

CHILD RIGHTS



# *The Best Interests of the Child*

TOWARDS A SYNTHESIS OF CHILDREN'S RIGHTS  
AND CULTURAL VALUES

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**Innocenti Studies**



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Philip Alston and Bridget Gilmour-Walsh

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# PREFACE

**T**HIS analysis<sup>\*</sup> deals with the principle, reflected in the Convention on the Rights of the Child (CRC), that the "best interests of the child" should be promoted in all relevant contexts. The phrase appears in a variety of contexts throughout the Convention. In particular, it is used in relation to the separation of the child from the family setting (Article 9); with reference to parental responsibility for the upbringing and development of the child (Article 18); in relation to adoption and comparable practices (Articles 20 and 21); and in the context of the child's involvement with the police and the justice system (Articles 37 and 40).

It is its use in Article 3(1), however, that is the central focus of the present analysis. This article 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.

This provision is of major importance since it is an 'umbrella' provision which prescribes the approach to be followed "in all actions concerning children". It is for this reason that it will often be invoked in conjunction with other articles of the Convention in order to support, justify or clarify a particular approach to issues arising under the Convention. Indeed, there is no article in the Convention, and no right recognized therein, with respect to which this principle is not relevant.

The best interests principle is not new, and its significance has been the subject of many learned analyses in the context of the family law principles in countries such as Canada, France, India, the United Kingdom, the United States and Zimbabwe. Its inclusion in the Convention, however, opens a whole new chapter for the principle and necessitates a very careful analysis of its content and implications. There are three principal reasons why such an analysis is needed. First, the use of the principle in domestic legal systems has generally been confined to the custody arena. Its role in the legal system of one industrialized country is well summarized by Justice Rosalie Silberman Abella of Canada:

In conjunction with changing gender roles, [the best interests principle] pitted biological parents against non-biological parents, parents against grandparents, mothers against surrogate mothers, and parents against child welfare authorities. Because the determination of best interests tends to be less a historical than a prognosticating exercise, and because what is best for the child is often only best understood twenty years after childhood, it is not difficult to see why custodial issues are so controversial (Abella, 1994, p. 542).

In contrast, the principle reflected in the Convention is of far wider applicability than in the custody area alone. Second, the CRC itself, with 186 States Parties as of March 1996, has assumed an importance, both in relation to the world's children and to the overall body of international human rights law, that few observers would have predicted only a decade ago. Third, the growing insistence that children's rights, and indeed human rights in general, be implemented in a culturally sensitive manner inevitably shines a spotlight on the best interests principle because of its capacity to facilitate the reflection of cultural values in CRC-related decision-making.

But the central importance of the best interests principle within the CRC framework does not mean that its interpretation or application is in any way straightforward or uncontroversial. Paradoxically, the stronger the agreement as to its centrality, the greater the diversity of approaches advocated in its application.

The Committee on the Rights of the Child has not hesitated to declare the best interests principle as "the guiding principle" of the entire Convention. This mirrors the almost instinctive appeal that the

<sup>\*</sup> This analysis is largely based upon a book entitled *The Best Interests of the Child: Reconciling Culture and Human Rights*, edited by Philip Alston and published in 1994 by Oxford University Press. Many of the references indicated in the text are to the various chapters of that book, which was the outcome of a project sponsored by the UNICEF International Child Development Centre, in Florence.

principle has in a child rights setting. Indeed it seems to many observers to be little more than a translation into the language of the law of slogans such as "First Call for Children" (UNICEF) or "Children First" (Leach, 1994). But this appeal, and the enthusiasm with which many commentators have greeted the principle's inclusion in the CRC, contrasts strongly with the reservations expressed by others. Some have asked whether the principle retains its original *raison d'être* once children's rights, rather than merely their "interests", have been recognized. Others have suggested that it raises more questions than it answers and could be counter-productive in some respects (Van Bueren, 1995, pp. 48-49).

The most commonly voiced scholarly criticism of the principle is that it is open-ended or indeterminate. In other words, its application in a given situation will not necessarily lead to any particular outcome. The problem is how to identify the criteria that should be used to evaluate alternative options that are open to a decision maker seeking (or purporting) to act in the child's best interests. As expressed by Robert Mnookin:

The choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but they are especially acute in this context because children themselves often cannot speak for their own interests.

... Even if predictions [as to the consequences of policy alternatives] were possible, what set of values should a judge use to determine a child's best interests....[H]e must have some way of deciding what counts as good and what counts as bad (Mnookin, 1985, pp. 17-18).

Linked to this critique of indeterminacy is a feeling that the values employed to give content to the best interests principle have very often been quite inappropriate. As Penelope Leach has noted:

The phrase "in the best interests of the child" can, and often does, reflect a (more or less) benevolent authoritarianism. Outside personal relationships with family, teachers or grown-up friends, the best most children can expect of most adults is patronage (Leach, 1995, p. 208).

Another criticism of the principle has arisen in the context of debates over what is seen as the culturally biased nature of international human rights law and its resulting inappropriateness in some cultural settings (the so-called cultural relativism debate). The best interests principle is seen by some as a potential 'Trojan horse' which will enable cultural considerations to be smuggled into the children's rights domain and will subsequently undermine the basic consensus that the Convention reflects.

All of these issues are analysed in this paper. An emphasis is given to the dilemmas arising in applying the principle in concrete situations involving the treatment of children. The first part explores some historical and current usages of the principle both in domestic and international law. The second part examines the technical meaning of the terms employed in the CRC. The third part explores the problem of indeterminacy, while the fourth and fifth parts consider some practical instances of indeterminacy centring around issues relating to culture and resources. The sixth section considers different ways of overcoming indeterminacy. The seventh examines the principle in relation to the overall debate over cultural relativism, and the final section considers the approach to best interests adopted to date by the Committee on the Rights of the Child.

The analysis concludes that efforts to promote respect for international human rights standards are often likely to remain superficial and ineffectual until such time as they relate directly to, and where possible are promoted through, local cultural, religious and other traditional communities. In this respect, the best interests principle plays an important facilitating role. By the same token, it can never be invoked to override the application of the various substantive rights recognized in the CRC. The analysis notes that the indeterminacy critique helps to explain both the role and the significance of the principle. The Convention as a whole goes a long way towards providing the broad ethical or value framework that is often claimed to be the missing ingredient that would give a greater degree of certainty to the content of the best interests principle. It provides a carefully formulated and balanced statement of values to which States Parties have formally subscribed. The Convention does not seek to provide any definitive statement of how a child's interests would best be served in a given situation. Any such pretension would be misplaced, since no general rules could effectively provide such a statement. It is clear that the precise implications of the principle will vary over time and from one society with its own cultural, social and other values and realities to another. It will also vary according to an individual child's situation.



# THE BEST INTERESTS PRINCIPLE IN DOMESTIC AND INTERNATIONAL LAW

**T**HE emergence of the best interests principle in international law is largely due to the fact that it has long been a central feature in family law at the national level in various countries. Although the experience of many of them, including in particular the United States, might well warrant careful study, the approaches adopted in the United Kingdom and France are especially relevant both because of their intrinsic interest and their pervasive influence in the approach adopted within their former colonies. Thus, before looking at the status of the principle in international law, we will consider its evolution in the law of these two countries.

## British common law

Prior to the twentieth century, British common law manifested a very low regard for children both within society at large and within the family. Indeed any concept of the rights of the child was entirely alien to the common law. Instead, it accorded strong recognition to "the superior parental right of a man in a family unit created within marriage, and was more concerned with safeguarding his paternal rights than the interests of children" (Goonesekere, 1994, p. 119). It is not then surprising to find that the law contained few provisions designed to safeguard the interests of children. There was, for example, no legal duty on parents to support their children. Similarly, children could not sue a person responsible for the death of a parent for harm that might result from loss of parental support. Indeed, it has been shown that many of the laws that at face value appeared to protect the rights of the child were actually designed to serve some other interests. Thus while fathers had a right to the custody of their heirs, they were nevertheless free to reject an heir. A father could exercise a writ of wardship "if he lost the benefits of a potentially attractive marriage into the family by the ravish-

ment of the ward" (Eekelaar, 1986, p. 164). The father could claim for loss of services that would have been provided to him by the child if the latter were injured. In essence, the common law conceived of the child as a resource for the use of his or her father and sought to protect the father's financial and other interests accordingly.

Gradually the law evolved in the direction of greater sympathy towards a rather limited notion of children's rights. These changes initially occurred through the use of equity as opposed to the common law. Using equitable rules, the Court of Chancery was able to intervene on behalf of the Crown in order to make the child a ward of the court or enforce orders relating to his or her education (Goonesekere, 1994, p. 119). Nevertheless, the courts remained reluctant to protect children's interests *per se* and were more concerned to uphold what they interpreted as being the greater social good (Eekelaar, 1986, p. 168). These developments in equity led to the formulation and application of the best interests principle and gradually produced a corresponding change in the principles of common law, so that by the beginning of the twentieth century the common law had come to treat the principle as a paramount consideration in custody disputes. Legislation subsequently reflected this approach. Thus, for example, the Guardianship of Infants Act of 1925 provided that in making decisions relating to the custody and upbringing of children, the courts should make the child's welfare "the first and paramount consideration" (Goonesekere, 1994, p. 120).

During the time of the British Empire, laws were enacted expressly incorporating some form of the best interests principle into the law of numerous colonies. Some of these laws either still apply today or have influenced the legal provisions subsequently adopted by the former colonies. As Goonesekere has noted in relation to South Asia, the British Parliament enacted the

Guardianship and Wards Act in 1890, which still applies in Bangladesh, Pakistan and India today. She summarizes its effects as follows:

The Act reflects the English law of the time and therefore concedes the superior paternal right of the father which will prevail unless he is 'unfit' to be a guardian. Nevertheless, the Act also requires a court to determine custody according to the 'welfare of the minor child' (ibid, p. 125).

Given this history it is not surprising to find that variations of the best interest principle also apply in various other former British colonies.

*Since 1980, when this approach to protect the rights of children was actually adopted in practice, some other countries*

In Zimbabwe, for example, the best interests principle applies in relation to custody and guardianship matters. The courts are to make decisions relating to the custody of children in situations of marital dissolution by taking into account that the paramount consideration must be the interests of the children concerned. The law is somewhat different in relation to custody disputes involving illegitimate children in that the best interests principle takes on a lesser role. In such cases, there is a presumption that the custodian will be the mother, but a third party may be granted rights if it is demonstrated that it is in the welfare of the child for that to occur (Armstrong, 1994, p. 153). Similarly, in Australian law, in matters relating to custody, guardianship and access to a child, the court must take into account the welfare of the child as the paramount consideration (Parker, 1994, p. 27).

#### French law

As in English law, the development of children's rights and the implementation of the principle of the best interests of the child in French law were part of a gradual process. As Rubellin-Devichi (1994, p. 260) has commented:

It is no doubt true that the child's best interests have never been absent from the

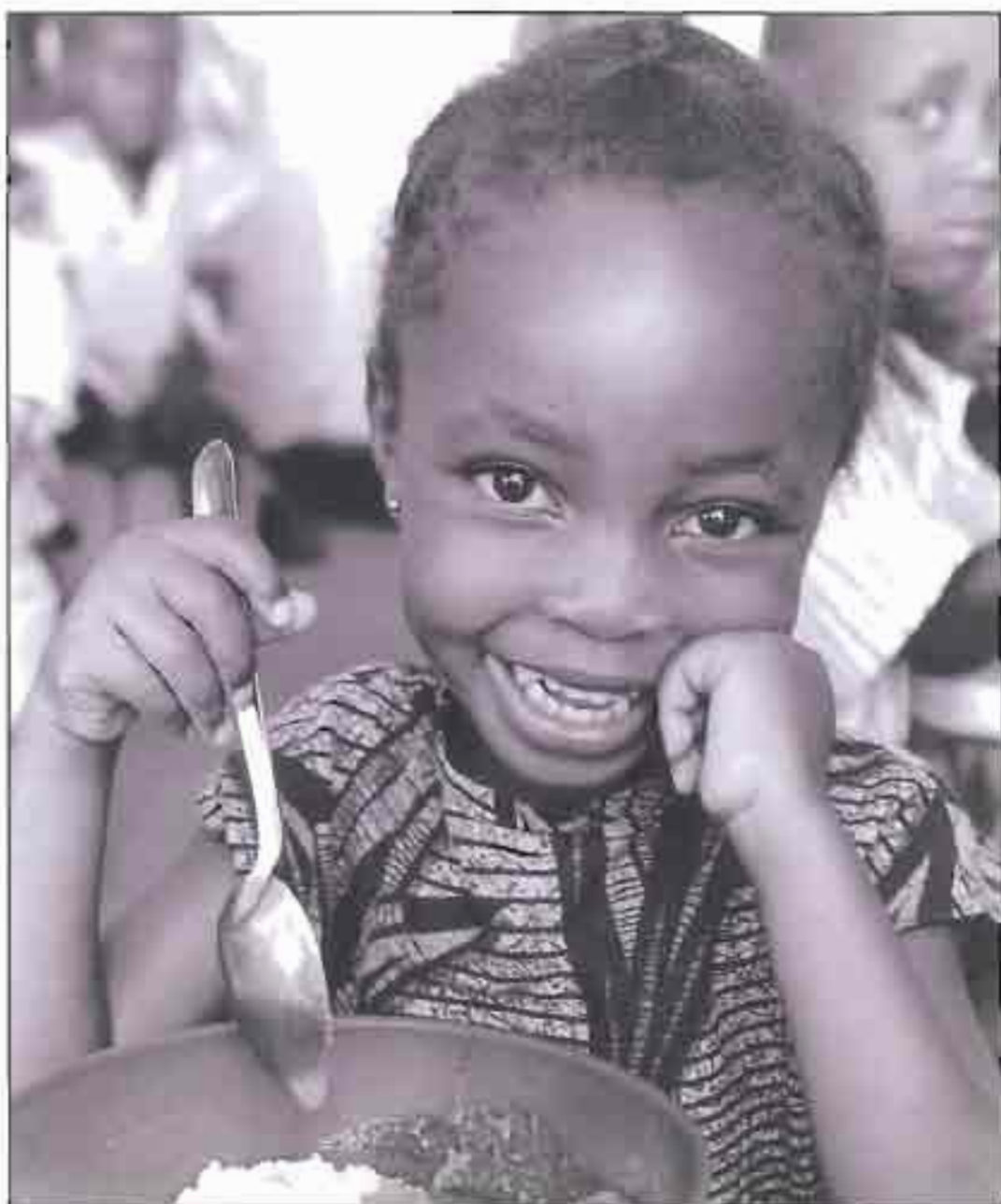
legislature's preoccupations but it was originally the best interests of childhood rather than the child as such, perceived as serving the general interests of society, which inspired nineteenth century laws to protect children in the areas of child labour, apprenticeship contracts, control of wet-nurses, and also compulsory schooling. Historians see the emergence of the best interests of the child considered as an individual as having occurred in the nineteenth century.

In this regard, her analysis of French law is similar to that of Eckelaar in relation to British law. Early laws in France relating to children were not designed to protect the child *per se* but to protect other interests, especially those of society at large. As in England, it was not until the nineteenth century that laws were implemented to protect the child. For example, the Napoleonic Code provided that in the event of divorce, custody of children should be granted to the person obtaining the divorce "unless the court ... orders, to the best advantage of the children, that all or some of them shall be entrusted to the care of either the other spouse, or of a third party" (ibid., p. 261). As in British law at about the same time, a presumption about custody was created which could be displaced if it could be demonstrated that the child's best interests would be served by a different arrangement. The law further evolved after the Second World War, with legislation relating to family law becoming increasingly child-centred. As a result, "the child's best interests came to be seen as the most important factor in all legislation" (ibid.).

#### International law

Use of the best interests principle at the international level is almost as old as international concern for the situation of children. A number of variations on the principle have found their way into instruments specifically dealing with children. An embryonic formulation of the principle can be seen in the first international instrument dealing with children's rights, namely the Declaration of the Rights of the Child, adopted by the League of Nations in 1924. It recognizes that "mankind owes to the child the best that it has to give". The next major international instrument that attempted to deal comprehensively with children's rights was the 1959 Declaration of the Rights of the Child, Principle 2 of which states:





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*International law recognized  
in 1959 that "emphasis must  
be laid on the child  
the fact that it has no voice"*

---

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the *best interests of the child shall be the paramount consideration* (emphasis added).

The principle has since been incorporated in various other international instruments that deal with issues of relevance to the situation of children. For example, it is reflected in two articles of the Convention on the Elimination of All Forms of Discrimination Against Women. Article 5(b) of that Convention requires States Parties:

To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that *the interests of the child is the primordial consideration in all cases*.

Similarly, Article 16(1)(d) provides that in all matters relating to marriage and family relations "the interests of the children shall be paramount".

Article 5 of the 1986 United Nations declaration relating to foster placement and adoption provides:

In all matters relating to the placement of a child outside the care of the child's own parents, *the best interests of the child*, particularly his or her need for affection and right to security and continuing care, *should be the paramount consideration*.

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*A 1986 United Nations declaration viewed the child's "need for affection and right to security and continuing care" as "the paramount consideration"*

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While the principle has not been expressly incorporated into other United Nations human rights instruments, such as those that deal with the rights of *all* persons including children, this has not precluded its use by the supervisory bodies that monitor States' compliance with their obligations under those treaties. Thus, for example, the Human Rights Committee has referred on several occasions in its "general comments" on the International Covenant on Civil and Political Rights to "the paramount interests of children". That Committee has also made effective use of the principle in determining the outcome of individual complaints lodged with it under the Optional Protocol to the Covenant.

The best interests principle has also been included in instruments and decisions of regional human rights bodies. In Africa, Article 4(1) of the 1990 Charter on the Rights and Welfare of the African Child provides:

In all actions concerning the child undertaken by any person or authority *the best interests of the child shall be the primary consideration*.

In Europe, although the principle is not contained in the European Convention on Human Rights, it has still been used by the European Commission of Human Rights in decisions involving children. Thus in the *Hendriks* case, in 1982, it was said that where "there is a serious conflict between interests of the child and one of its parents which can only be resolved to the disadvantage of one of them, the interests of the child... must prevail".

#### *The relationship between Article 3 and its sources*

Having traced the origins, in both national law and international legal instruments, of the best interests principle which has been enshrined in the CRC, we now need to examine the nature of the relationship between Article 3 and the sources that provided the original inspiration for it. It would seem logical that a strong element of continuity should prevail so that both at the national and international levels those seeking to interpret and apply the Convention would be heavily influenced by the long-established national jurisprudence in particular. Perhaps surprisingly, however, this is unlikely to be, and indeed should not be, the case. There are two principal reasons that should serve to limit the value of national jurisprudence as a persuasive precedent in relation to the CRC. In the first place, the principle has generally been applied to a rather limited range of issues in domestic law. It has predominantly been of relevance only in the custody field. But, as argued below, this is a peculiarly complex issue and leaves the principle particularly vulnerable to the critique of open-endedness or indeterminacy. It is thus far from being an ideal model upon which to develop a theory of the best interests principle for broader application. In contrast, the Convention not only requires the application of the principle in relation to custody matters but goes much further in



establishing it as a guiding principle which must inform the application of the entire Convention. As a result, it would seem that "the very extensive jurisprudential baggage accumulated by the best interests principle in both Anglo-Saxon and French contexts is not likely to be particularly influential, and will almost certainly not be determinative, in the interpretation of the principle by international bodies" (Alston, 1994b, p. 17).

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*The Convention establishes the child's "best interests" as a guiding principle not just in custody cases but "in all actions concerning children."*

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The second reason why the best interests principle as recognized in the CRC should develop a meaning and significance quite separate from that which it enjoys in other contexts is that a formulation used in an international treaty tends to take on a life (and meaning) of its own, regardless of what might have seemed its inevitable 'inheritance' from its domestic law counterpart. There are many phrases in international human rights law that can be traced directly to specific domestic formulations. This may be illustrated by reference to several staples of

American law that found their way into the International Covenant on Civil and Political Rights such as "due process", "equal protection" and "cruel, inhuman or degrading treatment". In international law, the first two phrases have failed, at least to date, to assume anything like the importance they enjoy, or to take on the specific meaning they have been accorded, in American law. The third phrase, by contrast, is important in international law but has been interpreted in rather different ways to its American forbear. These differences are due to a number of factors, including the different textual setting in which the principles are enunciated, the different legal context in which they are being interpreted, and the influence of many different legal cultures within the international bodies that apply them.

In conclusion, it may be said that while the use and interpretation of the best interests principle in domestic law may be of some relevance to the interpretation of Article 3 of the CRC, such approaches are by no means determinative. Indeed, over time, interpretations of the principle at the international level should provoke an evolution in the interpretation of the principle at the domestic level. As has been commented:

[T]he ways in which the Convention has both formulated and situated the principle should eventually result in the need for those domestic courts which seek to apply the Convention to adopt a rather different



approach from that which they themselves have hitherto developed, primarily within the limited context of custody decisions. (ibid.).

Having put the relevance of domestic formulations of the best interests principle into perspective, we turn now to a consideration of the scope and meaning of the principle as embodied in the Convention.

*...the best interests principle of the Convention, while at the international level should provide an evolution in interpretations at the domestic level.*



# APPLYING THE PRINCIPLE IN PRACTICE

**I**t is important in exploring the scope of the best interests principle to consider both the circumstances under which it is required to be applied and its specific implications in such situations.

## *Who must apply the principle and when?*

It will be recalled that Article 3 provides that the principle shall be treated as a primary consideration "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies". This phrase thus seeks to provide significant guidance as to when the principle is to be applied. The reference to "all actions concerning children" is designed to emphasize that the principle is expected to be applied very widely. But since it is not absolutely comprehensive in scope, it is necessary to consider what is meant by the words "actions" and "concerning".

One technique sometimes used to limit the scope of the word "actions" is to contrast it with "omissions". In relation to the CRC, however, it is not clear either that this would yield a very helpful result or that it would be consistent with the intention of the drafters of the Convention. No such distinction was made, either implicitly or explicitly, during the drafting of the CRC. In addition, the difference between acts and omissions is not always easy to maintain since some omissions are not readily distinguishable from acts. This is well illustrated by reference to the facts of the 1989 case of *De Shaney v. Winnebago County Department of Social Services*, decided by the United States Supreme Court, in which the governmental agency in question was found not to be liable for a failure to act in relation to a case of persistent and continuing child abuse which ended in the permanent and grave mental retardation of the child. The Court held that the Due

Process Clause of the United States Constitution "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law', but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means". Since the other means in question was the father, whose abusive ways were fully documented over a long period of time by the State, the characterization of the State's conduct as omission rather than as a positive act of abdication of responsibility has been strongly criticized by American commentators (Alston, 1994b, pp. 13-14).

The limits of the term "concerning" are also difficult to discern. What degree of impact on children is required before an action can be said to "concern" them? Must an action be directly concerned with a particular child's or group of children's interests such as a custody decision or a decision to exclude those children from school? Or does it include more indirect actions such as formulation of governmental policy relating to, for example, the provision of public housing or the closing of government schools? The drafters of the CRC did not discuss this issue. However, it is significant to note that during the drafting of the Convention proposals to limit the application of the article were rejected. One delegation suggested that the principle should only be relevant in actions involving the 'welfare' of a child. This was opposed by a number of delegations on the ground that it would narrow the scope of the article. The result was that the term 'welfare' was not included in the final draft.

It is also important to note that the term *children* rather than the singular 'child' is used in this sentence. Clearly matters may have some relevance to children as a whole which have no relevance to a particular child. The use of this broader language, especially in light of the drafting history, suggests that an overly restrictive



interpretation of the word *concerning* should not be adopted. Thus an action need not be so direct as a decision about the living arrangements of a particular child to be classed as “concerning” the child (ibid., p. 14).

When we turn to consider the question of who must apply the principle, neither the language of the text nor the drafting history of the article provides a particularly clear answer. The opening words of the article, especially the term “all”, tend to suggest that any person acting in a matter concerning a child or children must consider the child’s or children’s best interests. This would include governments, public and private bodies, and individuals such as parents and caregivers. However, an apparently narrower formulation is suggested by the words that follow which seem to limit the application of the principle to “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. A narrow reading of this phrase would suggest that the principle is primarily concerned with acts of public officials but that it does have some application in relation to the actions of private bodies if they are private “social welfare” bodies. Article 3 thus embodies an apparent contradiction in its endeavours to specify who is bound to apply the best interests principle.

The drafting history provides a little guidance on this point. Two different formulations were put forward:

(a) “...in all actions concerning children whether undertaken by their *parents, guardians, social or state institutions*, and in particular by courts of law and administrative authorities...”; and

(b) “...in all *official* actions concerning children whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities...”.

---

*The Convention establishes that all decision makers, whether public or private, should apply the best interests principle when acting in any matter concerning children.*

---

The differences between these formulations produced a debate over whether the Convention

should regulate private family decisions. Some delegations supported the former and wider formulation which clearly sought to impose such obligations, while others supported the latter and narrower formulation which excluded parents. The drafters resolved this conflict by adopting the narrower list of persons which did not refer to parents or guardians but did not accept the confinement of the article to *official* actions. This would seem to constitute a decision not to resolve the matter definitively. It has been argued that Article 3 is of such a nature that it can have application to private actions without seeking to regulate them. In this view, the article:

does not seek to impose specific duties, but rather to state a general principle that should inform decision-making in relation to ‘all actions concerning children’. Thus even though there may have been no intention to ‘regulate private family decisions’ as suggested during the drafting process, a general principle can still be made applicable in such contexts without amounting to regulation *per se* (ibid., p. 15).

It also seems that a cogent reason for the deletion of the word ‘official’ is that the working group wanted to leave the way open for the article to have application to the actions of private persons. It has been suggested that this conclusion is further supported by the inclusion of “private welfare institutions”, which suggests that the “provision is not exclusively confined to public undertakings” (ibid.). In this view, Article 3 is of such a nature that it must be applied by private as well as public bodies and persons.

*What weight must the principle be given?*

It will be recalled that Article 3 provides that the best interests of the child shall be “a primary consideration” in all actions concerning children. The drafting history and wording of this formulation provide some guidance as to exactly how much consideration a decision maker must give to the principle.

The first thing to notice about the formulation is that the child’s best interests are to be a primary consideration. The use of the article “a” is noteworthy. Other formulations of this principle use apparently more onerous wording. For example, Article 21 of the CRC, which deals with adoption, refers to the principle as “the para-





mount consideration". The difference between the terms 'a' and 'the' is significant. The term 'a' suggests that the best interests 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

*The weight given to the principle must vary according to circumstances. But at the very least the child's best interests would be an important or primary consideration*

The other notable feature of the phrase that describes the weight to be given to the principle is that it is to be applied as a "primary" consideration. Again this differs from formulations such as that used in Article 21 which speak of paramountcy. This also suggests that the child's best interests need not be the only, but should be an important, matter considered in actions concerning that child.

However, the conclusion that the child's best interests need only be one consideration among a

number, albeit an important one, is not the final word. The drafting history of the Convention actually sheds some helpful light upon the relative weight intended to be accorded to the principle. At one point during that process it was suggested that the phrase be altered to read "the primary consideration", the reasoning being that this would be more consistent with other international instruments. However, this proposal was rejected by some members of the working group who noted that other international instruments apply to a narrower range of situations, such as custody, in relation to which it is easier to justify an approach in which the child's interests override other concerns. Other members noted that there are situations in which the competing interests of "justice and society at large should be of at least equal, if not greater, importance than the interests of the child". This indicates that the drafters wished to ensure a degree of flexibility in the application of the principle, not because they thought that children's interests should not be paramount in some circumstances, but because the principle as contained in Article 3 was to be of broad application, and an approach that gave paramountcy to children's best interests could not be justified in all of the situations to which the article might apply.

Thus it would seem that decision makers must treat the best interests of the child at least as an important consideration. But the formulation used in Article 3 also leaves decision makers with the option of treating the best interests of the child as a paramount consideration. This conclusion is further supported by the inclusion of the paramountcy principle in a number of other articles, such as Article 21 dealing with adoption, and Article 18(1) dealing with parental obligations.

It has also been suggested that the fact that the interests of the child are to be a primary consideration would seem to create a sort of evidentiary burden of proof upon those seeking to achieve a non-child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist (*ibid.*, p. 13).

To summarize, the Convention sets out that the best interests principle is to be applied by all decision makers, whether public or private, when acting in any matter concerning children. The weight to be given to the principle may vary according to circumstances, although at the very least it must be an important or primary consideration in all such matters.

#### *How is the determination to be made?*

One issue that the drafters of the CRC did not discuss is the question of how a determination as to what is in the child's best interests is to be made. Is it, for example, to be made by adults on the basis of an assessment of what some might call 'objective' factors, or are children to have some say in the process? John Eekelaar is a family law specialist who has devoted particular attention to this question. He has suggested that there are potentially two main ways in which a determination of what is in a child's best interests can be made. The first is an objective model in which "the decision maker draws on beliefs which indicate conditions which are deemed to be in the child's best interests". Examples of such beliefs could be that a child requires strong bonds with a primary caregiver or that a child should ideally have contact with both parents. The second way is to allow children to make an input into decision-making relating to their lives. Eekelaar calls this "dynamic self-determinism". Under this system:

the child is placed in an environment which is reasonably secure, but which exposes it to a wide range of influences.

As the child develops, it is encouraged to draw on these influences in such a way that the child itself contributes to the outcome. The very fact that the outcome has been, at least partly, determined by the child is taken to demonstrate that the outcome is in the child's best interests (Eekelaar, 1994, pp. 47-48).

Eekelaar argues that determination of what is in a child's best interests should combine both objective and subjective elements. Objective assessments, he suggests, can be useful, but one must be aware that they depend on a "consensus over values" which is difficult to achieve. Moreover, the individual experiences of a child may produce a different determination of what is in his or her best interests. In other words, an objective standard cannot take into account all the small ways in which children's experiences differ. For these reasons an element of dynamic self-determinism must be introduced.

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*To determine the child's best interests,  
decision makers need to combine  
both objective standards and  
the child's own views*

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Of course, this point of view is open to criticism, as Eekelaar himself notes. He outlines and attempts to refute three arguments that may be used against self-determinism. The first argument is that it would give children a license to act as they want, perhaps in disregard of other members of society. He counters by noting that self-determinism is only a way of deciding what is in a child's interests. The theory does not suggest that such interests must be pursued at a cost to the wider society. The second potential argument against including an element of subjectivity is that it favours impulsive, or egoistic, behaviour on the part of the child, behaviour that may in the long run be damaging to the child and to society. Eekelaar acknowledges that a child may not have the ability to decide whether his or her impulses accord with his or her developing long-term goals. But he suggests that this is not a reason for not allowing some self-determinism. Rather it



means that parents or other carers must balance the child's immediate wishes with the child's "prospective social relationships".

The final potential objection is that children may simply make decisions that are self-destructive and that application of self-determinism would allow them to follow through on such decisions. Eekelaar's response is that self-determinism does not imply this, as long as its rationale is properly understood. The aim of self-determinism is to ensure that the child develops into an adult with the "maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice". Decisions that are self-destructive would prevent this from occurring and therefore one can say that in such circumstances the self-determined decisions should be disregarded (ibid., p. 53).

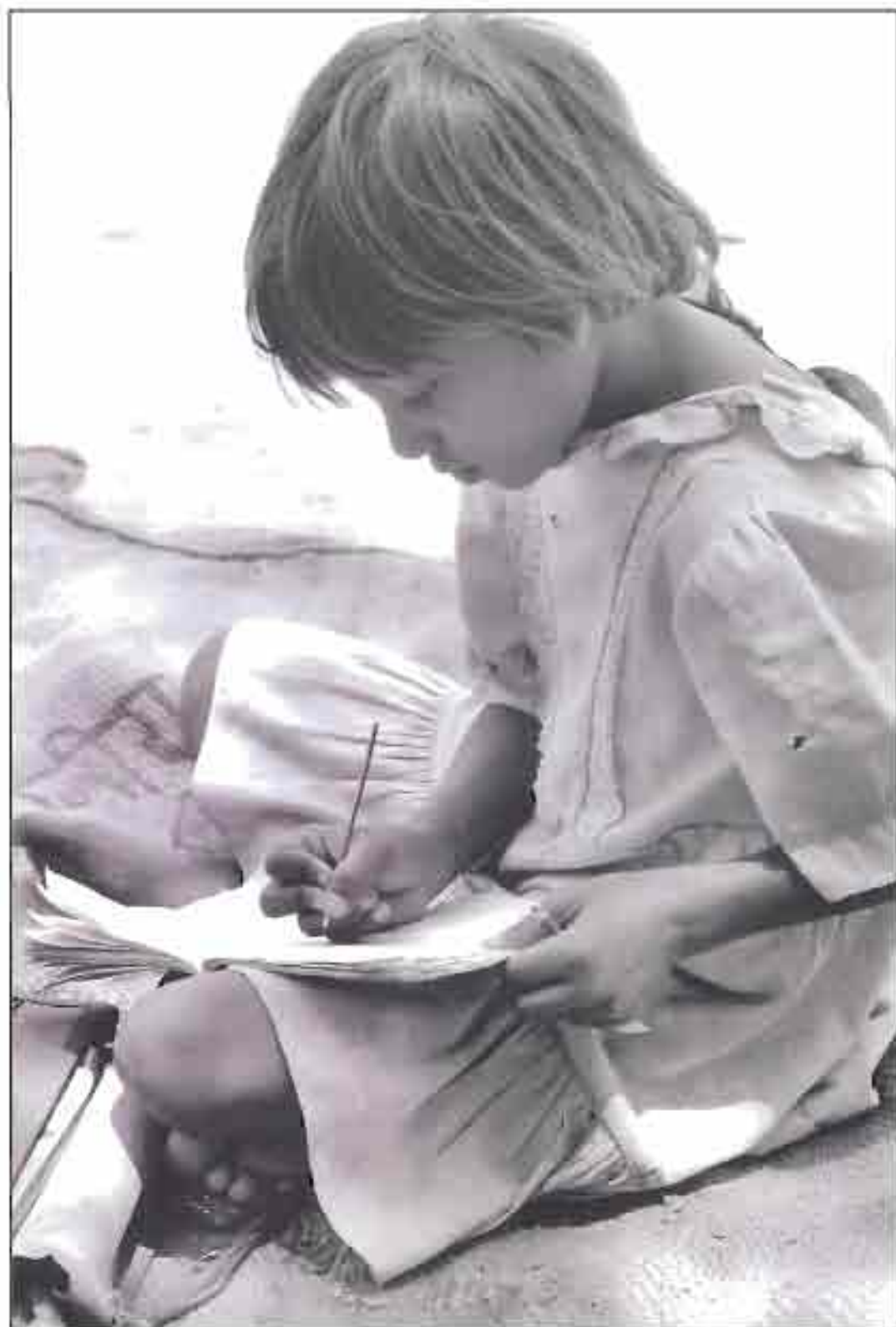
Thus, if one accepts Eekelaar's analysis, decisions relating to the child's best interests should not be made simply by reference to objective criteria that are thought to represent the child's best interests. Rather decision makers should incorporate the child's own decision-making as to what is in his or her own best interests.

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*To the extent possible, children should  
have maximum opportunities to form  
and pursue life-goals that they  
themselves have chosen*

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# INDETERMINACY – THE THEORY

WHILE the preceding analysis of the meaning of the terms used in Article 3 provides some guidance as to when the best interests principle must be applied and what weight it should be accorded, there remains the further challenge of how to apply the principle to practical problems. This section discusses what has been termed the problem of 'indeterminacy', or open-endedness. This refers to the view that application of the best interests principle does not lead to a determinate answer in any particular case. In other words, radically different results could be justified in a particular situation, but in each case it could plausibly be argued that the best interests principle had been applied. We turn now to consider two of the principal methodologies that can be used to justify the indeterminacy thesis. They are rational choice and rule scepticism.

## Rational choice

Rational choice theory, as characterized by Stephen Parker, specifies that in any decision problem a determinate answer will in general require that the following knowledge conditions are satisfied:

1. All options must be known;
2. All possible outcomes of each option must be known;
3. The probabilities of each possible outcome occurring must be known; and
4. The value to be attached to each outcome must be known (Parker, 1994, p. 29).

If decision makers have different views at any of the above stages then it follows that different decision makers could arrive at different answers to questions of what is in the child's best interests in identical situations. The most common view is that the best interests principle is indeterminate because decision makers will have different val-

ues and will thus decide the answer to the fourth question differently. Parker argues, however, that there is room for disagreement in relation to the other three issues as well. He points out that even if all the options are known, such as in a custody case where custody of the child will either be given to the mother or the father, the requirements of questions two and three can never be fully satisfied. In reality, the range of possible outcomes of each option are, in Parker's words, "a matter of pure speculation" being based on an "imprecise exercise of appraising peoples' characters and dispositions". In addition, there is the problem of deciding the probability of different outcomes, which again is a subjective decision (*ibid.*, p. 30).

Since there are many situations in which different decision makers could decide one or more of the questions differently, it follows that the best interests principle is indeterminate. In other words, it does not determine, or lead inevitably to, any particular outcome. This is said to be problematic because it means that a decision maker can justify virtually any determination on the grounds that it is in the child's best interests.

## Rule scepticism

The rule scepticism argument is derived from philosophical discussions about what it means to follow a rule. It is based on an argument put forward by a philosopher, Saul Kripke, in relation to rule-following in mathematics (Kripke, 1982). In his very influential work, Kripke questions whether we can really be sure that a particular person is following the rule of addition. The heart of his argument is that because of the finite number of instances of ever applying a rule, people can never be sure that others are also applying the same rule. Two people could be coming to the same answer on a particular issue at all times and thus appear to be following the same rule but,



because those cases of agreement are necessarily finite, it is possible that they are actually applying different rules that will produce radically different conclusions at a later point in time.

*Commentaries often criticize the best interests concept as being too open-ended to 'determine' a predictably uniform result.*

If this argument relating to rule-following is accepted, and it clearly cannot be adequately explained or justified within the confines of this analysis, it follows for present purposes that one can never actually be sure that a decision maker is following the rule that she or he must take the best interests of children as a primary considera-

tion. Particular decision makers may appear to be applying the best interests principle, but this can never be verified because instances of apparent application of the rule are finite. Later decisions or behaviour may indicate that a decision maker was actually applying a rule different to that of the best interests of the child and it was pure coincidence that the former decision appeared to follow from application of the best interests rule.

If one accepts either, or both, of these arguments, then it would follow that the best interests principle as used in Article 3 of the Convention will have little real effect. According to the rule scepticism argument, one cannot be sure that a decision maker is even applying the principle, while according to the rational choice argument, even if the decision maker is applying the principle, it can be used to justify almost any outcome. Before we examine some responses to this conclusion, it may be useful to consider a number of examples of indeterminacy in relation to the principle.



# ILLUSTRATIONS OF INDETERMINACY – CULTURE

**T**HE influence of culture on a society's value system well illustrates the potential indeterminacy of the best interests principle. If we take just one element of the rational choice theory, namely the value to be attached to different outcomes, it can be demonstrated that the best interests principle can be used either to justify or condemn the same practice. The illustrations explored in the book upon which this analysis is based deal with issues relating to child custody, female circumcision, child marriage, work and education.

## *Child custody*

Cultural considerations may, in some circumstances, be said to be relevant to a determination of what is in the child's best interests in a custody matter. To illustrate how this might be the case let us take the example of the concept of familial ties applied in some traditional African societies. As Rwezaura and Armstrong note, the custody of children in such societies is intimately related to the whole social structure. First, it is related to the practice of marriage through the exchange of bridewealth. Rwezaura describes the complex relationship between children and this practice as it relates to child custody as follows:

In most patrilineal African societies marriage is effected by the transfer of resources known generically as bridewealth. The transfer of bridewealth from the family of the husband to the family of the prospective bride has two main functions. The first is to validate the marriage. The second is to effect a transfer of the bride's procreative capacity from her family to that of her husband. This transfer entitles the husband and his family to claim all the children the wife bears whether or not he is the biological parent. Because patrilineal societies consider that all children born during marriage belong to the

husband and his family, custody of children at the time of separation or divorce is claimed as a matter of right by the father.

Rwezaura gives examples of these practices on the part of the Zulu of Natal, the Kulia of Tanzania and the Tswana and Swazi peoples (Rwezaura, 1994, pp. 86-87).

However, the concept of patrilineal ownership of children is also connected with wider social cohesion. Marriage in many such societies has been a means of securing alliances between groups of people. Thus children were seen as the essential link between two social groups.

In relation to Zimbabwe, Armstrong notes that the people are organized into family groups consisting of two generations of descendants from one man — namely his sons, his daughters and his son's children. It is this group that is responsible for important spiritual and ritual practices connected with many aspects of life such as health, marriage and death. In this context, Armstrong notes that it is important for the father of a child, and for the whole paternal family, to establish its rights to the children in order to fulfil the ritual functions of the family (Armstrong, 1994, pp. 157-158).

The customs relevant to custody of children in such traditional societies are then closely related not only to marital ties but also to the formation of familial alliances and the performance of religious practices. In this context, a decision maker might decide to award custody to the father on the basis of cultural considerations. The rationale would be that, in view of the traditional forms of social organization and religious instruction, it is definitely in the child's best interests to remain with the father.

However, the existence of these practices need not necessarily produce a determinate application of the best interests principle. Taking a concrete example, suppose that in contemporary Zimbabwe a mother and father choose to

divorce and have a dispute in the courts concerning a child who shows extreme emotional attachment to the mother. Suppose also that the traditional subsistence economy and family structure of the father has broken down for various reasons so that the familial ties are no longer so important. Suppose also that the mother, like many women in contemporary Zimbabwe, has tried to find alternative ways of providing for herself and has some funds available to support the child. In this context it would also be open to a decision maker to argue that the expressed emotional needs as well as the physical needs of the child mean that it would be in his or her best interests for custody to be granted to the mother. The best interests principle cannot produce a determinate result in this situation. A decision maker using this criterion could come to vastly different results depending on the weight to be given to cultural considerations.

*Decisions of best interests  
can depend on the value placed  
on competing concerns  
such as the child's integration  
into society and the child's health.*

#### Female circumcision

Female circumcision encompasses a range of practices that in varying degrees involve some sort of procedure being performed on the girl child's genitals. This can range from the removal of the girl's clitoris to a more dramatic intervention in which the clitoris, labia minora and labia majora are removed. Arguments could be, and have been, made based on the best interests principle, either to support or condemn such practices. For a cross-section of the views taken in appraising this practice, see Steiner and Alston, 1996, pp. 240-255.

Female circumcision is part of the culture of numerous countries, particularly in Africa, and is of significant social importance in the societies in which it occurs. Belembaogo has noted in relation to Burkina Faso that:

excision marks the passage of a young girl to womanhood. Only a girl who has been excised could marry a man and

maintain sexual relations with him ... Excision of a young girl marks her integration into social life and her progression to maturity. Numerous religious beliefs are also attached to the ritual. The girl's mother was equally proud of her daughter's completion of the ritual (Belembaogo, 1994, p. 213).

On this basis, the argument could be made that circumcision is in the best interests of the girl child for, if she is not circumcised, she will be ostracized from traditional society and she will be unable to marry and form a family.

On the other hand, there is much evidence that such practices can be harmful to both physical and mental health. The short-term effects of female circumcision can include haemorrhaging, infection, pain, damage to other organs and increased risk of HIV transmission. The long-term effects might include scarring, infections, problems with birthing, sexual and psychological problems. From this perspective it is said that health consequences make the practice of female circumcision contrary to the child's best interests.

If the test of the child's best interests were the only consideration, and if other substantive provisions of the CRC did not preclude the practice, the outcome would depend on the value placed on the relevant concerns such as the child's integration into society and the child's health.

#### Child marriage

Child marriage occurs in a number of countries in Africa and South Asia. In Islamic societies in which there is no lower age limit on marriage, the father of a girl child can compel her to marry prior to puberty. Similarly, under Hindu law a father can also require a pre-pubescent daughter to marry, which has resulted in some girls being married at ages as low as eight years (Goonesekere, 1994, p. 122). Child marriage in such cultures is an accepted social practice. In a culture in which it is customary for the father to decide whom the girl must marry, and when it may be said to be in a girl's overall best interests for the practice to occur, refusal may create bad relations and even lead to the girl's ostracism from her community.

On the other hand, a number of negative effects of the practice can be identified which would suggest that such practices are not in the girl child's overall best interests. Thus, the practice exposes young girls to physical violence and





abuse and is connected with child trafficking, with girls being taken illegally across national borders for prostitution or marriage (ibid., p. 122 and p. 131). Child marriage can also have harmful health consequences for the girl child who can become pregnant. As she is not yet fully developed, pregnancy can result in malnutrition and lesser life expectancy for her as well as for her child.

#### *Arranged marriage*

A related practice that can give rise to different applications of the best interest principle is that of the arranged marriage. This is a practice that involves both boy and girl children and occurs in a number of African and Asian societies. Thus in Burkina Faso:

The respective families of the future spouses are very much involved in the conclusion of the marriage. In effect, in most cases, the marriage is negotiated between

the two families with the children playing no essential role. The children must submit to the wishes of their respective families (Belembaogo, 1994, p. 213).

*It is patriarchal society  
a girl child's sexual control too  
if the village is happy the girl  
is married her father has chosen for her*

Again, the best interests principle could justify policies or actions either supporting or rejecting such practices. On the one hand, cultural considerations might be used to justify the practice since the child has to continue to live in a society in which strong views are held about paternal authority. As Belembaogo has com-



mented, "[t]he child has an obligation of submission with respect to his or her father, so the child must not question or oppose any decisions taken by his or her father". If a child refuses to comply with a decision about marriage, then she or he may endure the wrath of society which holds such strong views about authority. In a context in which the child has to continue to live in the same society, it may be said to be in the child's best interests to comply with parental will concerning such decisions.

On the other hand, a number of considerations support an argument that such practices are not in the best interests of the child. As Belem-baogo has noted, they seriously interfere with the child's freedom and autonomy. Moreover, some arrangements involve the giving of a girl child to a much older male, thereby exposing her to the abuses discussed above in relation to child marriage. Rwezaura has noted that "many of these marriages end up with the young wife running away to another district or to the city". The result for the child is removal from her social and familial environment, which may well be against her best interests.

#### Work

The operation of cultural practices in relation to child labour provides yet another context in which to explore the indeterminacy of the best interests principle. Rwezaura has noted that in many traditional African societies, children have a number of very important economic roles. In particular, they are directly "engaged in production from a very early age". For example, among one group in Kenya, it is the job of pre-adolescent boys to "look after the lambs and kids, bring them to their mothers in the evening and to put them away under their upturned baskets at night". Similarly in a community in Tanzania "boys and girls of three years are given the task of herding small stock such as calves, sheep and goats, in the vicinity of the *kraal* ..." (Rwezaura, 1994, pp. 89-90). Armstrong has made similar observations about Zimbabwean society where children are considered to be a resource for their families and are therefore expected to do some chores, such as herd cattle (Armstrong, 1994, p. 179).

In a culture in which children are expected to work and contribute to family life, an argument



may be made that it is in their best interests to do so, even at the expense of formal education. Because they are expected to work, any refusal to do so may lead to their being ostracized.

CHILDREN'S RIGHTS: A GUIDE TO THE  
CONVENTION ON THE RIGHTS OF THE CHILD  
AND THE AFRICAN CHARTER ON THE RIGHTS  
AND RESPONSIBILITIES OF THE CHILD

At the same time, there are numerous factors that support an argument that these practices are not in the child's best interests. Such labour is sometimes physically and mentally damaging to the child. For example, Rwezaura has commented that girls in some African communities are required to carry babies on their backs and hips "before they are old and strong enough for such a weight". Further, the labour may prevent the child from engaging in formal education or interfere

with that education. It might also interfere with the child's play and leisure time, time that some would argue is necessary for the child's development (Rwezaura, 1994, pp. 77-90).

*The traditional view of play as a form of  
learning is a child's right to play  
with other children and to play  
with toys.*

#### Education

Cultural influences are also relevant to many aspects of the formal education of children. As has already been observed, it is customary in many African societies for children to work from a very early age to help support the family. However, such activity can also be seen as a "vital educational and socialization institution" (An-Na'im, 1994, p. 77). In this context, refusal to place children in formal education, or their subsequent removal, might be said to be in their best interests because, by working instead, they will gain vital informal education and socialization skills and help to ensure their own as well as





their family's physical survival. However, another decision maker who places more value on formal education might decide that it is in the children's best interests to be educated in a more formal school setting. This view might be supported by an argument that informal, traditional education is less important given the gradual breakdown of traditional forms of social organization and subsistence.

Traditional practices in African societies are also of particular relevance to the application of the best interests principle to the formal education of the girl child. Rwezaura has commented that the traditional view of the role of women means that formal education is not really considered necessary. In his words:

it cannot be denied that in a society where girl children are viewed as further sources of bridewealth and where marriage and child bearing are seen as the major vocation for women, formal education will not be considered a top priority for them (Rwezaura, 1994, p. 102).

He notes that initiation practices also come into conflict with formal education. "It is expected that ... [girl children] will drop out of school to attend female initiation rites which in some cases take several months to complete". Similarly, in Egypt one factor contributing to educational drop-out of girl children is the "need to prepare for marriage" (Azer, 1994, p. 247). In such contexts it might be said that it is not necessarily in the girl child's best interests to receive formal education for this will not be of great benefit to her in the long run as wife and mother. It may be more important for her to gain informal education in the home. Further, the beliefs about initiation rites are so strong that, in some societies, a child who does not go through them cannot

marry. Since education is thought to interfere with traditional methods of integrating a girl into society, it might well be seen to be in the girl's best interests to forgo any educational opportunities. On the other hand, it might be argued by someone emphasizing the importance of different values that these arguments simply endorse discrimination against women and that education is a means of ending practices that limit greatly the freedom of women.

*Depending on the values they emphasize, someone's parents, and so different people, have different views about whether it is in the best interests of the girl child to receive formal education or to be in the home, involved in traditional practices.*

As has been said in relation to such arguments:

The real objective of the culturalist argument is the maintenance of structures of dominance and control and ... has little or nothing to do with the "cultural" wrappings of the argument. The one element that all the arguments have in common is the oppression of the human rights of women (Oloka-Onyango and Tamale, 1995, pp. 708-709).

In that view, formal education would be considered to be in the best interests of the child.

Another example concerns Japan which has what appears to some observers to be an education system that is harsh and repressive, at least in some respects. The system is extremely competitive and hierarchical. Children are put under intense examination pressure because their results determine their access to the good schools and universities. It is not surprising then to find that





much of their existence is taken up by intensive study. The typical Japanese high school student spends 240 days a year attending formal school and 19 hours a week outside school studying. Fifty-one percent of high school students spend additional hours in cram schools in order to boost their grades (Minamikata, 1994, pp. 281-282).

After examining parental attitudes to this system Minamikata discovered no unanimity as to whether or not it is in the child's best interests. Some parents thought that it was, because it helped children acquire knowledge and develop mental concentration or because the children

actually enjoyed it. At the other end of the spectrum, some parents considered that the system was not in their children's best interests because it helped them not to gain knowledge but only to cram. They felt that, because it emphasized work instead of play and neglected compassion, their children would not grow into well-balanced adults. Again we see a practical illustration of the indeterminacy of the best interests principle. Depending on what sort of values the parents in this study emphasized, they came to different conclusions about what was in the best interests of their children.



# ILLUSTRATIONS OF INDETERMINACY – RESOURCES

**T**HE best interests principle is sometimes invoked in connection with resources issues, both in relation to governmental budgetary allocations (a matter that is examined further later) and to the resources available to a particular child under different scenarios. Many of the examples just considered can also be viewed from a resources perspective.

## Child custody

The impact of resource factors in child custody matters provides a useful illustration of indeterminacy. Portraying the situation in Zimbabwe, for example, Armstrong finds that “the most striking characteristic of *physical* custody in Zimbabwe today is *fluctuation*. Many, if not most children, stay with a number of different relatives for periods of their lives. This pattern, although more widespread among low-income groups who often transfer custody as a way of sharing economic resources among family members, is not restricted to the economically needy. Well-off Shona families also transfer temporary *physical* custody of their children within the extended family. Children are moved from relative to relative, usually to seize economic advantages” (Armstrong, 1994, p. 170).

Similarly, Rwezaura has commented that it is a common practice in sub-Saharan Africa to send a child away “to assist a relative in doing housework in return for tuition money and a place at a neighbouring school” (Rwezaura, 1994, p. 101). In order to make the best of economic resources, child custody informally rests with the wider family.

In a context in which resources are short, it might well be argued that these practices of fluctuating custody within a wider familial setting are in the child’s best interests because they ensure better schooling opportunities and better nutrition. However, as we have seen in earlier

illustrations, there are also countervailing considerations that could justify an alternative interpretation of what is in the child’s best interests.

Armstrong notes there is a strong view, at least in Western discourse, that it is very important for children to live with at least one parent. If that is not possible, it is considered important that they develop strong bonds with another primary caregiver. Yet the practice of physical custody being with a variety of family members prevents either of these ideals from being realized. It may be therefore that this view is specific to certain cultures and not shared by many groups within Zimbabwe. Indeed, Armstrong notes that many Shona parents regard multiple parenting as highly desirable for their children. By the same token, however, Armstrong’s research also demonstrates support within Zimbabwe for a degree of stability in custodial arrangements. Many of those she interviewed, especially when probed, stated that it is in the best interests of a child to live with his or her parents. As one interviewee replied:

I think the best thing is for her to live with her parents, while they see how she is growing up, everything she eats, where she sleeps, supporting her, everything that she needs in life, her whole life. She should live with her parents (Armstrong, 1994, p. 184).

It is thus not clear what conclusions a person making a custody decision should reach in such cases or what weight should be accorded respectively to concern for the child’s emotional development or access to resources. Another consideration has been suggested by Rwezaura. He notes that when informal custody arrangements are negotiated, “[i]n most cases there is an expectation on the part of parents that their child will be treated as a member of the family. This is because the entire arrangement is viewed in an African traditional framework. But times have





changed and reality sometimes points to a different direction. Such a child may never be enrolled at a school or, having been enrolled, he/she may be burdened with housework and thus never get adequate time to do private study. This burdening may lead the child into failing examinations" (Rwezaura, 1994, pp. 101-102).

The potential failure of such arrangements to actually safeguard the child's well-being may lead some to conclude that such informal custody arrangements are not in the child's best interests

#### Work

It seems equally clear that application of the best interests principle cannot, on its own, provide any determinative solution to the issues surrounding child labour. Depending on the weight accorded to different values, it seems possible to justify almost any conclusion by invoking the best interests principle. On the one hand, it is sometimes argued, at least in relation to some of the poorer countries of the world, that the existence of child labour is in the child's best interests for it enables the child to earn some money. In the absence of such income, the family will have insufficient resources to support the child and its other members adequately. It

may be, as An-Na'im has commented, that "child labour is essential for his or her immediate and long-term survival in certain situations" (An-Na'im, 1994, p. 77).

*The reasons relevant to child labour require delicate and careful handling, apparently conflicting basic needs, and raise the question of what defines the needs and for whom*

The relationship between economic factors and child labour in the Egyptian context has also been noted by Azer. He reports a study in which 39.9 per cent of children engaged in labour attributed their family's lack of income as a factor leading them to take up work. A further 49.6 per cent listed educational failure as a motivating factor, although that too may be at least partly attributable to poverty. Factors such as lack of parental time to assist with school work or lack of resources to provide school materials are likely to affect a child's ability to achieve (Azer, 1994, p. 247).



But whatever the advantages, there are also counter-arguments that support the conclusion that child labour is not in the child's best interests.

The nature and circumstances of labour ... may not only threaten the physical and mental health of the child, but also deprive him or her of the basic needs of academic education (An-Na'im, 1994, pp. 77-78).

In addition, being forced to engage in labour may deprive children of play and leisure time that the Convention considers to be their right. There are thus ample arguments on both sides of the issue.

An-Na'im discusses a study prepared for the Arab League by Ismail Sabri Abdalla which suggests that the best interests of the child might warrant regulation of the labour market so that child labour is performed under conditions safe for the child and linked to education and skills development. The study proposes that government policy should be directed to attaining these goals. In An-Na'im's view, such a proposition "reflects the fundamental dilemma of balancing and reconciling apparently conflicting basic needs as well as raising the question of who defines those needs and for whom" (ibid., p. 77). A different approach to Abdalla's, premised

upon stronger views about the value of formal education and the value of play and leisure time, and which is sceptical about the possibility in practice of regulating labour conditions successfully, may well lead to the conclusion that a more restrictive policy is in the child's best interests.

*An Egyptian child looking at a book in a library. The child is a girl, and the book is a book about the environment of the city.*

#### **Educational**

Resources are also important in relation to the application of the best interests principle in the area of education. There clearly exist direct links between poverty, child labour and education. In order to ensure physical survival, the child is forced to work and, as a result, cannot participate properly, if at all, in formal education. This problem has been highlighted in the Egyptian context by Azer. For example, in one region of Egypt the drop-out rate in the first six years of schooling

was 29 per cent. Of this group, 45.6 per cent were farmers' children and 32.6 per cent were labourers' children. Given this breakdown one may expect that economic factors were significant. This was confirmed by the study which reported that 31 per cent of those affected attributed the drop-out to the family's need for extra income. A further 60.1 per cent cited educational factors, which, as noted above, may also be influenced by poverty. When there is no support at home for education because parents are too busy, or when income is so low that books cannot be purchased, children are unlikely to succeed or want to succeed at school. The application of the best interests principle in these circumstances raises similar considerations to those encountered in relation to child labour.

Resource issues are also relevant to wider governmental policies relating to education. Azer illustrates this by a question that faced the Egyptian Government at one stage. "Due to the shortage of school buildings, the government was faced with a crucial policy consideration — in fact a dilemma — which required making hard

choices. The matter boiled down to whether it would be 'better' to educate half, or less, of the number of children who are entitled to basic education or to adopt a two-shift system which would cut down the school hours, but would accommodate at least double the number of those who would normally attend a full-day school system" (Azer, 1994, p. 239).

Application of the best interests principle does not readily yield a solution to this dilemma. On the one hand, it could be argued that education is so vital for the child's development that it is in the interests of children generally for every child to receive at least some education, even if only half a day a week. On the other hand, it could be said that it is in the interests of children as a whole that some receive a proper education rather than all receiving a substandard one. It could be argued that this is particularly so because some children will never use formal education and will instead go into unskilled occupations. In this view, it would be appropriate to provide a full day's formal education to only some of the population.



# OVERCOMING INDETERMINACY?

VARIOUS arguments have been put forward to defend the best interests principle against charges of indeterminacy. The first is a general argument, which suggests that conventions about usage among rule users constrain the range of outcomes of application of the best interests principle. The second suggests that precedents, or 'previous examples', can constrain the selection of a rule by a decision maker. The third relates more specifically to the best interests principle as it appears in the CRC and suggests that the concept of the best interests of the child is given more definite meaning by the context in which it appears, namely the CRC as a whole.

## Continuation of this work

Parker (1994) suggests a response to indeterminacy based on conventions among communities of rule users. This concept can provide a response to the arguments of rational choice theorists. He puts the response to the rational choice critique, in a legal context, in the following way:

By virtue of their training within some given legal tradition, the court process, their allegiance to notions of precedent, hierarchy and authority, lawyers are continually confronted by the interactive nature of rule following. ... [T]he product of ... [such] interactions amongst the legal community as to how legal rules should be applied in new situations can be called 'conventions' (p. 34).

According to Parker, such 'conventions' provide guidance as to how to apply rules such as the best interests principle. As a result, some sort of determinacy is introduced into decision-making, at least within specific communities. If we take

some of the examples of cultural indeterminacy discussed earlier, we can see that this argument has some explanatory power. Take, for instance, the case of assumptions within some African societies about the desirability of paternal custody in the event of marital breakdown. As we have seen, this practice is related to the whole structure of traditional society where marriage is formed through payment of bridewealth, and alliances are formed through marriage and the resulting children. Armstrong found in interviews with families in Zimbabwe that these customary views are still strongly held by the population in general. She cites a number of comments by persons involved in custody proceedings as indicative of the sway of these beliefs (Armstrong, 1994, p. 174):

The children of my daughters are with their fathers because the 'parents' (children's grandparents) said they wanted their children.

The father insisted that the children be left at their home saying, 'I have divorced you, go your own way, and leave the children here'.

The father just said, 'I want you to leave my child'.

(Father) I am the one who said, 'I don't want my blood to go'.

(Father) I have a son from a woman I did not marry. I will take him when he gets big (he is now 3 years).

I would love to be with my child but the father's parents won't allow it.

I asked my wife when she left, 'Why then when you leave me do you want to take my child which is part of my clan?'

It is easy to see that if these cultural views are still generally strongly held by parents, then, in Parker's terms, the community of parental rule users have developed a convention that, in the event of marital breakdown, it is in the best interests of their children for custody to be given to the father.

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APPENDIX 6: DO TRADITIONAL BELIEFS  
AFFECT CONVENTIONS IN AN INDIVIDUAL'S  
SOCIO-ECONOMIC STATUS AND  
EDUCATIONAL LEVEL?

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It is interesting to note that other studies have shown that the customary views are not necessarily so strongly held by all of the population. A study by Banda in Zimbabwe showed that women's attachment to traditional beliefs about custody corresponded with their social and economic strength as well as whether they had been married under customary or civil law. She found that women married under customary law, who also generally have low socio-economic status, are more likely to follow traditional practices. In contrast, women married under civil law, who also generally have better education and socio-economic status, are more likely to ask for custody rather than following the cultural traditions (Banda, 1994, pp. 194-197). However, the differences emerging from the analyses of Armstrong and Banda do not necessarily interfere with the application of the community of rule users argument. If one accepts Banda's analysis, it simply means that there are two groups of rule users with different conventions about how to apply the best interests principle, namely women who have been married under customary law and women who have been married under civil law.

Some sort of convention as to how to apply the best interests principle also appears to have developed in the Zimbabwean High Court in matters of child custody. Legislation in that country directs courts to promote children's best interests and to award custody on that basis. This criterion, as has already been discussed, allows space for consideration of cultural matters. However, as Armstrong notes, the High Court has

paid more attention to factors such as the wishes of the children, the ability of a parent to provide accommodation, the income of the parents, and evidence of violence by one parent. In her view, "the general law considers the same factors which are relevant to custody in most industrialized countries of the North, with very little Zimbabwean content" (Armstrong, 1994, p. 153). In the community of High Court judges, then, a convention that the individual interests of the child should be accorded priority over cultural factors appears to have developed. The application of these conventions as to what is in a child's best interests would produce a degree of certainty in the outcome of cases.

It also appears, however, that different communities of legal rule users may have developed different conventions in the Zimbabwean context, which is characterized by dual systems of law and courts. Generally Roman-Dutch common law along with legislation is applied in the Magistrate's Courts and High Courts, whereas customary law is applied in the Community Courts. The practice is somewhat different in relation to custody where both sets of courts are bound by statute. Not surprisingly, Banda has noted a different trend with respect to customary law in the Community Courts, in which she found "a strong traditional bias in favour of the customary position of awarding custody to men who had paid *lobolo* [bridewealth]..." (Banda, 1994, p. 197).

Similar observations relating to conventions among communities of rule users can be made in relation to female circumcision. Belembaogo has noted that in Burkina Faso the traditional practice of female circumcision is still widely practiced and supported; "Resistance to the banning of excision is still very strong today, although there has been slight observable progress in the urban environment. The attachment of the rural society to the practice can be explained by the strong link between this practice and a young woman's status. Excision of a young girl marks her integration into social life and her progression to maturity" (Belembaogo, 1994, p. 213). In this context, at least in rural communities of rule users it is likely that a convention that it is in the best interests of the child to be excised will prevail.



Similarly a different, but relatively determinate, perspective on the best interests of the child in relation to female circumcision appears to have been reached by the community of legislative and administrative rule users in Burkina Faso. As Belembaogo has noted, "the practice of excision was strongly opposed by the political and administrative authorities on behalf of the interests of the child. This was justified by the numerous risks to the health and physical integrity of the young girl from excision" (ibid.).

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*Within the same community, different groups of rule users may have different conventions about how to apply the best interests principle*

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Thus the community of governmental rule users appears to apply a convention that it is in the girl child's best interests that her individual physical health be protected rather than that cultural traditions be upheld.

It is clear then that while application of the best interests principle in matters relating to child custody and female circumcision could not be said to result in any universal rules, it can nevertheless produce relatively determinate outcomes within communities of rule users who develop conventions about how to apply the principle. In this sense the problems highlighted by rational choice theory are at least partly overcome.

#### *The influence of previous examples*

Parker also outlines an argument that can be used to respond to the argument of the rule sceptics. He discusses the argument of the philosopher Philip Pettit who suggests that "previous examples ... [can] exemplify uniquely a rule for rule followers. While a set of examples potentially instantiates an infinite number of rules, that set may 'for a particular agent ... exemplify just one rule'. Examples, therefore, can produce an inclination in a rule follower, whether or not he or she is aware of the process of inclination that led to it" (Parker, 1994, p. 33).

In other words, previous instances of dealing with particular questions can lead someone to have an inclination to pick one rule out of an infi-



nite number of possible rules. If one accepts this argument, then one can have some certainty that a decision maker is actually applying the best interests principle and not some other rule.

#### The context in which the principle appears

The third argument against indeterminacy relates particularly to the best interests principle as it applies in the CRC. It has been suggested that "the Convention as a whole goes at least some of the way towards providing the broad ethical or value framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interests principle" (Alston, 1994b, p. 19).

Similarly, commenting on the position in South Asia, Goonsekere (1994) observed that "[i]f constitutional and international standards could be used to set the guidelines for determining what is in the best interests of the child, it will be possible to reduce the current subjectivity in decision-making both by judges and policy makers" (p. 145). She thus appears to be suggesting that international standards, such as the express rights enumerated in the Convention, could be used to give meaning to the best interests principle.

*The Convention provides a broad ethical framework that should give the best interests principle a much clearer content.*

To illustrate the possible interpretive use of express rights let us take the example of the Egyptian education system discussed above. It will be recalled that the Egyptian Government did not have sufficient numbers of schools to provide education to each child for the full day, nor did it have sufficient resources to build more schoolrooms. In this situation the question arose as to whether it would be better to educate all children for a half day or half the children for a full day. As was noted above, if applied on its own, the best interests principle could be used to support either outcome. However, in the context of the CRC as a whole, some content can be given to the best interests principle which may

decide this issue. Article 28 of the CRC provides:

1. States Parties recognize the right of the child to education, and with a view to achieving this right *progressively* and on the basis of equal opportunity, they shall in particular:
  - (a) Make primary education compulsory and available free to *all*;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available, and accessible to *every child*, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) Make higher education accessible to *all* on the basis of capacity by every appropriate means;
  - (d) Make education and vocational information and guidance available and accessible to *all children* ... (emphases added).

It is important to note that in setting out these obligations the CRC recognizes that resources may sometimes create problems for States attempting to implement this right, and for this reason it is provided that the right to education may be achieved progressively. Despite this, Article 28 clearly requires States Parties to endeavour to make education available to *all* children. In doing so, it could be said to be creating a presumption that it is in the child's best interests to receive education. One might thus argue that this constrains the interpretation of the best interests principle and that this principle cannot be used to justify a policy that would prevent some children from receiving education.

It could further be argued that a policy to educate only half the population runs the risk of offending the non-discrimination provision of the CRC. Article 2(1) provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, ethnic or social origin, property, disability, birth or other status.



It could be suggested that it would be difficult to design a programme where only half the children would receive formal education that would not embody some element of discrimination. Presumably admission in this context would have to be based on some sort of meritocratic system such as admission examinations. However, such meritocratic systems can incorporate elements of discrimination. In some cultures, as has already been noted, girl children are not encouraged to pursue education and thus they are unlikely to wish to succeed at such examinations.

*The Convention requires governments to 'allocate resources to redress situations of discrimination'*

Even if they do wish to try, they are unlikely to receive from their families the encouragement or material resources required to succeed. Similar observations could be made with respect to children from poorer families who may be encouraged to work instead of attending school. The point is that in societies where inequalities exist it is very hard to design entry systems that will

not reproduce those inequalities. It can thus be said that the Convention establishes that it is not in children's best interests for discrimination to occur.

The final response would be that Article 2 of the Convention effectively requires the Government in such a situation to transfer more of its total resources into the education sector rather than arguing, or at least assuming, that the existing level of resources is an unalterable element in the equation. The next step, in the event that the Government was able to demonstrate satisfactorily that such additional resources were genuinely not available, would be to launch a campaign to obtain international assistance to ensure that the right to education is given adequate effect (see generally Himes, 1995).

It is clear that these arguments provide at least some way of overcoming suggestions that the best interests principle is indeterminate. The principle need not be a vacuous doctrine, application of which will support a range of apparently contradictory outcomes. The argument put by Parker suggests that the best interests principle will have determinate outcomes, at least within communities of like users. In contrast, the argument of Alston and others suggests that the best interests principle assumes much clearer and

thus more determinate content when read in conjunction with the substantive rights recognized in the CRC.

But that conclusion still does not resolve the much broader question of the relationship between cultural values, traditions, perceptions, among others, and the overall framework of international human rights law. We turn now to that issue.

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*Governments with demonstrable  
resource constraints should seek  
international assistance to ensure that  
children's human rights are fulfilled*

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# THE RELATIONSHIP BETWEEN CULTURE AND INTERNATIONAL HUMAN RIGHTS NORMS

**R**ECENT years have witnessed a radically increased awareness of the importance of cultural values within the overall international human rights framework. But this new awareness has served not only to emphasize the potential benefits of a more culturally sensitive approach. It has also highlighted the potential misuse of cultural concerns to undermine both domestic and international efforts to promote respect for human rights. As we have seen through the various illustrations already provided, the best interests principle is both a potentially important conduit for cultural values and a potentially exploitable loophole through which practices that most observers would consider to be incompatible with human rights might seek acceptability.

## *The historical setting*

The nature of the cultural relativist "threat" to universal human rights standards is best understood in the light of the relationship between the two dimensions over recent decades. The post-Second World War international human rights regime has reflected a determined, and often single-minded, commitment to universality on the part of most of the key players. They include the treaty drafters, those responsible for the implementation of the norms at the international level, and the most active proponents of the norms among the ranks of non-governmental organizations. Appropriately, this approach has also drawn strong support from the ranks of those victims of oppression living under regimes that have sought to challenge the universality of the norms they stand accused of violating. Indeed it is difficult to see how the human rights movement could have survived as well as it did from its emergence in the 1960s as a force to be reckoned with, through to the 1980s, had a significantly different approach been adopted.

Nevertheless, by the 1990s the increasing success of that movement, especially in terms of breaking down defences based on notions such as state sovereignty and domestic jurisdiction, and the increasingly effective threat that it poses to governments that had assumed that they could remain immune to international scrutiny and accountability, has endowed relativist arguments with at least two newly important constituencies. The first consists of those who are supportive of the overall enterprise but who insist on the need for a far greater cultural sensitivity than has hitherto been demonstrated.

Thus, for example, An-Na'im argues that the drafting process involved in developing international human rights norms cannot be regarded as having produced universal consensus. This is in part because persons and countries from the South have been disadvantaged in the process of drafting international human rights instruments. First, such treaties are negotiated by government officials who are more concerned with the interests of government than with the attitudes of the populace. Secondly, the negotiators from the South have, broadly speaking, been latecomers to the norm-setting process, and do not have the material and human resources of countries of the North. They might also have lacked "alternative positions to present since their national constituencies did not have the chance to articulate different proposals out of their indigenous experiences and in response to the realities of their own contexts" (An-Na'im, 1994, p. 65).

But despite these historical shortcomings and the inherent difficulty of reconciling different cultural values and experiences, An-Na'im does not conclude that "the project of normative universality on the best interests principle should be abandoned because of the difficulty of cross-cultural communication and understanding". Rather, his objective is "to emphasize the need to take that difficulty into account in seeking to

achieve normative universality..." (ibid., p. 67). He suggests that, instead of the acceptance of a false universality, norms should be developed through a process of dialogue occurring within countries. Such dialogue will, over time, help to mediate cultural and contextual differences and thereby produce common standards. He argues that those who question traditional practices should attempt transformation within those traditional models rather than "seeking to challenge and replace them immediately". These strategies should take place within the process of internal dialogue. He concedes, however, that this process may yield standards that are at variance with international norms (ibid., p. 69).

The second constituency, which favours more of a cultural relativist approach, consists of those governments that would like for various, often selfish and culturally manipulative, reasons to discredit the human rights concept. Thus in the lead-up to the 1993 World Conference on Human Rights in Vienna, Amnesty International, along with various other groups, sounded alarm bells, warning, *inter alia*, of "a backtracking on the ideals of universality". Some observers suspected that these fears had been realized in the Bangkok Declaration, adopted at the World Conference Regional Preparatory Meeting in April 1993, in which the Asian states recognized "that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds". While that statement was open to competing interpretations, spokespersons for the South did little to discourage negative assessments of its intent through comments such as the following:

Cultural relativity keeps many countries in the South from embracing total equality for women ... Similarly, the primacy placed upon the importance of the individual or complete freedom of the press cannot be accepted completely in the South, which places a far greater emphasis on the well-being of society. Finally the developmental approach in the South would frown upon absolute priority being given to civil and political liberties if they come in the way of satisfying the basic needs of the people.

In sum, therefore, we have to recognize that while constantly upgrading human rights, the countries of the South, rather than aping Northern models, must work out their own norms and standards suited to their social, cultural and economic conditions (p. 9).

In the context of such an approach, cultural considerations are only one aspect of a range of factors invoked to justify an *à la carte* approach, which would clearly undermine any international consensus worthy of the name. Other versions of relativist approaches to human rights have also continued to find some support among Western intellectuals in recent years. Indeed, if the more extreme predictions of some political scientists and others are borne out, the Cold War will be replaced by conflicts among and within cultures, religions and ideologies at the expense of any further universalization of human rights standards.

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*Cultural considerations are one of a range of factors invoked to justify an à la carte approach to human rights: at the expense of international consensus*

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But at the end of the day the World Conference on Human Rights adopted an unequivocal statement to the effect that "[t]he universal nature of [all human rights and fundamental freedoms] is beyond question". While some of the wording of the Bangkok Declaration found its way into the Vienna Declaration, it was accorded a rather different thrust in the following formulation:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to protect all human rights and fundamental freedoms.

But despite its undoubted importance in terms of rejecting what might be termed crude relativist attacks, this diplomatic/legal vindication of the principle of universality cannot be taken to have resolved the deeper, more enduring challenge of ensuring greater openness and sen-





sitivity to different cultural contexts in the implementation of human rights standards. This challenge is no less important in the promotion of respect for children's rights. But since the Convention lacks any specific provision to this effect, much of the burden will be borne by the best interests principle.

*A major challenge is to clarify distinct approaches and functions in different cultural contexts in the implementation of human rights standards.*

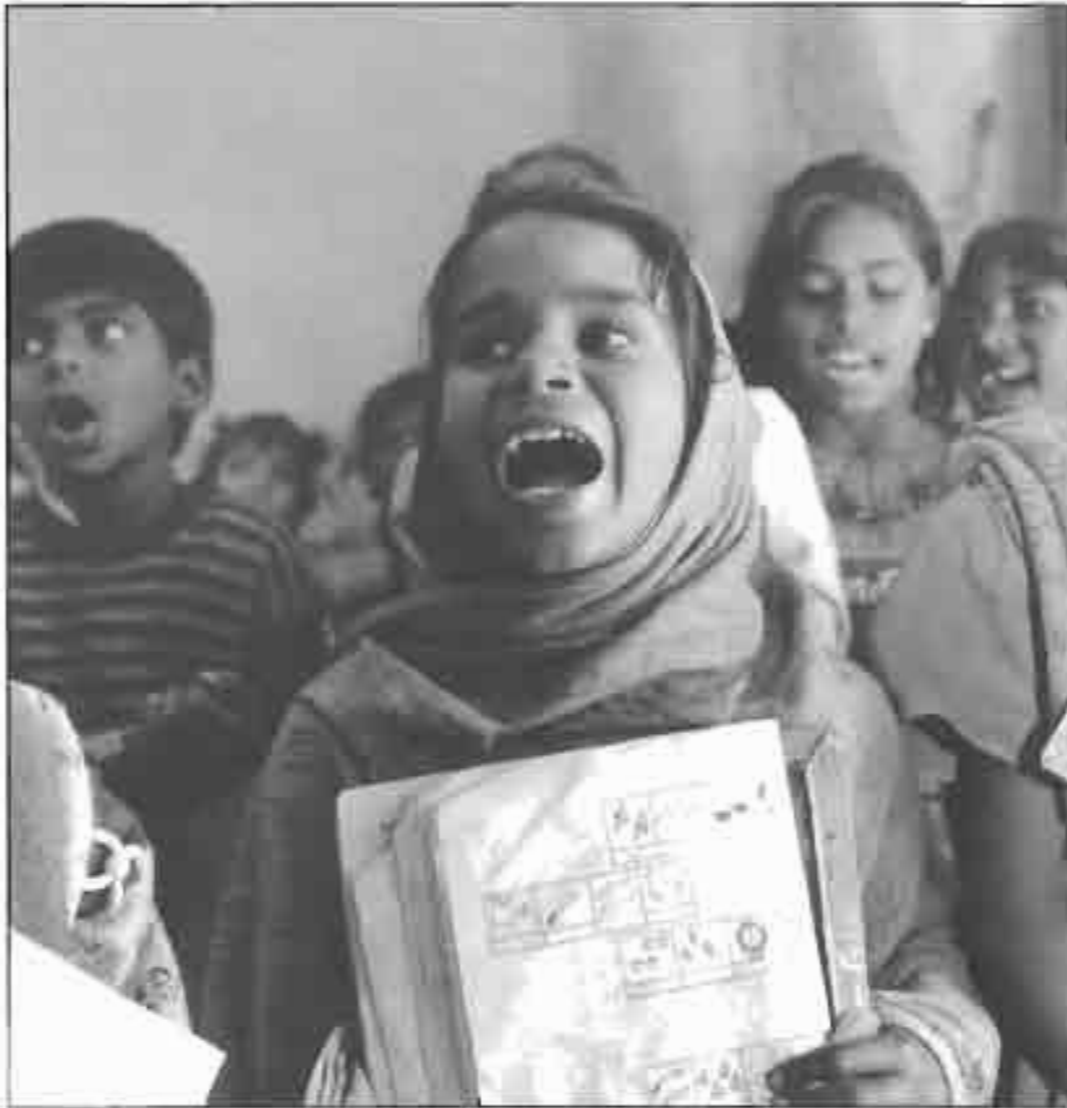
*The roles played by the best interests principle*  
Given both the importance of cultural sensitivity and the open-endedness or indeterminacy of the best interests principle, the question that arises is whether there are limits to its capacity to accommodate cultural values. What then are the roles played, or the functions served, by the principle?

It has already been suggested that the inclusion of the principle in Article 3(1) accords it an importance and prominence that it would not enjoy if it were merely included in a later, and more narrowly focused, provision of the CRC. It has also been characterized as an 'umbrella' provision. But this does not adequately describe the function that the principle has been accorded by the Convention.

In brief, there would seem to be three, rather different, roles that the principle might play:

- It can support, justify or clarify, in conjunction with other articles of the Convention, a particular approach to issues arising under the Convention. In this context, it is an aid to construction of human rights norms as well as an element that needs to be taken fully into account in implementing other rights.
- It can act as a mediating principle that can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention.
- It can serve to evaluate laws, practices, and policies relating to children that are not covered by express obligations in the Convention.





This role reflects the fact that the principle is more than merely a principle of interpretation. It rejects the view according to which "Article 3(1) does not create rights or duties..." (Van Bueren, 1995, p. 46).

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*The best interests principle plays  
a vital, but not unlimited, function  
in relation to cultural values*

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In addition to these three roles, the principle plays a vital function in relation to cultural values. It is not, however, an unlimited function. An-Na'im, for example, concludes that cultural considerations, or what he terms 'folk models', should not be subordinated to international norms. He suggests that a view that culture should prevail is problematic, first because it decreases the effectiveness of international norms if all they can do is conform to understandings arrived at in particular cultural settings; and, second, because folk models are unlikely in practice to provide settled and definitive criteria against which to evaluate international standards. In his words:

Instead of a simplistic dichotomy between folk models and international standards, which installs one as the definitive norm by which the other is to be judged, I propose a dynamic interaction between the two. On the one hand, international standards should be premised on fundamental global, ethical, social and political values and institutions, and thereby have an inspiring, elevating and informative influence on popular perceptions of existing folk models. These models and their rationale, on the other hand, should be seen as a source of the values and institutions which legitimize the international standards. Both aspects of this dynamic interaction ... should be mediated through the processes of discourse and dialogue ... (An-Na'im, 1994, p. 71).

He is thus suggesting that, through a process of negotiation in which some participants will present cultural views and others will present international norms, some reconciliation will be achieved as to what is an appropriate norm in the circumstances. Of course, this will be an evolving and culturally specific process, and norms may differ among cultures and within cultures at different points of time. The main questions arising out of this proposed approach relate to its viability in practice. Thus, for example, it is not easy to envisage a process of dialogue in which all members or groups in a particular society will have equal opportunities to present their views. The risk is that the process of dialogue will simply reflect and serve to perpetuate existing inequalities.

A somewhat different approach has been proposed by Alston. He notes that it is important for cultural considerations to be taken fully into account in the implementation of international norms at the domestic level:

It is entirely appropriate for such scope to be provided; indeed it is in many ways a type of elastic glue which enables the overall human rights enterprise to be held together and remain coherent.

He observes that, except for a provision in the Preamble to the effect that due account

should be taken "of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child", there is no specific mechanism in the CRC that allows direct consideration to be given to cultural differences. He suggests that, as a result, "much of the burden will be borne by the best interests principle". The very flexibility of the concept of the best interests of the child thus provides important scope for introducing considerations of culture into the CRC. Nevertheless, he concludes that, while it is appropriate and necessary that culture play some part in the construction and implementation of human rights norms, such considerations should not serve as a 'trump'. In other words, they should not be permitted to override the established children's rights norms. He concludes that "it must be accepted that cultural considerations will have to yield whenever a clear conflict with human rights norms becomes apparent" (Alston, 1994b, p. 21).

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*Cultural considerations should never be used to override the substantive rights recognized in the Convention.*

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It is important to note that this approach allows significant scope for cultural practices to be taken into account. Many of the express provisions of the Convention are broad statements that are open to some interpretation. In this context, decisions about whether particular practices are regulated by a particular provision may have to be decided by reference to the 'umbrella' provisions such as the non-discrimination principle or the best interests principle. Through the best interests principle there will be some scope for adopting a culturally sensitive interpretation of various provisions of the Convention. By the same token, there are important limits in this respect, and the best interests principle must always be applied in a manner that is consistent with respect for all of the substantive rights recognized in the CRC.





# THE APPROACH OF THE COMMITTEE ON THE RIGHTS OF THE CHILD

**T**HUS far we have undertaken a careful analysis of the legal and theoretical dimensions of the principle, in the light of actual case studies. It is now appropriate to consider the approach that has been adopted towards the principle by the Committee on the Rights of the Child. The Committee was established to monitor governmental compliance with the Convention and met for the first time in September 1991. A survey of its approach in the course of its first nine sessions (up until June 1995) indicates that it has made considerable use of the best interests principle in its work, although not necessarily always in the ways that the commentators quoted in this analysis might have suggested.

## *'The guiding principle' of the CRC*

Perhaps most importantly, the Committee has designated the best interests principle as one of four 'general principles' upon which the Convention is based. It has even gone so far, in relation to reports on Costa Rica and Mexico, as to refer to it as "the guiding principle in the application of the Convention". In its 'concluding observations' on the 36 reports by States Parties which the Committee dealt with in these nine sessions, it referred specifically either to the best interests principle, or to Article 3 of the Convention which expresses it, in all but six. In other words, the principle has been invoked in relation to the situation in more than 80 per cent of the countries that have been examined.

But, although the Committee has made such consistent reference to the principle, it seems not yet to have attributed to it a clear and unambiguous meaning. One conclusion to be drawn from a review of the Committee's practice is that it has not used the principle as a vehicle by which to permit a degree of sensitivity to cultural factors, in situations in which such leeway might be appropriate and consistent with the obligations

contained in the Convention. At one level, this is surprising. It has been suggested in the present analysis that while those cultural relativist arguments that undermine the provisions of the Convention must be rejected, there should nevertheless be an element of flexibility which permits specific cultural traditions and concerns to inform the manner in which the Convention is interpreted and applied in particular situations. In the absence of any specific provision of this type in the Convention, Article 3 would seem to be the most appropriate means by which to achieve such a result. To date, at least, the Committee has not chosen to make use of the principle in this way.

At another level, however, it is not especially surprising. In the first place, governments themselves, whether in their written reports to the Committee or in their accompanying presentations, have been reluctant to invoke the best interests principle as a ground that would warrant a different interpretation of one of the substantive norms in a particular context. Indeed, a certain duality of this kind has been a consistent characteristic of the cultural relativism debate. While some governments have been energetic in their invocation of cultural values as a factor that should take precedence over certain human rights, they have been notably reluctant to spell out what those rights are and how exactly they might, or should, be modified in the light of which particular values. Secondly, the Committee might well be sympathetic to the use of the best interests principle to facilitate an element of cultural sensitivity, while at the same time considering that it is not its role to take the lead in an enterprise that is inevitably blurred and potentially fraught with danger. Members of the Committee might prefer to confine their role to a reactive one in which they can query or reject specific invocations of the principle, rather than a pro-active one in which they suggest the relevance of the principle as a modifying or adaptive influence.

In general, the Committee has used the principle in three different contexts. They are:

- in relation to overall resource allocations;
- as an 'umbrella' principle which should inform all relevant governmental activities; and
- in relation to a rather limited range of specific issues.

Each of these contexts is now considered in turn.

#### *Article 3 and resource allocation*

The Committee's most consistent usage of the principle has been in the context of its concern that budget-cutting measures, and especially cut-backs in public expenditure linked to fiscal adjustment programmes, have taken inadequate account of the resulting impacts upon children. This has been an enduring concern which has been accorded prominence not only in relation to the Committee's concluding observations on the reports of developing countries such as Pakistan, Mexico, Colombia, Honduras, Paraguay and Indonesia, and countries with economies 'in transition' such as Romania and the Russian Federation, but also in relation to industrialized countries such as Canada, Denmark, France and the United Kingdom.

A reasonably typical example is the following statement taken from the Committee's observations on the report of Pakistan:

The best interests of the child is a guiding principle in the implementation of the Convention, including its Article 4. In this connection, the Committee notes the importance, in reviewing budget allocations to the social sector, both at the federal and provincial levels, of implementing that principle and ensuring that the maximum amount of resources are made available for children's programmes (UN Doc. CRC/C/29, para. 51).

In the same vein, another formulation especially favoured by the Committee has been to call, "in the light of Articles 3 and 4 of the Convention", for the provision of sufficient resources for children. The use of Article 3 in these ways seems straightforward enough until one recalls the relevant wording of Article 4. It provides, in relation to the rights that are of concern in this

context (that is, economic, social and cultural rights), that "States Parties shall undertake [all appropriate] measures to the maximum extent of their available resources...". Given that the required mobilization of resources must be pursued to "the maximum", the question that arises is what additional function, if any, is performed by adding a reference to Article 3? The implication of the addition is clear enough. It is that the best interests of the child must be a primary consideration when public authorities are allocating resources. But if they are already required to devote the "maximum ... of their available resources" to the realization of children's rights, this additional reference would seem redundant.

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*The Committee on the Rights of the Child has urged governments to view children's interests as "a primary consideration" when allocating resources to the social sector*

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One possible explanation is that the reference to Article 3 extends the appeal for adequate resources beyond the specific substantive rights identified in the Convention, to which Article 4 applies, and embraces a wider range of activities in relation to which children's best interests should be considered. This is not a very plausible explanation, however, given the comprehensive scope of the Convention's provisions. Another explanation is that the Committee tends, at least implicitly, to consider the nature of the obligation described in Article 4 to be rather open-ended and imprecise and thus in need of reinforcement. But even if we accept that in a psychological, if not legal, sense the weight of the appeal is increased by the invocation of two separate provisions of the Convention rather than one, the Committee's use of the best interests principle in relation to resources issues has still been problematic in another respect.

On several occasions, the Committee has sought to insist upon the separation of Articles 3 and 4. It has done so, for example, by asserting that the best interests principle applies "irrespective of budgetary resources" (in relation to the report of France) and that the implementation of the principle "is not to be made dependent on budgetary constraints" (in relation to the report



of Indonesia). But such statements would not seem to capture adequately the nature of the relationship between the two principles. While the best interests of the child must always be a primary consideration, the obligation to pursue policies that are consistent with that principle is, in so far as economic, social and cultural rights are concerned, limited to the maximum of available resources.

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*Article 3 is highly relevant to how "available resources" are spent and which priorities are chosen within the relevant constraints*

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Thus the result of the Committee's juxtaposition of these principles is not entirely satisfactory. This would seem to argue in favour of its making more limited use of the best interests principle in relation to resources issues. In prin-

ciple, Article 4 is, and should be treated as, the central provision in relation to such matters (see Himes, 1995). Article 3 should only be invoked in situations in which it clearly adds an additional dimension to the equation. In particular, it will be highly relevant to discussions as to the ways in which available resources are spent and in the determination of priorities within the relevant constraints.

#### *The best interests principle as an 'umbrella'*

The earlier discussion in this analysis indicates that while the best interests principle is clearly important as a general principle in its own right, its content remains potentially indeterminate when used in that way. In contrast, its implications are likely to be clearer and more readily identifiable when it is invoked in conjunction with specific rights recognized in the Convention. This concern has not, however, deterred the Committee from underlining the importance of the principle in its fullest, and thus potentially most abstract, sense.





At its very first session the Committee, in adopting its "general guidelines" for reporting by States, identified the best interests principle as one of only four 'general principles' underlying the Convention (The others were non-discrimination; the right to life, survival and development; and respect for the views of the child). It requested States to provide it with "relevant information, including the principal legislative, judicial, administrative or other measures" relevant to the principle. It also requested information on its application in the implementation of the other articles of the Convention. While it is perhaps not surprising that most States have provided scant information of such a general character in their written reports, the Committee's commitment to highlighting the importance of the principle certainly warrants the maintenance of such a request. Curiously, however, the reporting guidelines then divide the Convention up into five separate clusters of substantive rights (civil rights and freedoms; family environment and alternative care; basic health and welfare; education, leisure and cultural activities; and special protection measures). Yet it is only in relation to one of these clusters (that dealing with family environment and alternative care) that the guidelines make specific mention of the relevance of the best interests principle.

*The best interests principle should guide policy-making at both the central and local levels of government*

While the preparation of reporting guidelines will always be a somewhat haphazard process that can never aspire to comprehensiveness (at least without making the reporting burden unmanageable), the Committee's rationale for restricting references to the principle in this way is unclear. Moreover, as we shall see later, it is not consistent with its subsequent practice in which it has invoked the principle in relation to a much wider range of substantive rights.

Contrary to any misgivings on the part of theorists, the Committee has in practice been expansive in its interpretation of the appropriate role that should be accorded by States to the best

interests as an overarching 'umbrella' principle. Thus, for example, it has proposed to Belarus the adoption of a national plan of action for children which would, *inter alia*, integrate the best interests principle. In relation to Chile it noted the need to "ensure that the best interests of the child ... is a primary consideration in all actions concerning children, including those undertaken by Parliament". After considering the report of Denmark, it urged that the principle should be incorporated into national laws and procedures. It also suggested to both Canada and Sri Lanka that the principle should be reflected in national law.

But the Committee reached its zenith in this respect when it criticized the United Kingdom on the grounds that the principle was not "reflected in such areas as health, education and social security", criticized the apparent incompatibility of "legislative and other measures relating to the physical integrity of children" with the principle, and urged that the principle "should guide the determination of policy-making at both the central and local levels of government". On another occasion it was even more sweeping, although less specific, in telling Tunisia that the measures it had taken to implement Article 3 were "insufficient".

*The best interests principle is specific issues*

In dealing with specific issues, the Committee has made effective use of the best interests principle in relation to two categories of issues. In the first, it has used the principle to reinforce the content and importance of specific rights recognized in the Convention. Thus, for example, it has urged Egypt, Jamaica and the United Kingdom to take greater account of the principle in relation to juvenile justice issues, otherwise dealt with in Articles 37 and 40 of the Convention. It has criticized Burkina Faso for a "lack of adequate training provided to law enforcement officials and judicial personnel in the light of Article 3...". It has called upon Romania and Belarus to pay greater attention to the principle in relation to the provisions of their labour legislation affecting children. And it has questioned the ease with which inter-country adoptions appear to have occurred in Honduras and Paraguay on the basis of both Article 21, which addresses the issue specifically, and Article 3.

But it is in relation to the second category of issue that the Committee has, entirely appropri-



ately, made the most effective use of the principle. This encompasses a range of issues in relation to which the Convention either is silent or contains provisions that are insufficient to provide an adequate basis upon which the Committee can act decisively. In such circumstances the principle provides an important basis upon which the Committee can construct a more teleological (in other words, broader policy-oriented) interpretation of the Convention.

*The Committee also invoked the best interests principle in relation to the right of the child to be heard in proceedings concerning him or her, and to the right of the child to be heard in proceedings concerning him or her.*

One such example concerns corporal punishment of children. While there is no specific pro-

vision that prohibits such activity, the Committee has taken steps, in relation to both Canada and the United Kingdom, towards suggesting that Article 19 (requiring protection of the child from all forms of physical or mental violence), when read in conjunction with Article 3 on the best interests, combine to preclude such physical punishment. Leaving aside in this context the potentially problematic implications of the Committee's apparent reluctance to assert this interpretation definitively when dealing with States from regions that are rather more favourably disposed to such punishment for children than are Canada and the United Kingdom, the use of the best interests principle as an aid to construction of other rights is surely an appropriate application of the terms of Article 3.

Another example relates to the rights of asylum seekers. The specific provisions of the Convention, contained in Article 22, do not formally apply to children whose application for refugee status has been rejected, nor do they specify what is meant by the obligation to ensure "appropriate protection and humanitarian assistance in the enjoyment of applicable rights...". The Committee has sought to fill these gaps by invoking the best interests principle, in conjunction with other provisions of the Convention, in order to achieve what it considers to be a reasonable standard of protection for the relevant group of children. Thus, in relation to Norway, it cited Article 3 together with Article 2 (non-discrimination) to support the proposition that health care and education should be provided, as a matter of law, to children remaining in Norway despite the rejection of their asylum requests. It adopted a comparable interpretation in relation to Belgium, suggested to the United Kingdom that a reservation relating to the Nationality and Immigration Act did not appear to be compatible with Article 3 and urged Canadian administrative bodies to give greater weight to the principle in dealing with refugee and immigrant children.

Another issue that proved too controversial to be regulated by the Convention is the minimum age of marriage. In practice, the problem relates overwhelmingly to girls who in a number of traditional societies are able to be married off at a very young age, often to much older men. Thus, although the United Nations had adopted a Convention specifically dealing with this issue as long ago as 1962 (the Convention on Consent to



Marriage, Minimum Age for Marriage and Registration of Marriages), the issue remained undressed in the Convention. The Committee has sought to reduce, if not close, the resulting gap in protection by invoking Article 3 as a basis upon which to question what it considers to be unreasonably low minimum ages. Thus it informed Madagascar that legislation that authorizes the marriage of 14-year-old girls "may raise the question of compatibility with the principles of ...

the best interests of the child". In other cases, such as Nicaragua and Sri Lanka, it has also invoked Article 2 (non-discrimination) and Article 6 (right to life, survival and development) for the same purpose.

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*The best interests principle can be used as an aid in construction of other rights, such as the right to health care and education for refugee or immigrant children*

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#### *The principle in the private domain*

While the Committee could not yet be said to have developed any definitive statements as to the reach of the best interests principle, under Article 3, into the private domain, it has to date tended to adopt an expansive approach on this issue as well. Perhaps the clearest example in this respect was the Committee's expression of concern that legislation in the United Kingdom dealing with reasonable chastisement of a child within the family did not appear to be compatible with, *inter alia*, Article 3 of the Convention.



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