

THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

Ioana PĂDURARIU*

Abstract

Since 1919, the recognition of children's rights has begun to find an international echo, when the League of Nations "came to life", the name of which links to the Geneva Declaration of 1924. Adopted in 1989, by the Convention on the Rights of the Child, the principle of the best interests of the child is still an imprecise, subjective notion if we consider its application, but so necessary, even in the absence of precise regulatory criteria.

Keywords: best interests of the child, children's rights, Geneva Declaration, Declaration on the Rights of the Child, Convention on the Rights of the Child (CRC).

1. Introduction

„There is only the authority of love, the natural one, that we naturally have since birth, preserved only by love. Authority is not what I want to impose, but just what others recognize in me.”¹

In the absence of a legal definition, determining the notion of „best interests of the child” may present major difficulties. This happens because this notion can be defined differently, depending on the legal situation to which it refers, above all in family law² (separation from parents, adoption, deprivation of family environment), but also in relation to juvenile justice (separation from adults in detention, presence of parents at court hearings for penal matters involving a juvenile).

The Convention on the Rights of the Child (hereinafter CRC) does not simply

expose a list of rights. Of course, the CRC is the enumeration of those rights to which the child is entitled, but for sure it is also much more than this. If we admit that, in the past, the Geneva Convention (1924) and the Declaration on the Rights of the Child (1959) considered the child as „an object in need of attention and protection”³, however, since 1989, when the CRC was promulgated, the child has been understood to be a subject of rights. As a result, the CRC has become a reference document for the development of European child rights.

In this spirit, legal acts concerning children are followed, almost without exception, either by explicit references to the CRC or by implicit references in the form of references to the rights of the child, such as: the „best interests of the child” (article 3 – the best interests of the child as a primary consideration in all actions concerning children), the child's right to participate in

* Lecturer, PhD, Faculty of Law, “Nicolae Titulescu” University (e-mail: padurariu_ioana@yahoo.fr).

¹ S. Baştovoi, *The price of love*, Cathisma, Bucharest, 2018, pp 80-81.

² See also C.-M. Crăciunescu, *The best interests of the child in the exercise of parental authority exclusively by one of the parents*, in *Parental authority. Between greatness and decadence*, Solomon Publishing House, Bucharest, 2018, pp 3-25.

³ See J. Zermatten, *The Best Interests of the Child. Literal Analysis, Function and Implementation*, Working Report, 2010, Institut International des Droit de l'Enfant, p. 2.

decisions that affect him (article 12) or the right to be protected against discrimination of any kind (article 2).

It is important to mention, among other things, the role of the European courts in interpreting and ensuring the respect for children's rights in Europe.

The Court of Justice of the European Union (hereinafter CJEU) referred to the fact that its decisions⁴ have been grounded also on the general principles on the rights of the child, also incorporated into the CRC (such as the „best interests of the child” and the right to be listened), especially in the context of international kidnapping cases.

Unlike the CJEU, the European Court of Human Rights (hereinafter ECHR) has a rich jurisprudence on child rights. ECHR jurisprudence on family life recognizes interdependent rights such as the right to family life and the right of the child that his best interests have a higher priority. It recognizes that children's rights are sometimes contradictory. For example, the child's right to respect for family life can be limited to guaranteeing his superior interest. Furthermore, the Council of Europe has adopted various other instruments dealing with issues related to personal relationships, child custody and the exercise of children's rights.

Thus, in the Maslov case against Austria⁵, the applicant had been convicted of several delinquencies during the minority period. The ECHR affirmed that the obligation to take into account the best interests of the child includes the obligation to facilitate its reintegration, in accordance with Article 40 of the CRC, as regards the expulsion measures against a juvenile delinquent. The ECHR has also received

complaints from children about the impossibility of establishing the identity of their biological fathers. The ECHR has observed that establishing a legal relationship between a child and the alleged biological father goes into the sphere of private life. Thus, the authorities may have a positive obligation to intervene in the action to establish paternity, in the best interests of the child, when the legal representative of the child (in this case⁶, the mother) was unable to represent the child properly, for example, because of a serious disability.

2. Meanings of the expression „the best interests of the child shall be a primary consideration”. Rule of procedure and foundation for a particular, independent right

First of all, this concept was interpreted as a rule of procedure⁷. That means, whenever a decision is to be taken and that decision will affect a specific child or a group of children, the decision-making process must carefully consider both, positive and negative, impacts of the decision on the child or on the children concerned, and must give to this impact a primary consideration when weighing the different interests at stake.

On the other hand, this principle is nevertheless considered one of the foundations for a particular right. And is clearly that, seen like this, the principle represents the guarantee that it will be applied whenever a decision is to be taken concerning a child or a group of children.

In fact, no one really knows what are the best interests of a particular child. However, the principle of the best interests

⁴ See CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga/Simone Pelz, 22.12.2010.

⁵ See ECHR, Case Maslov/Austria, no. 1638/0323, 23.06.2008.

⁶ See ECHR, Case A.M.M./Romania, no. 2151/10, 14.02.2012, points 58-65.

⁷ See J. Zermatten, *op. cit.*, p. 7.

of the child must respect what the Committee on the Rights of the Child established⁸ in the General Comment no. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment:

«26. When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of „reasonable” or „moderate” corporal punishment can be justified as in the „best interests” of the child. The Committee has identified, as an important general principle, the Convention’s requirement that the best interests of the child should be a primary consideration in all actions concerning children (art. 3, para. 1). The Convention also asserts, in article 18, that the best interests of the child will be parents’ basic concern. But interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child’s views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.»⁹

So, this principle must respect the importance of every child as a human being in development, an individual with opinions, all that seen in the global spirit of the CRC, with an interpretation that could not deny other rights of the CRC (for example, the right to protection against harmful

traditional practices and corporal punishment).

„Best” and „interests”, as a whole, mean that the final goal should and must be the well-being of the child, as defined through the Convention, especially in the Preamble and in the Article 3 of the CRC (paragraphs 2 and 3).

Moreover, as an author has observed¹⁰, there is a subtle, but highly relevant nuance in the second part of the expression of this principle („shall be a primary consideration”). We clearly see that a literal analysis reveals us that this text refers to „*a* primary consideration” and not to „*the* primary consideration”. That means, indeed, that this terminology implies that the best interests of the child will not always be the single, overriding interest and that there may be other competing interests at stake.

However, in accordance with the opinion expressed by the same author¹¹, in at least two particular situations, the drafters of international human rights instruments have used „*the*” when referring to the paramountcy of the best interests of the child:

- Article 21 of the CRC: „States parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration (...);”

and

- Article 23 (2) of the UN Convention on the Rights of Persons with Disabilities: „States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases *the* best

⁸ Geneva, 15 May-2 June 2006.

⁹ See <https://resourcecentre.savethechildren.net/node/10263/pdf/gc8.pdf>.

¹⁰ See J. Zermatten, *op. cit.*, p. 11.

¹¹ *Idem*, p. 12.

interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”

In these cases, the best interests of the child become the sole determining factor when considering a solution, or, „in certain circumstances, such an adoption or for children living with disabilities, the higher standard is applicable”.¹²

3. „Best interests of the child” in other articles of the CRC

This expression is also included in a number of other articles of the CRC¹³, as a reference point that must be considered in particular situations.

Article 9 of the CRC put the principle promulgated by Article 3 of CRC in relation to the right of the child to live with his parents, also referring to the rule that the child must maintain personal relationships and direct contact with both parents, unless this threatens the best interests of the child (situations that include an open conflict between the child and one or both parents, or the cases when a child and his parents may become separated as a result of an official decision, necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence, but only when such a decision takes into account the best interests of the child).

Article 18 establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education.

Article 20 of the CRC provides that the child who is deprived, temporarily or permanently, of his family environment or in whose own best interests cannot be allowed to remain in that environment shall be entitled to special protection and assistance provided by the State. States Parties, in accordance with their national laws, shall ensure alternative care (*inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children for such a child).

According to the article 21 of the CRC, „States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the

¹² See G. Van Bueren, *Pushing and pulling in different directions – The best interests of the child and the margin of appreciation of States, in Child Rights in Europe*, Council of Europe, 2007, p. 32.

¹³ See <https://www.ohchr.org/documents/professionalinterest/crc.pdf>.

objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.”

Article 37 of the CRC looks at general principles which should govern the administration of juvenile justice¹⁴, in particular the exclusion of torture, punishments or inhuman treatments and the prohibition of capital punishment. Also this article impose that the child be treated with humanity and, if the child is deprived of freedom, he must be detained separately from adults, except if the opposite proved to be preferable for the best interests of the child (this might be the case if the child is imprisoned with one of his parents or a mother who gives birth while she is confined).

As a conclusion, we observe that the principle of the best interests of the child is a general principle which must be applied in all activities related to implementation of the entire CRC.

4. „Best interests of the child” – roles and fields of application

The concept of the best interest of the child, such as it is defined by the CRC, but also for example in the Convention of the Hague on international adoption, was seen as a concept that has two „traditional” roles, one that seeks to control and one that finds solutions (criterion of control and criterion of solution¹⁵).

Control criterion means that the best interest of the child is applied to oversee that the exercise of rights and the obligations towards children be correctly carried out, fulfilled. It is the entire field of child protection that is concerned with this aspect of control (family law, child protection services, situations of alternative care and cases of migration).

Regarding the solution criterion, the concept of the interest of the child itself must intervene to help the people that need to make the right decisions for children. The solution chosen should be selected because it is in the interest of the child. It is an essential bridge between the right, the theoretical concept, and the reality.

Many attempts have already been made to specify, supplement and to „objectify” the concept of the best interests of the child.

For example, in Canada, the draft amendment to the „Divorce Act” which wishes that the child’s interests be judged according to elements¹⁶:

1. the nature, the stability and the intensity of the relationship between the child and each person concerned with the procedure;
2. the nature, the stability and the intensity of the relationship between the child and other members of the family where the child resides or implicated in the care or the child’s education;
3. the child’s leisure activities;
4. the capacity of each person to offer a framework for life, education and all care for the child;
5. the child’s cultural and religious bonds;
6. the importance and advantages of joint parental authority, ensuring the active

¹⁴ See also Article 40, as a continuation of the Article 37.

¹⁵ See P. Pichonnaz, *Le bien de l'enfant et les secondes familles (familles recomposées)*, in *Le Bien de l'enfant*, Verlag Ruediger, Zürich/Chur, 2003, p. 163; H. Fulchiron, *De l'intérêt de l'enfant aux droits de l'enfant in Une Convention, plusieurs regards. Les droits de l'enfant entre théorie et pratique*, IDE, Sion, 1997, p. 30 and following.

¹⁶ N. Bala, *The best interests of the child in post-modern Era: a central but paradoxical Concept*, in *Law Society of Upper Canada, Special Lectures, 2001*, quoted by J. Zermatten, *op. cit.*, pp. 18-19.

- involvement of the two parents after separation;
7. the importance of the relationship between the child and his/her grandparents or other members of the family;
 8. the proposals of the parents;
 9. the capacity of the child to adapt him/herself to the parent's views;
 10. the capacity of the parents to facilitate and ensure the maintenance of the child's relationships with other members of the family;
 11. all previous incidents showing violence by a relative towards the child;
 12. the exclusion of preference shown to one parent because of their sex;
 13. the demonstrated willingness of each parent to take part in educational meetings;
 14. any other factor that could influence decision-making.

As we can see, it is a long list that is not exhaustive and the 14 elements are not hierarchically ordered. These points remain to be examined largely open „and consequently only have a relative influence, as well they allow for a more concrete approach and offer a working method to better comprehend, *in casu*, the interests of the child”¹⁷.

Other countries have taken identical steps. A particular product of the Anglo-Saxon legal system, an attempt to objectivize the concept, England's „Children Act” of 1984 provides that the judge must take into account¹⁸:

- the views of the child;
- his/her physical, emotional, educational needs;
- the effect of change on the child;

- his/her age, sex and personality;
- the pains which he/she has already suffered or could suffer;
- the ability of each of the child's parents to meet the child's needs.

5. Conclusions

It is very important that any cause involving a child can find a solution best suited to the best interests of the child, so that his development will not suffer. It is also clear that the child must be heard, so the decision maker in question has an obligation to hear if the child is able to form and communicate his views if the case affects him.

Nevertheless, it is evident that the principle of the best interests of the child is one of the most important of the CRC, but, in the same time, it is the most difficult to explain.

We need to clarify this concept; we cannot deal only with the assumption that everyone is acting in the best interests of the child. If we do not clarify, it is possible to risk that this principle be emptied of content, legislative and social reality.

Also, we must consider another aspect: the potential impact on children of relevant legislation. Therefore, the State parties to the CRC have an obligation to take seriously their commitments.

And, above all, maybe it is the perfect time to keep in our minds the fact that, in the absence of the „authority of love”, this principle and for sure the whole mechanism that turns the wheels of his profound understanding will become meaningless.

¹⁷ See J. Zermatten, *op. cit.*, p. 19.

¹⁸ Children Act, quoted by the Canada Justice Department (website: <http://Canada.justicde.gc.ca>), entry Child and Custody Access.

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