Act 1989* (2 All ER pp 794-797).

Section 1(1) of the *Children Act 1989*, uses the language of paramountcy of the child's welfare:

When a court determines any question with respect to – (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration (Section 1(1) of the *Children Act 1989*).

Paramount consideration has been accepted as involving:

...a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood (per Lord Mac Dermott in *J v C* [1970] AC 668 at pp 710-711).

This passage has been accepted as reflecting the standard to be used in section 1 of the *Children Act 1989 (Re O and another (children) (non-accidental injury); Re B (children) (non-accidental injury)* [2003] 2 All ER 305 per Lord Nicholls at p. 312).

The paramountcy construct appears to be giving greater concern to the child's interest. This elevation of prioritization of the child's interests may then require the decision-makers to give greater attention to the child's welfare. However, the paramountcy principle itself is not without criticism as there are questions about whether it is human-rights compliant (Herring, 1999). Reece suggests that the, "...paramountcy principle must be abandoned and replaced within a framework which recognises that the child is merely one participant in a process in which the interest of all the participants count" (Reece, 1996, p.303). The House of Lords stated that the principle was compatible with the European Convention of Human Rights (*Re L (A Child) (Contact: Domestic Violence)* [2001] Fam 260 per Butler-Sloss at p. 277).

The Committee has defended the use of the phrase 'primary consideration' within Article 3(1) of the CRC noting:

The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.)... If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best (United Nations Committee on the Rights of the Child, 2013, para 39).

It is submitted that the introduction of the phrase 'paramount' into Article 3(1) would have introduced the issue of disproportionality of interests and rights within the CRC. This might have been problematic within Article 3 itself, owing to the existence of Articles 3(2) and 3(3), which clearly take into account the rights and duties and responsibilities of other parties. Article 3(2) and Article 3(3) of the CRC reads as follows:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (Article 3(2) CRC).
States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision (Article 3(3) CRC).

Article 3(1) sits within the CRC and is broad in context and concept. There are many co-existing principles and rights within the CRC itself that should be given due regard, including Articles 2, 6, 12 of the CRC and the newly emerging concept of the 'evolving capacities' of the child within Article 5 of the CRC. The CRC grants children entitlements in relation to the "three P's"- protection, provision and participation but these entitlements, "...have to be interpreted as interdependent and indivisible in the same way as the Convention itself" (Verhellen, 2015, p.50). Thus, the weightage accorded to the best interests of the child within Article 3(1) of the CRC appears to be the correct 'fit' for the CRC as the interest of the child is still accorded priority whilst taking into account many other rights and interests.

BEST INTERESTS CHECK-LIST: DETERMINING WHAT EXACTLY IS IN THE BEST INTEREST OF THE CHILD

Moving past the language used in Article 3(1), "...it is how those interests are determined that remains the principal dilemma in the application of the principle" (Alston and Gilmour-Walsh, 1994, p.11). As noted earlier, the oft-cited criticism of Article 3(1) is its indeterminacy or open-endedness (Alston and Gilmour-Walsh, 1994, p.15). The deficiency in the principle is that, "...what is best for any child or even children in general is often indeterminate and speculative and requires a highly individualized choice between alternatives" (Mnookin and Szwed, 1983, p.8). It has been pointed out that the 'welfare' principle "...conceals the facts that the interests of others, or, perhaps, untested assumptions about what is good for children actually drive the decisions" (Eekelaar, 2002, p. 237).

The next issue that is considered is whether the indeterminacy of Article 3 (1) can be reduced by the introduction of a best-interests or welfare check-list of factors which the decision-maker can refer to as a guide to help determine what lies in the best interest of the child.

Article 3(1) of the CRC works within a broad context. The Committee has provided guidelines for the assessment of best interests which could serve as a check-list of factors. The factors drawn up by the Committee include taking into account the child's views, the importance of the child's identity and the preservation of family relations, upholding the care, protection and safety of the child, and bearing in mind certain vulnerabilities of the child such as disability, homelessness or being a refugee, the child's right to health and education (United Nations Committee on the Rights of the Child, 2013). The well-being of the

child is determined by a variety of individual circumstances, such as, "...the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences" (UNHCR, 2018, p. 14). The onus appears to be on the State Parties to draw up a comprehensive list of factors that perhaps mirror the views of the Committee and the rights within the CRC itself.

In England and Wales, in coming to a decision that promotes the welfare of the child, judges are guided by a check-list of factors within section 1(3) of the *Children Act 1989*, which have to be taken into account by the judge in certain matters pertaining to contested child care and other matters involving the child as stated in s1(4). Section 1(1) of the *Children Act 1989* is also supported by other principles including the principle that delay is deemed prejudicial to the welfare of the child and the assumption within s1(2A) that parental involvement in the life of a child will enhance the child's welfare. The welfare checklist in section 1(3) (a)-(g) directs the adjudicator to take note of the following factors:

- a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- b) his physical, emotional and educational needs;
- c) the likely effect on him of any change in his circumstances;
- d) his age, sex, background and any characteristics of his which the court considers relevant;
- e) any harm which he has suffered or is at risk of suffering;
- f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- g) the range of powers available to the court under this Act in the proceedings in question.
- h) Further the mandated application of the factors is limited to matters such as contested applications relating to the care and upbringing of the child but it is a beneficial starting point .

A check-list such as the one in section 1 of the *Children Act 1989* obliges the adjudicators to take note of certain issues impacting the child's life .However the ambit of factors within section1(3) can be perceived as being narrow. Further the mandated application of the factors is limited to matters such as contested applications relating to the care and upbringing of the child, but it is a beneficial starting point.

However, a 'one-size-fits-all' check-list may not be the solution as the evaluation of what lies in the best interests of the child is sometimes complicated and involves the need for specialist knowledge and expertise. Thus, "...there are numerous dimensions in relation to a child's best interest that a decision-maker can (and must) consider, including expert knowledge about nutrition, attachment, education, brain development and the normative and cultural values for a good and meaningful life" (Skivenes and Sørdsdal, 2018, p. 60).

A check-list does not do away with all the problems of subjectivity of decision-making. One blatant issue is the nature of the power granted to the decision makers. As pointed out by Eekelaar:

...the heavily subjective nature of the power granted to the judge means that, so long as he or she does not claim to be applying it as a conclusive rule of law, a judge can consider almost any factor which could possibly have a bearing on a child's welfare and assign to it whatever weight he or she chooses (Eekelaar, 1991, p. 248).

The Committee has also cautioned against the use of overly 'adult views' being used to side line the child and the child's views. The Committee stressed that, "...an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention" (United Nations Committee on the Rights of the Child, 2013, para 4). The principle has also been said to provide, "... a convenient cloak for bias, paternalism and capricious decision making" (Parker, 1994, p. 26). However, this does not detract from the usefulness of such a check-list which serves as guidance to the courts and other decision-makers. The Committee itself has pointed to the usefulness of such a, "...non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests... The list should provide concrete guidance, yet flexibility (United Nations Committee on the Rights of the Child, 2013, para. 50). The design and formulation may work well within the domestic frame-work as, "...drawing up such a list of elements would provide guidance for the State or decision maker in regulating specific areas affecting children" (United Nations Committee on the Rights of the Child, 2013, para. 51).

THE 'BEST INTERESTS' OF THE CHILD: FOCUS ON CORPORAL PUNISHMENT

Deciding what is in the best interest of the child, "...poses a question no less ultimate than the purposes and values of life itself" (Mnookin, 1975, p. 260). Where different values, perspectives, views, cultures and religions exist, the determination of what lies in the best interest of the child will be determined differently across States Parties. States Parties may incorporate best interests check-lists into their domestic law, some States Parties may elevate the best interest of the child from being the primary consideration to being the paramount consideration – but the varied approaches among States Parties to issues involving custody of children in family matters, immigration and deportation of families with children and corporal punishment demonstrate that what is in the best interests of the child is a value-laden, subjective concept. The practice of female circumcision and child marriages in certain communities could be defended or condemned using the principle of best interest. (Alston and Gilmour-Walsh, 1996, p.18) The notion of what is in the best interest of the child incorporates issues of custom, culture, religion and practice. Thus, as suggested by Alston, "...the best interests principle clearly has considerable potential to be invoked in defence of cultural practices which are incompatible with children's rights norms" (1994 p.20-21).

The issue of corporal punishment is a controversial issue. States Parties may be firm in their stance that disciplining the child is the right of the parent; that punishment of the child who has violated the tenets of the criminal justice system is justifiable and that it is in the best interest of the child to be punished in the manner prescribed by the domestic law. The disciplining and punishment of children in institutions and within families may trespass into the terrain of what is labelled as 'corporal punishment'.

Corporal punishment or physical punishment has been defined by the Committee as:

... any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light...In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child (United Nations Committee on the Rights of the Child, 2006, para 11).

A reading of Articles 19(1) Article 37 and Article 28(2) shows that the CRC prohibits corporal punishment:

Art. 19(1): States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child....

Art. 37: States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age....

Art. 28(2): States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

The Committee has clearly recommended that corporal punishment should be abolished in families, schools and other institutions. The Committee has stated their view that the domestic laws of States Parties, "...must be sufficiently clear that prohibition applies to all corporal punishment in all settings, without exception" (United Nations Committee on the Rights of the Child, 2006, para 11).The Committee had criticised the United Kingdom for its refusal to ban corporal punishment (United Nations Committee on the Rights of the Child, 1995). In response to these criticisms, England and Wales passed laws in the form of section 58 of the *Children Act 2004*. However, these changes appear to suggest a compromise where:

...reasonable chastisement remains a defense only to common assaults on children (in lay language, when a mark is not left), but not to occasioning actual bodily harm. The Committee, unsurprisingly, has condemned this half-way solution. And rightly so: the message it gives to parents is that they may hit their children (Freeman, 2010, p. 218).

Thus, where some States Parties assert that corporal punishment is in the best interest of the child, that assertion would not be supported by the Articles within the CRC. Where disciplining a child amounts to corporal punishment, this would be considered as a violation of the rights within the CRC and accordingly not in the child's best interests (Wolf, 2012, p. 129). The CRC itself is a living, breathing check-list of rights. In the words of the Committee:

"...the ultimate purpose of the child's best interests should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child. Consequently, elements that are contrary to the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children" (United Nations Committee on the Rights of the Child, 2013, para. 51).

The Committee has recognised that while Article 3 has to maintain flexibility, that flexibility can be manipulated by some quarters. Thus, the Committee notes:

...the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant (United Nations Committee on the Rights of the Child, 2013, para. 34).

The Committee has provided invaluable guidance for instance as, "... it recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests" (United Nations Committee on the Rights of the Child, 2013, para 4).

CONCLUSION

The language used in Article 3(1) where it states that the best interests of the child shall be 'a primary consideration' appears to be the right terminology in the context of the CRC. The formulation of check-lists within the domestic law of States Parties would go some way towards countervailing the indeterminacy of the best interest principle, thereby introducing more clarity and objectivity into decision-making processes. Article 3(1) remains vague and indeterminate and problems associated with the application of subjective criteria by the decision-makers may plague the assessment of what is in the best interests of the child.

The issue then is whether the best interest principle in Article 3(1) in its present form is the lesser of all evils as, "...while the indeterminate best interests standard may not be good there is no available alternative that is plainly less detrimental" (Mnookin, 1975, p. 282). However, the advantage of the open-textured nature of Article 3 is that it maintains flexibility. It has been stated that "...since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application (United Nations Committee on the Rights of the Child, 2013, para 39). The Committee has provided guidance for States Parties in matters of determining what lies in the best interest of the child and where there is a violation of the child's rights within the CRC, this is interpreted as not being in the child's best interest. The rights embedded within the CRC itself provide a cohesive structural framework to Article 3(1). While it is true that, "...at a certain level, the debate over the nature of the relationship between international or 'universal' human rights standards and different cultural perspectives and contexts can never be resolved" (Alston, 1994, p.16), it is submitted that the CRC provides a sustainable framework of rights and standards that guide the way towards an outcome which is deemed to be in the child's best interest. Whether States Parties will comply with the rights within the CRC is another issue altogether.

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Mary George
PhD Candidate
Faculty of Law
Universiti Kebangsaan Malaysia
marygeorge13@yahoo.com

Noor Aziah Mohd Awal
Faculty of Law
Universiti Kebangsaan Malaysia
naha@ukm.edu.my