WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

INTRODUCTION

Until recently children's rights have not been a perceptible body of law separable from the greater universe of individual human rights. If they recognized them at all, lawyers and legal scholars considered that children's rights derived from the rights of the parents or from individual human rights recognized by international or domestic law. There was a time, exemplified by early Roman law, when children were considered property of the family father, who had a life and death power over them.[1] Children were treated the same as adults- as workers, spouses or parents in their early years. Their bodies and energies were harnessed for the benefit of their families, communities or society as a whole. Their small and nimble bodies have been preferred for work such as mining, where tunnels could best be negotiated by children because of their small physical frames, or agriculture, where extra hands in the fields have been invaluable.[2] The onset of adolescence and sexual maturity has been treated as the signal that childbearing is not only possible, but appropriate.[3] Before Rousseau, children were often viewed within the upper classes as little adults, and were dressed accordingly, but not allowed the freedom to express themselves as adults. The child rights movement, which Rousseau founded, soon spread to the German speaking world, and eventually to the English-speaking world.[4] The status of children as persons with rights received official recognition with the adoption by the General Assembly of the United

---

[1]Clark Butler, Child Rights: *The Movement, International Law, and Opposition* 13 (Purdue University Press, 2012).
[2]Purna Sen, *Child Rights in the Commonwealth: 20 Years of the Convention on the Rights of the Child* 9 (Commonwealth Secretariat, 2009).
[3]*Ibid*.
[4]*Supra* note 1.

WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Nations of the Convention on the Rights of the Child in 1989, and with ratification of the convention by virtually all countries of the world during the 1990s.[5]

The emerging reconceptualization of childhood, which started several decades ago, has meant that the treatment of all human beings as adults, even at an early stage of their lives, has been replaced by the notion that childhood is a time of development and learning, which needs special attention. Childhood has come to be seen as a time when protection and nurturing are needed and for which parents and wider society should take responsibility.

The UN Convention on the Rights of the Child emerged after the drafting of a series of important human rights treaties, a large number of declarations on human rights and an even larger number of UN resolutions about human rights. These include, most prominently, the UN resolutions in the Universal Declaration of Human Rights (1949) and the two treaties which were drawn up to create formal legal obligations of the rights set forth in the Declaration- the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Although some human rights proponents have held that these instruments adequately protect all human beings, others have argued successfully that particular groups encountered particular problems, and therefore needed special conventions to assure the implementation of their rights.[6] In addition, of course, there was also the history of special documents or special provisions for children's rights. Among these are those mentioned in the Preamble to the Children's Convention itself: the Geneva Declaration on the Rights of the Child(1924); the UN Declaration on the Rights of the Child(1959); Articles 23 and 24 of the Covenant on civil and Political Rights(1966); Article 10 of the Covenant on Economic, Social and Cultural Rights(1966); the Declaration on Social and Legal Principles

---

[5]Luisa Blanchfield, *United Nations Convention on the Rights of the Child: Background and Policy Issues* 67 (DIANE Publishing, 2010)

[6]Natalie Hevener Kaufman, The Participation Rights of the Child: Rights and Responsibilities in Family and Society 26 (Jessica Kingsley Publishers, 1997)

relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the UN Standard Minimum Rules for the Administration of Juvenile Justice; and the Declaration on the Protection of Women and children in Emergency and Armed Conflict.[7]

The major significance of the convention is that it officially elevates the status of children worldwide to persons in their own right, and puts to rest lingering assumptions about parental and state paternalism with regard to children. Ratifying states put on record their agreement that children are claim holders who have fundamental rights as individual persons, and that parents, adults, and state authorities are duty bearers who have obligations for providing for those rights. The convention is also significant in that it is the first document of international law in which the psychological needs of children are given equal primacy with their physical and mental needs.[8]

The text of the Convention is broad, covering a range of issues, including health, education, family life, involvement in decision both familial and beyond, freedom of thought and peaceful assembly. The Convention acknowledged the modern understanding of childhood and formulated what children can expect as a set of rights, rather than welfare or kindness from adults. The Convention exemplified thinking that sought a gender inclusive approach, with language that speaks of 'he or she', 'his or her', and was the first international law to do so.

The major features of this convention include recognition of the following rights of children:[9]

---

[7] *Ibid*.
[8] *Supra* note 1 at 38
[9] Christine Corcos," The Child in International Law: A Pathfinder and Selected Bibliography" 23 *CASE W. RES. J. I NT'L L.* 171 (1991)

WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Article 2: Non-discrimination; Article 3: Best interests of the child standard; Article 5: Right to remain with extended family or familiar community; Article 6: Right to nationality; Article 8: Right to personal identity; Article 9: Right to remain with parents barring proof of abuse; Article 10: Right to maintain contact with parents geographically separated from him/her; Article 11: Right to intervention by the state in cases of child abduction; Articles 12 and 13: Right to freedom of speech at an appropriate age; Article 14: Right to freedom of thought and religion; Article 15: Right to freedom of assembly and association; Article 16: . Right to freedom from arbitrary search and seizure; Article 17: Right to information; Article 18: Right to shelter and support from both parents; Article 19: Right to freedom from abuse and neglect by any party; Article 21: Right to adoption, within the laws of the affected state; Article 22: Right to asylum in time of war; Article 23: For disabled children, right to shelter, education, rehabilitation and protection; Article 24: Right to medical treatment; Article 28: Right to an education; Article 32: Right to protection from forced labor; Articles 34-36: Right to freedom from sexual abuse and harassment, Right to freedom from other forms of exploitation; Article 37: Right to freedom from torture or unauthorized imprisonment; Article 40: Right to due process in criminal cases.

The CRC has two additional Protocols, adopted in 2000, that addressed specific concerns and are appended to the main treaty.

The Optional Protocol on the Involvement of Children in Armed Conflict is an attempt to increase protection of children during armed conflict. The Protocol places states under an obligation to take all measures they can to prevent those under the age of 18 in their armed forces from taking a direct part in hostilities.[10] While the CRC establishes 15 as the minimum age at which anyone may be voluntarily recruited into the armed forces, the Protocol provides

---

[10]Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx

that states must raise this age. In addition, it prohibits compulsory recruitment to the armed forces of anyone under the age of 18.

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography builds on the right of children to protection from sexual exploitation conferred by the CRC by providing that states must comply with detailed requirements to end these particularly heinous violations of children's rights. It requires the states to criminalise and punish all activities related to these abuses and to provide a range of support services for child victims. Further, the Protocol highlights the importance of increased public awareness and the values of international co-operation in combating these offences.[11]

The rights elaborated in the Convention are normally discussed in four categories: survival, protection, development and participation. The groupings do not imply that the rights are mutually exclusive; on the contrary, the rights in the Convention are interrelated and mutually reinforcing.

Survival rights are easily considered to be a prerequisite of other rights. The Convention addresses survival explicitly in Article 6, paragraph 2, requiring states parties to 'ensure to the maximum extent possible the survival...of the child'. Article 6 also explicitly states the child's 'inherent right to life'. Survival is normally understood to also include basic survival needs such as health (Article24) and adequate standard of living (Article27). [12]

Development rights stress the importance of fostering and nurturing the many dimensions of the child. The same article that states the right to survival includes the right to development(Article 6). These rights include among others, the child's rights to 'the highest

[11]The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Available at:http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx
[12]*Supra* note 6 at 28.

attainable standard of health' and 'to benefit from social insurance' (Article26), 'to education' (Articles28 and 29) and 'the enjoyment of one's culture, language and religion' (Article 30). The standard of living required by the convention is defined as one which is adequate for 'physical, mental, spiritual, moral and social development' (Article 27), thus pointing to the many aspects of child development. The concern about development is also reflected in Article 23, which provides for development rights for the mentally of physically disabled child.[13]

Protection rights stem from the convention's core of human dignity. These rights include, among others, ' the right to be protected from economic exploitation' (Article32), 'from the illicit use of ...drugs' (Article34), from torture (Article37), from abduction (Article35) and from denial of due process or other criminal and judicial safeguards (Article 40).[14]

Participation rights are reflected in several provisions in the Convention. Participation is one of the guiding principle of the convention, as well as one of its basic challenges. Article 12 of the Convention on the Rights of the Child states that children have the right to participate in decision-making processes that may be relevant in their lives and to influence decisions taken in their regard-within family, the school or the community. The principle affirms that children are full-fledged persons who have the right to express their views in all matters affecting them and requires that those views be heard and given due weight in accordance with the child's age and maturity.[15]

According to Katherine Covell, Professor of psychology at Breton Cape University and Executive Director of its Children's Rights Center, the CRC, ratified by most states in the 1990s, reflects a near-global consensus on what childhood should be and an almost global

[13]Supra note 6 at 28
[14]*Ibid*.
[15]Available at: http://www.unicef.org/crc/files/Right-to-Participation.pdf

commitment to make laws, policies, and practices consistent with its provisions. But she sees a large gap between promise and reality.[16] It is only a near global consensus and commitment because there remain two countries which have signed, but not yet ratified, the convention. Somalia has been unable to ratify the convention due to its ongoing state of civil war. The United States, which signed the convention in 1995, has made no move towards it ratification.[17] It has been argued that a major reason for the US failure to ratify the convention, other than political complexities, is based in public concerns that the rights of children would override the rights of the parents, and that the convention would override American sovereignty.

The Convention makes reference to itself as legally 'binding' (article 50). However as a matter of sociological fact, the Convention clearly fails to bind the behaviour of many nations that have nonetheless ratified it. We need to be clear about what it means to say the CRC is 'legally binding.' It doesnot mean that all ratifying nations are legally bound to legislate the children's rights in the convention as domestic law. It means, rather, that ratifying nations are legally bound to participate in the monitoring procedure spelled out in the convention. They are legally bound to show that they are seriously trying to legally implement children's rights, to file reports on their success in implementing those rights, to be examined by the UN Child Rights Committee, and to receive recommendations from the committee. They are not legally bound to follow the recommendations or to actually pass domestic legislations, however great the displeasure which the committee may show toward such countries in future reports. States sometimes feel conflicting pressures from different governmental or non-governmental agents of the world human rights movement, and sometimes have to make hard decisions and set their own budgetary priorities.

[16] *Supra* note 1 at 4
[17] *Ibid*.

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Yet even in this weaker sense of a 'legally binding' human rights convention, the CRC fails to consistently bind in fact the action of ratifying nations that fail to submit reports in the required time frames, that submit frivolous or unresponsive reports, or that do not seriously attempt to follow the committees' recommendations. No punitive actions beyond shaming and blaming exist to enforce compliance with what nations have legally bound themselves to do. The committee issues recommendations, but the CRC regime provides for no court empowered to issue legally binding verdicts.

BEGINNING OF THE CHILDHOOD

In English the terms like baby, infant, juvenile, adolescent, youth, young persons and minor are used characterised by a lack of consistency. Traditionally a child has been defined as a comparative negative: a child is an individual who is not yet an adult.[18] It is a definition which is laden with religious, cultural, physical and psychological practices and beliefs. There are only two points in contention: the beginning of childhood and the end of childhood. The first reference to the beginning of childhood is found in the preamble to the Declaration of the Rights of the Child 1959, which provides 'whereas the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'[19] The issue is critical, because if childhood begins from the moment of conception then the child's ' inherent right to life' contained in article 6(1) of the Convention on the Rights of the Child, and in other international treaties applies as from the moment of conception.[20] In practice not only would this mean that abortion would be prohibited under international law but also other rights, such as privacy and health, would be equally applicable from the moment of conception, with implications for a wide

---

[18]Geraldine Van Bueren, *The International Law on the Rights of the Child* 33(Martinus Nijhoff Publishers, 1998)
[19]*Ibid*.
[20]*Supra* note 18.

variety of situations including neonate testing and eligibility for compensation for drug damage.

The point which international law recognises as the beginning of childhood also arose during the drafting of article 1 of the Convention of the Rights of the Child, the article which attempts to define who is a child. Article 1 currently defines a child as:"For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Morocco proposed successfully that the original draft of article 1 defining a child, which included 'from the moment of his birth', should be deleted.[21] Hence article 1 now begins, ' for the purposes of the present Convention a child means every human being below the age of 18 years, unless...' . The Convention does not restrict a state's discretion to provide under its domestic law the point in time when childhood begins. Argentina lodged a declaration on ratification that article 1 ought to be interpreted 'to the effect that a child means every human being from the moment of conception...' and Guatamala indicated similarly on signature.[22] The Holy see strongly although indirectly supports this approach. Hence, under the convention, the beginning of childhood and therefore life itself is to be determined by the States Parties' own domestic legislation.

Because of the absence of a universally agreed point in time as to when childhood begins, cases concerning the beginning of childhood under the American Declaration of the Rights and Duties of Man and the European Convention on Human Rights have been brought not under who is a child but under the right to life. In relation to the Inter-American Declaration and the African Charter on the Rights and welfare of the child, which are both silent as to the beginning of the childhood, it is concluded through a series of case laws that each state is

[21]Jane Fortin, *Children's Rights and the Developing Law* 32 (Cambridge University Press, 2009)
[22]*Supra* note 18.

independent to determine in accordance with its own domestic law the point at which life begins and the point at which the state believes it necessary to provide protection. [23]

The issue also arose within the Council of Europe. The European Commission of Human Rights had to decide whether the unborn child is protected by article 2(1). The Commission observed that the same point had also been the subject of proceedings before the Constitutional Court of Austria.[24] The Austrian Constitutional Court had found that article 2(1) of the European Convention does not extend to unborn life. The European Commission also rejected the contention that the foetus has an absolute right to life but noted that 'certain rights are attributed to the conceived but unborn child, in particular the right to inherit.'[25]

From the limited case law and treaty law it would appear that international law protects the beginning of childhood from birth. States are not prohibited from extending their definition of child to pre-birth, but such protection cannot be read into customary international law.

The arbitrariness of the definition is not a reason for denying the existence of specific rights attaching to childhood. Despite being arbitrary it is important to arrive either at a definition of childhood or to mark out its possible boundaries, as children benefit from additional rights which are only applicable during the period of childhood. Therefore the definition of childhood in international law is critical because it determines which specific rights attach to the status of children and which legal remedies are available to children as a class

END OF CHILDHOOD

In the arena of International Law fundamental considerations and implications apply to the settling the age which marks the end of childhood or the attainment of adulthood. Legal age

[24] *Supra* note 18.
[25] *Ibid.*

limit may be subject to change within one country or may vary from country to country. In Norway the age of majority was 21 years until 1960. In the USA voting age was lowered as a result of the 'old enough to fight, old enough to vote' campaign at the time of the Vietnam War. The age-level set for marriage has changed from 12 to 14 for daughters, to 18 for both sexes now, after a period of being 16 or 18 for girls, 18,20 or 21 for boys, varying from country to country.[26] Within criminal justice a variety of limits in different countries illustrate not only how different these limits may be, but also how obligation to take full responsibility for breaking the law can be a gradual process. One question that must be considered is the appropriateness of the ages set. In the USA the legal age for drinking alcohol was lowered from 21 to 18 years, but raised again when it became clear that the lower age led to an increase in car accident fatalities among young drivers.[27]

Fundamental considerations apply to the end of childhood or the attainment of adulthood. There are enormous differences between societies and culture as to the role of children within the family and the community, leading to inevitable differences in how communities view duration of childhood. There are a number of factors which are commonly applied to determine the end of childhood: the attainment of a particular age, the ability to perform specific acts or the capacity to perform particular functions. The minimum ages are inevitable arbitrary, as they cannot reflect the speed of development of each individual child. If the age limit is set too high, the majority of children may feel underestimated. Yet an age limit set for the purpose of protecting children cannot be set at the level at which half of the children can manage, but the other half still needs the protection.[28]

[26] *Supra* note 6 at 13
[27] *Ibid.*
[28] *Supra* note 6 at 15

WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Neither the 1924 nor the 1959 Declaration of the Rights of the Child, defines when childhood ends. According to article 1 of the Convention on the rights of the Child, a child for the purpose of the Convention is, 'every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier.' When the age of 18 was proposed during the first reading of the Convention a minority of states argued against it as under their national legislation childhood ended at a lower age.[29] This is because states with a high infant mortality rate and a low age for life expectancy allow children to participate at a lower age in performance of duties which help the survival of all members of the family; this is particularly so in rural communities.[30] These delegations were of the opinion that an upper age limit lower than that of 18 years should be used. Two suggestions were put forward. One was to take the same position as the UN general Assembly in connection with the International Year of the Child and to set the upper age limit at 15. The other was to set the upper age limit at 14, considering that the age of 14 years was the end of compulsory education and the legal age for marriage in many countries. [31]

States which wished to retain the age of 18 argued that the convention ought to apply to as large a group of individuals as possible. The domestic legislation of these states was already in conformity with the age of 18, and they believed that the qualification contained in article 1, 'unless under the law applicable to the child majority is attained earlier' would avoid difficulties for states where majority is attained earlier. By linking the international definition of childhood to the national law on majority, the Convention attempts to accommodate the existing cultural and religious diversities reflected in national age limits.[32] Within the

---

[29] *Supra* note 18 at 36.
[30] *Ibid.*
[31] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* 45 (Martinus Nijhoff Publishers, 1999)
[32] *Supra* note 31 at 46-47.

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Council of Europe the Committee of Ministers recommended in 1972 that Member States of the Council of Europe lower the age of majority from 21 to 18,' provided that states may retain a higher age of capacity for the performance of certain limited and specified acts in fields where they believe that a higher degree of majority is required.[33]

There are, a number of international treaties concerning children which do set an upper limit of applicability for that particular treaty. Such agreements are easier to accomplish as many concern only one aspect of a child's life. In both the Hague Convention on Civil Aspects of International Child Abduction 1980 and the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of custody of Children 1980, a child is defined as being under 16. A different approach is adopted by the International Covenant on Civil and Political Rights, which prohibits the imposition of sentences of death on people who committed crimes below the age of 18, but omits the use of the word child.

The international community is still some way from agreeing on a universal definition of childhood, and it is at least arguable as to whether such a universal definition is even desirable.

BEST INTEREST OF THE CHILD

The principle of the best interests of the child is a modern and fundamental concept in the determination of child welfare. It is not expressly incorporated into many major human rights instruments. For example, neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights includes any such reference, therefore the inclusion of best interest of the child in a rights treaties, the Convention on the Rights of

---

[33] *Id.* at 47

the Child, suggest that this traditional concept has been remoulded. From the very first draft of the UN Convention on the Rights of the Child, put forward by the Polish Government in 1978, it was clear that the principle of the 'best interests' should be included and given a prominent position.[34] Discussion of the principle since the adoption of the UN Convention on Rights of the Child often refers to its key provision in Article 3 of the Convention.

Standard and generally accepted definition of the principle of the best interests of the child is nowhere to be found. In the UNHCR Guidelines on Determining the Best Interests of the Child, the term was broadly defined as the well being of a child (UNHCR, 2008).[35] The phrase generally refers to the deliberation undertaken by the courts in deciding what orders will serve a child best. In the undertaking, the court will have to consider a number of factors related to the circumstances of the child.[36] However, the phrase as it is provided under the UNCRC denotes much wider key players than the judges and these include the executive, administrative, legislative and any judicial and quasi judicial bodies and involving both action and decision.[37] Under this principle a decision maker has the duty to analyse the best interests of a child or to give a child's interest a primary consideration above other interests when deciding on any child related issue or taking of action affecting children.[38]

Article 3 of the UNCRC makes it obligatory to apply the principle into every action and decision taken by public and private provider of welfare services and all organs of states.[39] This simply means that the best interests of the child are claims that should have greater

[34]Lecture by Thomas Hammarberg, Commissioner for Human rights, Council of Europe, *The Principle of the Best Interest of the Child- What it Means and What it Demands From Adults*, Strasbourg, 30 May 2008.
[35] Dina Imam Supaat, "The principle of the best interests of the child as the basis of state obligation to protect refugee children in Malaysia", 1 *South East Asian Journal of Contemporary Business, Economics and Law* 147 (2012)
[36]*Ibid.*
[37]*Ibid.*
[38]*Ibid.*
[39]*Ibid.*

bearing on any action and decision making. Consequently, this has placed a requirement for state to take every possible effort to ensure a coordinated action and decision directly and indirectly affecting children that comply with the principle of the best interests of the child.

The drafters of the Convention not only widened the scope of the principle, but they also made it one of the 'umbrella' provisions and thereby important for the overall framework of the Convention. The 'best interests of the child' is mentioned in several articles of the Convention: relating to the separation of the child from the family (Art. 9); parental responsibility (Art. 18); foster placement (Art. 20); adoption (Art. 21); deprivation of liberty (Art. 37); and juvenile justice (Art. 40). The key formulation, however, is found in the first paragraph of Article 3[40]:

> '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.'[41]

The UN Committee on the Rights of the Child has taken the principle one step further, defining the best interests of the child as a 'general principle' guiding the interpretation of the entire Convention. The principle also guides the interpretation of the Convention when articles might appear to contradict each other. In some unfortunate cases a conflict may arise between the right to have access to both parents and the right to be protected against abuse.[42] In such situations, the best interests of the child must determine the course of action.

[40] *Supra* note 35.
[41] Convention on the Rights of the Children (1989), Article 3.
[42] *Supra* note 34.

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

By being linked to the 'best interests' principle, the substantive articles gain in clarity and depth. The principle also provides guidance on problems and situations not specifically mentioned in the Convention. For instance, although the Convention requires States to establish a minimum age of criminal responsibility (Art. 40.3), it makes no mention of what exactly that age should be.[43] When that decision is taken, the best interests of the child should be a primary consideration.

Used as a standard and test to make decision impacting children[44], its application in the determination of custody, permission of adoption, sentencing and in the administration of juvenile justice are widely practiced around the world. In relation to refugee children, the principle is seen as the essence in the determination of refugee status; whether a child is in need of international protection; and in immigration proceedings involving children.[45]

The current evolution is seen as a result of children's upgraded position from merely as a property of their parents to "legal subject" or right holders[46]. As a significant feature in the adjudication of custody, family relations and criminal justice related to children, the principle gains more prominence after the adoption of the UNCRC which stipulates the principle in Article 3 in a more extensive form than normally provided under domestic laws around the world.

It is to be noted here that this principle is not a substantive right[47]. It is a requirement in which procedures involving determination or action affecting a child must make the best interests of the child a primary consideration, and "...give them substantial weight, and be

---

[43] *Ibid.*
[44] M Woolf, "Coming of Age? –The Principle of the "Best Interests of the Child" 2 *E.H.R.L.R.* 205, (2003).
[45] *Supra* note 35
[46] J.K Dalrymple, "Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protected Unaccompanied Minors" 26 B.C. Third World L. J. 131 (2006).
[47] J. Zermatten, "The Best Interests of the Child Literal Analysis, Function and Implementation", Working Report , International Institute for the Rights of the Child: Switzerland (2010)

alert, alive and be sensitive to them." The best interests rule is not about the outcome but the process of coming to the conclusion or decision. The interests of the child are to be assessed and weighed as part of a process in applying a rule or procedure. This principle does not command that a decision maker should constantly decide everything in complete agreement with a child's best interests[48]. It is important to understand that if a decision is to cause greater impact on children, greater emphasis on the requirement of making the best interests of the child as a primary consideration should be made. Therefore, to adopt a different approach which is in contradiction with the principle or ousting the best interests of the child as primary consideration will require solid and concrete reason.[49]

The broad scope of Article 3 naturally had a price in the drafting process. There was considerable discussion on whether the formulation should be 'a' or 'the' primary consideration. In the end it was recognized that given the widened scope of Article 3, situations would arise when other legitimate and competing interests could not be ignored. The conclusion was to settle for the somewhat less decisive wording 'a primary consideration'.[50]

Generally, the "best interests" principle is regarded flexible as because what is considered best interests for a child may not be so for another child and furthermore several elements make up the term 'best interests' including the rights of a child[51]. However, the rule is also referred to as indeterminate, vague, unrestricted, and can be exposed to bias interpretation.[52]

---

[48] Tobin, "Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children" 33 *Melb. U. L. Rev.* 579, 588 (2009

[49] *Ibid.*

[50] *Supra* note 35.

[51] *Supra* note 48.

[52] A. Barratt and S. Burman, "Deciding the Best Interests of the Child: An International Perspective in Custody Decision Making" 118 *South African Law Journal* 556- 557(2001).

WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

A child's best interests might differ from one situation to one situation and a group of children's interests may vary from other group depending on the circumstances they are in and no one can tell exactly the best interests of a particular child or a group of children. Furthermore, besides the law and regulation, culture and religion may have some influence on what constitute the interests of a child. In a situation when a Christian parent confronts a Muslim parent over whether their son should be circumcised- both parents may have the boy's best interests at heart. The English Court of Appeal in one such case thought it was not in a five year old's best interests to be circumcised against the wishes of his primary carer(the nominally Christian mother)[53]. A decision concerning custody rights between parents and international adoption for instance, may depend on different sets of factors.[54]

However, it is seen that Governments or individual adults have sometimes misused the 'best interests of the child' to justify actions that in reality have violated the rights of the child. There is a danger that article 3(1) will become a fulcrum for regression rather than progress and that states will adopt an extreme culturally relativist position to defend their actions. Corporal punishment has been defended with the argument that it teaches children necessary limits and is therefore for their own good in the long run. Adopted children have been prevented from knowing their biological family 'in their own interests'. Children of indigenous peoples have been forcefully removed from their families and placed in boarding schools so that they could be introduced to 'civilization', again in the name of their 'best interests'. This danger is significantly reduced under the African Charter on the

---

[53]Micheal Freeman, *Article 3: The Best Interest of the Child*., 2 (Martinus Nijoff Publishers, 2007)
[54]*Supra* note 35.

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Rights and Welfare of the Child which in contrast to the Convention on the Rights of the Child prohibits customs and practices affecting the welfare and development of the child.[55]

Furthermore, it has been argued that what is in the best interests of the child varies from one era to another and also depends on the resources, the developmental level and the culture of the country in which the child lives. Child labour is one example of a controversial application of the best interest principle. In developing countries, families do in many cases depend for their survival on income earned by all productive family members, including children.

The reconciliation of the best interest principle with culture norms is a major concern, Perhaps more so now than it was in 1989. We are more sensitive to cultural diversity and arguably more tolerant of it than we were when the principle was being formulated.[56] Different societies have different understanding of childhood, there are different views on such questions as whether children should work; when they should be allowed to marry and what choice, if any, they should have.[57]

Very frequently culture, religion and tradition frustrate the implementation of the best interests principle. The low legal age of criminal responsibility is one of the many concerns. There are many references to corporal punishment and its use by parents and in schools, as well as in institutions. There are references to economic difficulties and budgetary constraints due to which the best interests of the children are neglected

---

[55]Geraldine Van Bueren, The International Law on the Rights of the Child, 47 (Martinus Nijoff Publishers, 1998).

[56]Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child* 33 (BRILL, 2007).

[57]*Supra* note 54.

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

There is another important aspect of the Convention that is relevant to this discussion: the emphasis on respecting the evolving capacities of the child.[58] For the best interests of the child to be determined, it is important that the child himself or herself be heard. With increased age and maturity, the child should be able to influence and decide more. This obvious point is often forgotten. Adults tend to discuss what is best for children without seeking their opinions or even listening to them.

The interplay between Articles 3 and 12 is one of the most interesting aspects of the Convention. Article 12 states that the child who is capable of forming an opinion on matters affecting him or her has the right to express that opinion freely and that the child's opinion should be given due weight in accordance with his or her age and maturity.[59]

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

The interests of the child versus the interests of others

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

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

---

[58] *Supra* note 34.
[59] *Ibid*.

a) How to balance the interests of one child against those of others? Such dilemmas are common in schools, pre-schools or other community activities for children. One example is when a country does not have sufficient resources to build more schoolrooms for a growing number of children. Would it be better to adopt a two-shift system, which would cut down the school hours for some children, but provide education for all children? In other words, would it be better to educate all children for a half day or half the number of children for a full day?[60]

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

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

[60] *Supra* note 34.

c) How to balance the interests of the child versus the whole society? What is good for an individual child or for children in general may well clash with what is seen as important for other groups or for the community as a whole. Such contradictions or competing interests are often about resources. Given all other needs, the costs of responding to the very best interests of a child can be unacceptably high, especially in low-income countries. One example could be when a child needs advanced, and therefore expensive, hospital care. In such cases, it will sometimes be necessary, however painful this may be, to seek the fairest possible solution, within the given constraints, though still respecting the principle that the best interests of the child should be a primary consideration.[61]

The Convention does give some guidance on the issue of resources. Article 4 asserts that States should allocate the maximum extent of their available resources for the implementation of the rights of the child. A serious decision maker would therefore have to determine what reasonably should be regarded as the 'maximum extent' possible.[62]

The Convention does not give concrete answers on how conflicts of interest should be resolved, except for the most obvious cases. The weighing of legitimate but different interests is naturally delicate and difficult. Often it is a question of assessing and comparing degrees of benefit and damage. If the interests of a child or group of children would be less infringed by a certain proposed action, there would naturally be more room to accommodate the interests of others, and vice versa.[63]

The important point is that the 'best interests' principle must remain present in such processes: that the interests of the child have to be an important consideration in all decision-

[61]*Supra* note 35.
[62]Jan C. M. Willems (ed.), *Children's Rights and Human Development: A Multidisciplinary Reader* 588 (Intersentia, 2010)
[63]*Supra* note 34.

making that has a significant impact on the child's well-being and the fulfilment of her or his rights. There are two major stages in the implementation of Article 3: to assess what is best for the child, and to balance her or his best interests against competing claims.

FIRST STAGE, the Convention as a whole gives pointers as to what is good for the child. It also requires that the child be heard and that his or her opinions be taken seriously.[64] As SECOND STAGE, it is important to remember that the basic idea is that priority should be given to the child, although the interests of others should also be considered as relevant. Impact analyses will facilitate the assessment and balancing of competing interests.[65]

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

RIGHT TO REFUSE AND CONSENT TO MEDICAL TREATMENT

Even though Convention of rights of the Child is one big step towards recognizing various rights which a child should be entitled to, there are certain rights which have emerged gradually, which haven't been dealt with in the Convention. Despite the wide scope of the Convention certain rights still remain outside its perview and have an ambiguous status. One such right is the" right to refuse medical treatment". Through a series of case laws in the USA, England and Canada much deliberation has been done on this issue by the courts. However, there lack a set principle to let the minors exercise this right.

[64] *Ibid.*
[65] *Ibid.*

WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

It is a fundamental principle of law and ethics that competent adults have the right to make their own medical decisions, even if these are "bad" medical decisions that may result in the individual's death.[66] Occasionally, physicians encounter situations that question whether minors are afforded this same fundamental right. Minors have often argued that they possess the right to make medical decisions independently, even decisions to refuse medical care. Courts and society have struggled with this question and have sought to introduce standards by which minors can make medical decisions without parental consent.[67]The issue of consent is an important one and is a vital requirement when it comes to medical treatment. However, when 'consent rules' are applied to children, in particular, to 'Mature Minors' teenagers, the law appears to be less clear and more ambiguous. [68]

Clearly, society would not question the parents' rights to overrule their 5 year-old son's refusal to have a broken leg repaired. However, society has come to question whether parents can override their 16 year old daughter's decision to refuse additional bouts of chemotherapy to treat leukemia. However, can physicians, honour the minor's decision to refuse care when the parents believe the minor should be treated?[69]

Evolution of the "mature minor" doctrine

Traditionally, in a litigated dispute over the administration of medical treatment to a minor, only the minor's parents and the state have standing. Such cases almost always arise when the parents have refused to consent to necessary medical treatment for their minor child. Typically, a statutes in different states in the USA provides the procedures by which the state

---

[66] Christopher m. O'connor, "What rights do minors have to refuse medical treatment?" 4 *the Journal of Lancaster General Hospital* 63 (2009)
[67]*Ibid*.
[68]Miray Gorgy, " Article 8 and Minors Right to Refuse Medical Treatment" *The Student: Journal of Law* (2011) http://www.sjol.co.uk/issue-4/article-8-and-minors-right-to-refuse-medical-treatment
[69]*Supra* note 64.

can challenge a parent's refusal of consent to medical treatment for the child on the basis that it constitutes neglect. After the parent has made a decision regarding the type of medical care her child should receive-whether it is an alternative course of treatment or no treatment at all, a state agency may challenge the parent's choice and move to obtain temporary legal custody of the child, allowing an agent of the state to supply the necessary consent for the treatment of the child. The decision whether to award custody of the child to the state temporarily, thereby effectively ordering the child to undergo the proposed treatment, is ultimately the province of the judge.

In recent years, the debate surrounding the rights of minors to refuse medical treatment has been played out internationally in England, USA and Canada. There is an argument that when a minor is competent, courts must recognize the minor as a party with standing in cases where the parent and the child disagree over medical treatment decisions, as well as in cases where the state has brought an action to compel medical treatment for the minor when the minor's parents have refused to consent to such treatment on religious or other grounds.[70]

A 13 year old girl in England garnered international attention when she refused a heart transplant. After being diagnosed with leukemia at a young age, her heart became weak after treatment of an infection. After weighing the option of a heart transplant, which her physicians determined was necessary to preserve her life, she refused it. Her physicians questioned her ability to make that decision on her own, and initiated court proceedings. Upon adequate assurances that the girl understood the nature of her decision and that her decision was not influenced by her parents, the courts and her physicians honoured her decision to refuse the transplant.[71] In another highly publicized case, fifteen-year-old Lee Lor

[70] Susan D. Hawkins, "Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes" 64 *Fordham Law Review* 2075 (1996).
[71] *Supra* note 64.

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

---

fled her home in Fresno County, California after police, paramedics, and social workers "dragged her from her home and forced her to undergo chemotherapy for ovarian cancer." Her parents had refused to consent to the necessary treatment, a decision with which Lee agreed, due to "her fears and her Hmong family's suspicion of Western medicine."[72] These cases are just two examples of situations in which a minor has experienced pressure to undergo medical treatment against the minor's wishes. Other disputes have also arisen when parents refused to consent to medical treatment for their minor child, despite that the minor herself had expressed a desire to undergo the treatment.

Having faced circumstances in which mature minors have adamantly refused intensive or invasive medical treatment, many courts have begun to recognize the "mature minor" doctrine.[73] This doctrine recognizes that some minors are mature enough to evaluate the treatment options and to make their own decisions. However, the mature minor doctrine lacks concrete principles that can be easily applied to future scenarios.[74] Many courts, without elaboration, simply announce that minors are mature if they can understand the nature of their decisions. But the courts have not been able to set principles based on which it can be decided as to 'how do minors demonstrate that they understand the nature of their decision?'Like, most courts have failed to dictate who determines whether the minor is mature. Does this responsibility rest with the physician or with the courts?

The minor has an interest in preserving his/her own life and thus, in cases where parents refuse to consent to life-saving treatment, but the child wishes to undergo the treatment, the minor herself should be able to challenge her parents' decision. The nature of the right to

---

[72] *Supra* note 68.
[73] *Supra* note 64.
[74] *Ibid*.

choose medical treatment, however, is so uniquely personal that the minor herself must have legal standing to challenge this decision. Additionally, a minor has a right to a "normal" life in non-life-threatening situations in which parents refuse to consent to treatment to correct a disfigurement.[75] Finally, in cases where the minor herself refuses treatment, regardless of whether her parents agree with her, the minor's right of religious freedom, and her wish to be free of the extreme pain and discomfort associated with some forms of medical treatment, are at stake.

Absence of the above mentioned specific criteria, the application of the Doctrine of Mature Minor falls within the discretion of the courts. It has been seen that different courts exercise this discretion differently and with much variation. *Re E (A Minor) (Wardship: Medical Treatment)*[76] is an excellent example of the unfair level of understanding courts require from minors in order to deem them 'Mature Minor', inevitably leading to the rejection of their refusal to treatment. This is a case where a Jehovah's Witness boy aged 15, almost 16, was refusing a blood transfusion, and so risking his life based on religious reasons. The judge on this occasion held that the boy did 'not have any sufficient comprehension of the pain he has yet to suffer, of the fear that he will be undergoing, of the distress not only occasioned by that fear but also – and importantly – the distress he will inevitably suffer as he, a loving son, helplessly watches his parents' and his family's distress…I find that he has no realization of the full implications which lie before him as to the process of dying. He may have some concept of the fact that he will die, but as to the manner of his death and to the extent of his and his family's suffering I find he has not the ability to turn his mind to it nor the will to do so.'

[75] *Supra* note 68.
[76] [1992] Fam 11 CA

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

The court observed "It seems that the required level of understanding regarding death is too high, and perhaps even unattainable by most adults, let alone any minor."[77] In this particular case, the boy's persistent refusals to blood transfusions were overridden by the courts until he turned 18, when the doctors and courts had no choice but to respect his decision and allow him to die. It is therefore questionable whether the boy, at 15, really did lack an understanding of what death would be like i.e. whether he was a 'Mature Minor'.

In Planned Parenthood v. Danforth and *Bellotti v. Baird*, the Court struck down state statutes that required unmarried females under the age of eighteen to obtain parental consent before having an abortion.[78] In *Danforth*, the Supreme Court announced that "the State may not impose a blanket provision, such as... requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor.Most importantly, the Court emphasized that a parent's interest in her minor daughter's abortion decision does not outweigh the competent, mature minor's right of privacy. Thus, the Court held that, provided that the unmarried minor is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances, **. . .** the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the minor to terminate her pregnancy.[79]

With increasing number of such cases cropping up where teenagers are refusing medical treatments due to religious beliefs or other considerations, it becomes necessary for the international law to take up the issue and settle the ambiguity attached to it. The courts have taken up the responsibility to apply the 'Doctrine of Mature Minor' wherever it seems apt,

---

[77] Miray Gorgy, "Article 8 and Minors Right to Refuse Medical Treatment" *The Student: Journal of Law* (2011) http://www.sjol.co.uk/issue-4/article-8-and-minors-right-to-refuse-medical-treatment
[78] *Supra* note 68.
[79] *Supra* note 68.

however, the courts are facing difficulty in its proper application due to the unsettled position.

CONCLUSION

The Convention on the Rights of the Child is an international treaty adopted by the United Nations on November 20, 1989, establishing global standards to ensure the protection, survival, and development of all children, without discrimination. Countries that ratify the treaty pledge to protect children from economic and sexual exploitation, violence, and other forms of abuse and to advance the rights of children to education, health care, and a decent standard of living. The convention also addresses children's rights to a name and nationality, to be heard, to be fairly treated when accused of offenses, when deprived of parental care, and other rights. Many countries have used the convention to strengthen their national legislation and adopted new policies to improve the lives of children. Although the convention is only a contributing factor, children are better off now in many ways thanbefore the Convention came into existance. Greater attention to children's right to health has meant that those born today are more than twice as likely, to reach their fifth birthday than a child born during the period prior to 1989. The obligation of countries to provide free primary education has meant that children are much more likely to attend school.

While the United Nations Covenant on the Rights of the Child is a tremendous step forward in the direction of recognition of the problems which the particular legal and economic status of the child may cause, it still does not address some of the issues which involve children or some of the situations which continue to put children at risk, such as uncertainty of the age of beginning of childhood and the end of childhood, no set standards for the 'best interest principle' extensively mentioned in the Convention, ambiguity in the rights of the child to refuse medical treatment.

WISDOM CRUX [ISSN: 2456-6233]

www.wisdomcrux.lawtimesjournal.in
[Volume 5, Issue 1]

RIGHTS OF THE CHILD: SPECIAL REFERENCE TO THE 'CONVENTION ON RIGHTS OF THE CHILD', PROBLEMS AND CHALLENGES

Author – Sakshee Sharma, Asst. Professor, SOL UPES

Many countries have adopted impressive sets of laws protecting children, they often fail to enforce them. At least 58 million children are not in school—particularly girls, children from poor families, children in conflict countries, and children with disabilities. Many children suffer and die from diseases that can be easily prevented, including diarrhea and malaria.

The rights of millions of children are still violated on a daily basis. Governments should take several key steps to fulfill their international obligations to children:

1. review national legislation to ensure that it conforms with the convention— for example, by ensuring that child labor, child marriage, female genital mutilation, and all forms of violence against children are strictly prohibited;
2. ensure accountability for violations of children's rights by establishing complaint procedures and investigation mechanisms, and ensuring that abusers—whether parents, teachers, employers, police, or other officials—are fairly held responsible;
3. expand practices with proven track records for increasing school enrollment and improving children's health—for example, programs that provide direct assistance to the poorest families;
4. identify marginalized and vulnerable children who are being excluded from school, health, and other services or need special protection—including girls, children with disabilities, children from ethnic and racial minorities, migrant children, and those living in conflict areas; and adopt concrete and specialized plans and policies to ensure that these children have access to schooling and other services, and are protected from the effects of armed conflict and other violence; and
5. abandon policies and practices that are proven ineffective and damaging to children, including the overuse of detention and institutionalization, and make a commitment

to use community- and family-based care models that are both cheaper and more effective.

Thus, we see that inspite of having a comprehensive instrument of international law, child rights are still far from reaching full recognition. Cultural factors, resource non availability, religious beliefs, family system, new emerging trends etc. have made it a difficult task to devise a law which is applicable universally. However, the need of the hour is to try to the fullest of our abilities to reach near absolute consensus on such piece of law.