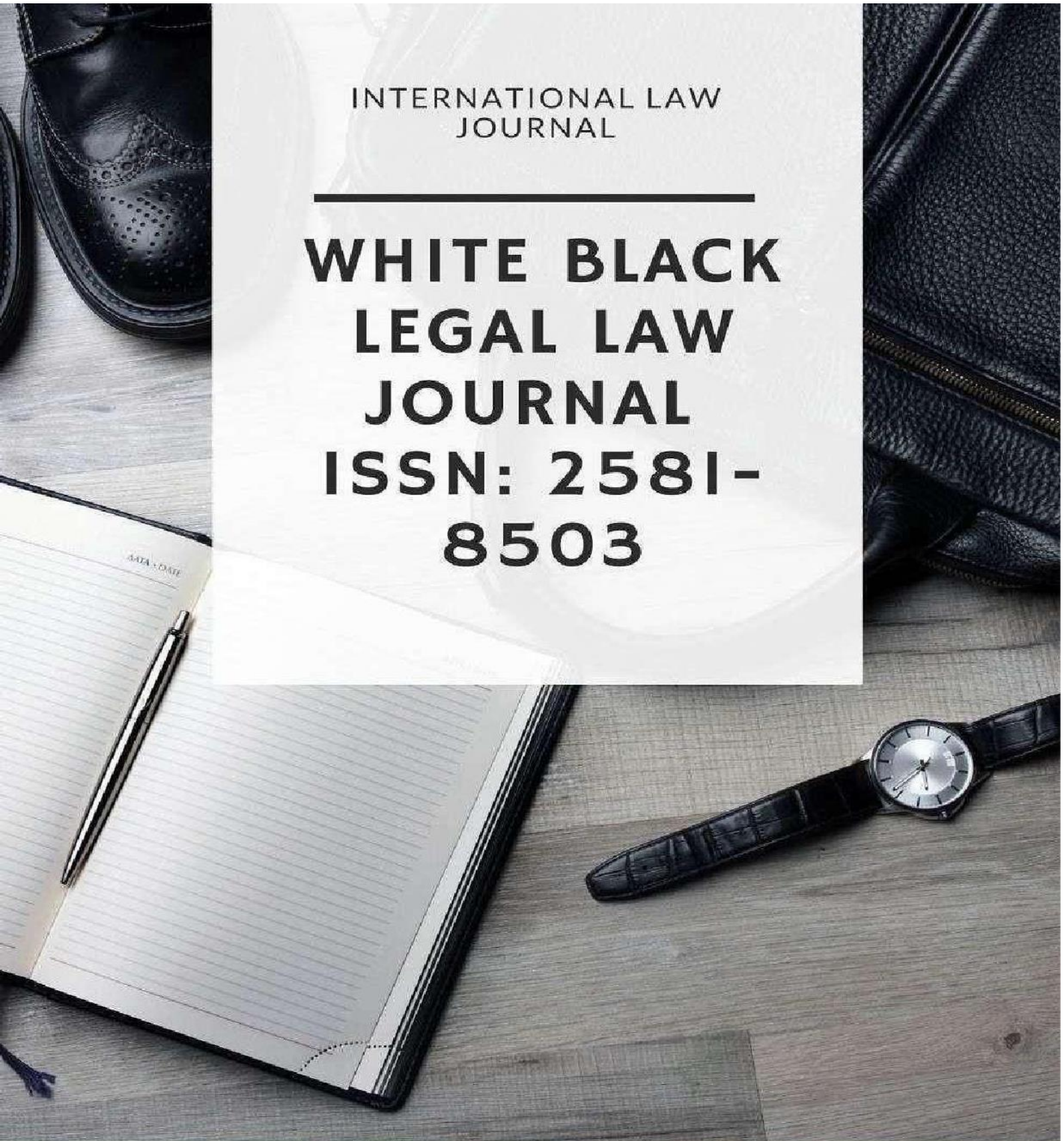




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THE BEST INTEREST OF THE CHILD PRINCIPLE: A CRITICAL ANALYSIS OF INTERNATIONAL STANDARDS AND INDIA'S LEGAL FRAMEWORK

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ABSTRACT

The paper critically examines the "Best Interest of the Child" principle under the United Nations Convention on the Rights of the Child (CRC) and other international instruments. It highlights that while the "best interest" phrase is used frequently, it remains undefined, leading to broad interpretations. The paper explores the CRC's obligations on states to ensure non-discrimination and holistic child development. It assesses India's legal framework, including the Constitution and statutory provisions, and critiques their alignment with the best interest doctrine. The paper also addresses critiques of the principle's vagueness, suggesting alternative approaches like statutory welfare checklists to reduce subjectivity. The discussion concludes by emphasizing the need for a balance between objective guidelines and judicial discretion in determining a child's best interest.

Keywords: *Best Interest Principle, Child Rights, United Nations Convention on the Rights of the Child, India Legal Framework, Welfare Test, Judicial Discretion, CRC.*

I. Introduction

The Preamble of the United Nations Charter (hereinafter the charter) provides that the Organization is determined "to reaffirm faith in fundamental human rights". UN General Assembly, on December 10th, 1948, proclaimed¹ the *Universal Declaration on Human rights* (hereinafter UDHR). Article 25 of the UDHR provides that childhood is entitled of special care and protection². Similarly, Article 24 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) provides that a child needs special protection because of his status as a minor and it is an obligation on the part of his family, society and the State to provide for the

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¹International Bill of Human Rights, A Universal declaration of human rights available at: [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)) (last visited on September 9th, 2021).

² Article 25(2) UDHR.

same³.

The legislative history of child rights may be traced as early as in 1924 as *Declaration of Geneva, 1924* which came into its final shape as *the United Nations Convention of the rights of the child, 1989*⁴ (hereinafter the CRC or the convention). While the earlier instruments projected child as *an object which needed care and protection*, the CRC recognized and advocate the fact that a child is a “*subject of Rights*”⁵. The present paper would critically examine the “*Best interest principle*” laid down in the CRC primarily and the other instruments if any. Researcher shall examine the best interest principles in the case of children who are differently situated. Finally, we would critically examine that how far India as a state party to the convention have taken care of the “*Best interest principles*”.

II. Child and its categories

According to article 1 of the UN convention on the rights of Child, “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. But child is not a homogeneous category. Article 2 of CRC provides that the state parties shall insure that each child shall be protected against any form of discrimination “irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” In a way, article 2 of the convention creates categories of children and the grounds of their classification.

The above concerns have been taken into considerations by the *Committee on Rights of the Child* through their various general comments. General comment no. 6 (General comment hereinafter as GC) deals with *separated children*, GC no. 9 deals with *Children with disability*, GC no. 10 deals with the *Children in conflict with law in Juvenile Justice*, GC no. 11 deals with *the indigenous children*, GC no. 21 deals with *the children in street situation*. The committee also have released joint comment no. 3 and 4 which deals with the issue *migration and children of migrants*. Each comment mentioned here would be discussed in detail separately.

³ Article 24, ICCPR.

⁴ Office of the United Nations High Commissioner for Human Rights, “Legislative History of the Convention on the rights of the child”, vol.1 34 (2007).

⁵ Jean Zermatten, “The Best Interests of the Child: Literal Analysis, Function and Implementation, working report” 2010.

Article 22 of the CRC deals with the children in *refugee situation*. Article 38 of the convention deals with the care and protection of children in *armed conflict situation*. It also provides that state shall refrain from recruiting children into the armed forces. Article 21 provides that while a child is given or taken in *adoption*, the best interest of the child shall be the paramount consideration. Article 34 provides that state shall protect the children from all forms of *sexual exploitations*. Article 9(4) of CRC provides for protection of children whose parents have been separated because of the reasons, provided in the article, which shall be discussed into great detail later. The categories discussed above are not exhaustive. Other categories may be considered for discussion which may appear to the researcher through the other international instruments related to the Human rights in general and Child rights in particular.

III. Functional Mechanism of the Convention

The state parties are obligated to Implement the provisions laid down in the convention to achieve the child's best interest. There are few articles that may be considered functioning principles which provides that the state parties shall have to proceed as per the procedure laid down by the present convention.

Article 2 of the convention provides for a *non-discriminatory principle*. It lays down that “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, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” The non-discriminatory principle does not imply identical treatment. The equally placed shall be treated equally. Children is not a homogeneous group. The need of care and protection would vary in the categories of children. Thus, the convention obliges the state to examine the situation of the child and then take decisions for him/her in his/her best interest. Human right committee in its general comment no. 18 substantiate the above assertions and remark that States parties are under obligation to undertake special measures in order to diminish or eliminate conditions that cause discrimination⁶.

⁶ Jean Zermatten, “The Best Interests of the Child: Literal Analysis, Function and Implementation, working report” 4 2010.

Article 4 of the convention provides that “*the state parties shall undertake all the appropriate legislative, administrative or other measures for implementation of the rights recognized in the present convention*”. So, under the present article, state parties are obliged to undertake legal measures to protect the interest of the child. further, the article provides that the state parties shall take such measures within their resources to provide the maximum benefit to the child. The article further provides that state may seek international cooperation, where needed, to do justice to the child for the rights recognized under the present convention. The other interpretation of the present article provides that the state parties with more than sufficient resources are under obligation to help the needy state parties.

GC no. 19 on *Public budgeting on realizing the children’s right* of on CRC discusses the budgetary expenditure for children as obliged upon the state under article 4 of the convention. The committee remarks that the children shall be taken on board while to discuss the policy formulation, as mandated under article 12 of the convention, and subsequently the budget should be allocated after examining the views of the children on board.

The state parties shall not discriminate between the adults and the children. It has been recognized under article 42 of the convention. It was realized as late as in 1989 that child is not an object to take care of, rather the convention has explicitly laid down that child is a subject of rights recognized under the convention.

The other mechanism principle has been laid down in article 6, para 2 of the convention. It provides that “States Parties shall ensure to the maximum extent possible the survival and development of the child”. “The Committee, in GC no. 5, remarks that the term “development” in its broadest sense as a holistic concept, embraces the child’s *physical, mental, spiritual, moral, psychological and social development*.”⁷.

The other principal mechanism laid down in the convention are article 3 and 12 respectively. These two shall be discussed in detail in the subsequent provisions.

⁷ UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 5 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) 4 (2003).

IV. Analyzing “Best Interest” in CRC

Though, the phrase “Best Interest” has been used eight times in the Convention, it has not been defined in the instrument. Article 3 para 1 of the convention provides that *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”*. The present article is the foundational stone of the best interest mandate. The term may refer to the steps undertaken, by public or private social welfare institutes, courts, executive or the administrative bodies, while deciding the services, actions, and orders for the child. It shall be the primary consideration that the decision taken should be of the nature that is best suited to take care of a child.

Article 3 of the convention obliges the Legislative, the Executive and the Judiciary, while legislating or ordering or deciding for the child, his/her best interest shall be a primary consideration. Every step taken by the authorities shall aim at “effective enjoyment of all the rights recognized in the Convention and the holistic development of the child”⁸. Article 3 read with Article 12 of the convention makes it clear that the adult’s judgment shall not override the obligations to respect the rights of the child recognized under the convention. The convention through article 12 provides that state shall assure that the ideas of the children who are capable of forming opinion, considering their age and maturity, for themselves shall be taken on board while making any decisions affecting them. Thus, combined reading of article 3 with article 12 provides that to determine best interest of the children, state or organization⁹ shall take into consideration the view of children while formulating any policies affecting them.

Recognition of the Best Interests Principle across the Convention

The best interests principle appears throughout the Convention on the Rights of the Child (CRC), not only in Article 3. Article 3(1) states the general rule: the best interests of the child shall be “a primary consideration” in all actions concerning children. But the drafters repeated the concept in several specific contexts, so that decision-makers apply a child-centred approach whenever they exercise legal, administrative, or judicial authority. The Committee on the Rights of the Child has explained that these repeated references show the principle is meant to operate concretely, in parental separation, alternative care, adoption, juvenile justice, detention,

⁸ UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 3 (2013).

⁹ Public or private organizations.

and questions of parental responsibility, and not simply as an abstract ideal. Children are not passive recipients of adult protection under the Convention; they are rights-holders whose interests must be assessed individually, in light of their own circumstances. The concept works as an interpretative guide, but it is also a substantive right and a procedural requirement: authorities must show how they weighed a child's interests before they decide anything.

The repetition matters because childhood is not one experience. What serves a child's interests depends on age, maturity, family situation, disability, migration status, contact with the justice system, or exposure to violence. So the Convention avoids fixed answers and asks instead for an individual assessment in each case. This sets the CRC apart from earlier welfare instruments, which tended to treat children mainly as objects of care. The CRC puts children's own rights at the centre of decisions, so that protective measures have to be justified by reference to the child's rights and development, not just by adult ideas of what counts as welfare. The Committee has said repeatedly that no single factor decides a child's best interests on its own; authorities have to weigh all relevant circumstances against every right the Convention guarantees.

One of the earliest specific uses of the principle is Article 9, on separating children from their parents. The Convention does not ban separation. It recognises that separation can become necessary when parental care exposes a child to abuse, neglect, exploitation, or other serious harm. But Article 9 changes the traditional picture of parental authority: the child's interests, not parental preference or state convenience, decide the matter. Separation can be justified only after an individual finding that staying in the family would go against the child's best interests. This provision balances two values that pull against each other. International human rights law treats the family as the natural setting for a child's growth and well-being. At the same time, it recognises that family autonomy cannot be used to shield violence, neglect, or exploitation. The best interests principle sits between these two positions. It does not assume biological families are always good for children, nor does it license the state to intervene at will. It asks instead for evidence-based, proportionate decisions that are sensitive to the individual child.

Article 9 also sets procedural requirements. Parents and children should normally get to take part in proceedings about separation, and children should keep personal relations and direct contact with both parents unless that contact would itself harm their welfare. So the best interests principle does not stop at the decision to separate; it also shapes what happens afterward, including visitation, custody, and reunification. Much current child-rights scholarship reads Article 9 as supporting family preservation more broadly: removing a child from parental care should be a last resort, not a routine response.

Article 18 reinforces this by placing the primary responsibility for raising and developing the child on parents or legal guardians, while making the child's best interests their basic concern. This matters because it extends the best interests principle beyond the state into private family life. Most human rights instruments regulate only what states do; Article 18 recognises that the decisions that actually shape a child's daily life are usually made by parents and caregivers. So parental authority is not an unlimited legal entitlement. It is a responsibility that has to be exercised for the child's benefit.

The CRC therefore moves away from older ideas of parental rights, which stressed control over children, and toward parental responsibilities, consistent with the child's evolving capacities recognised in Article 5. Parents keep considerable discretion in raising their children, but that discretion has to stay compatible with the child's rights under the Convention. Decisions about education, healthcare, religion, discipline, residence, or social life cannot rest on parental preference alone. They have to serve the child's physical, emotional, intellectual, and social development.

Article 18 also exposes a real tension in child-rights law: the relationship between parental autonomy and children's own autonomy. Too much state interference can undermine family life; too much unchecked parental discretion can put children's rights at risk. The Convention rejects both extremes and sets up a model in which the state supports parents through legislation, administration, and social measures, and intervenes only where parental decisions seriously conflict with the child's rights or welfare. This reflects the CRC's broader position that children are neither the property of parents nor wards of the state, but rights-bearers who need protection from abuses of power in both spheres.

Article 20 extends the principle to children who have temporarily or permanently lost their family environment. Losing parental care leaves a child more vulnerable, so the state has an obligation to provide special protection and assistance. Article 20 does not treat institutional placement as the default. It asks states to find whatever form of alternative care best supports the child's development while keeping continuity in the child's upbringing where possible.

Article 20 matters because it recognises that removal from parental care does not end a child's right to family life. The state takes on substitute parental responsibilities, and it has to exercise them in the child's best interests, just as a parent would. Alternative care can mean foster care, kafalah under Islamic law, adoption, or residential care, and residential care should be used only when necessary. International child-rights discourse increasingly treats institutionalisation as a last resort, because long stays in institutions tend to disrupt attachment, identity, and psychological development.

A notably progressive part of Article 20 is its requirement that decisions about alternative care respect the child's ethnic, religious, cultural, and linguistic identity. This shows that best interests cover more than physical safety; it includes the child's personal identity and cultural continuity. Children are not interchangeable beneficiaries of a welfare programme. Their individual histories, relationships, beliefs, and social backgrounds are part of what makes up their best interests. This reading has become more prominent in practice, especially for indigenous children, refugee children, and children from minority communities.

The principle carries even more weight under Article 21, which governs adoption. Article 3(1) asks that a child's best interests be "a primary consideration." Article 21 raises the bar and makes them "the paramount consideration." That change in wording is deliberate: adoption permanently changes a child's legal identity, family relationships, inheritance rights, nationality, and social belonging, so adoption decisions demand stronger protection than most other decisions affecting children. The Committee on the Rights of the Child has treated Article 21 as one of the strongest expressions of the best interests principle in the whole Convention, because it puts the child's welfare above institutional convenience, the expectations of prospective adoptive parents, or wider demographic concerns.

Article 21 does more than authorise adoption. Rather than treating adoption as the preferred way to protect children, the Convention frames it as one option among several forms of alternative care, available only after a careful finding that the child cannot safely stay with the biological family and that reunification is either impossible or against the child's interests. Adoption is an exceptional measure, not an automatic answer to parental deprivation. This fits the Convention's broader preference for keeping families together where possible, while accepting that children's rights cannot be sacrificed for the sake of biological ties alone. The child's welfare decides every stage of the adoption process, from eligibility and placement through consent, supervision, and protection after the adoption is finalised.

Article 21 should be read together with Article 20(3), which requires due regard to a child's ethnic, religious, cultural, and linguistic background when deciding on alternative care. Together, the two articles show that the Convention treats a child's welfare as more than physical safety or material comfort. It also covers identity, emotional continuity, cultural belonging, and social development. A child removed from an abusive family can still suffer real psychological harm if placed somewhere that erases their cultural, linguistic, or religious identity. So the Convention rejects welfare assessments that rely only on economic or institutional measures. It asks decision-makers to treat the child as an individual with a distinct identity that deserves equal protection.

This attention to identity matters especially in inter-country adoption. International adoption can protect children who cannot be cared for in their country of origin, but it also raises concerns about cultural displacement, identity loss, trafficking, and the commodification of children. These concerns led to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993), which supplements Article 21 with procedural safeguards meant to keep inter-country adoption focused on the child's best interests rather than commercial or political interests. The Hague Convention supports subsidiarity: domestic, family-based care should ordinarily be tried before international adoption. It also asks states to cooperate to prevent trafficking and improper financial gain from adoption. Read together, the CRC and the Hague Convention show that the best interests principle has become a central organising idea in international adoption law, not just an aspiration.

Article 21 still generates real debate. One recurring criticism is that the open-ended nature of the best interests standard leaves room for subjective judgment by judges, adoption agencies, or social workers, who may unconsciously favour dominant cultural norms when they assess what counts as a suitable family environment. This becomes especially problematic in transnational adoption, where assumptions about economic prosperity can crowd out a child's cultural identity or attachment to their community of origin. So, while Article 21 strengthens child protection considerably, how well it works depends on transparent decision-making backed by objective criteria rather than unchecked discretion.

The principle takes on a different shape under Article 37(c), which governs children deprived of their liberty. Detention is one of the most intrusive forms of state authority, so the Convention builds in special safeguards to limit the harm it can cause children. Article 37(c) requires that every child deprived of liberty be separated from adult detainees unless doing so would go against the child's best interests, and that the child keep contact with family through correspondence and visits except in exceptional circumstances. These guarantees reflect the fact that children have developmental, psychological, and emotional needs that ordinary adult detention facilities cannot meet.

The case for separating children from adults goes beyond physical safety. Studies consistently find that children detained with adults face much higher risks of violence, intimidation, sexual abuse, psychological trauma, and criminal socialisation. The Convention treats separate accommodation as a core part of child protection, not just an administrative detail. Keeping family contact matters just as much. Older penal approaches emphasised punishment and isolation; Article 37(c) recognises instead that continued family relationships often help with rehabilitation, emotional stability, and successful reintegration. So, deprivation of liberty

should not sever a child's family ties unless that contact would itself harm the child.

At the same time, Article 37(c) shows how flexible the best interest's principle can be. It does not require separation from adults in every case. Exceptional situations can arise where separation would actually harm the child's welfare; a young child detained with a caregiving parent or sibling, for example, may benefit from staying together despite the general rule favouring separation. This exemplifies the Convention's preference for context over rigid rules, but it also means judges and administrators need to give real reasons when they depart from the general rule.

The best interest's principle reaches its most complex form under Article 40, which governs children accused of, alleged to have committed, or found to have broken the criminal law. Article 40 breaks with older criminal justice models that treated juvenile offenders mainly as subjects for punishment. It takes a rights-based approach grounded in dignity, rehabilitation, reintegration, and fair procedure. Article 40(2)(b)(iii) gives a child the right to legal or other appropriate assistance in preparing and presenting a defence before an independent and impartial authority, and requires that the proceedings themselves be consistent with the child's best interests.

Including the best interest principle in juvenile justice makes clear that children accused of crimes remain rights-holders. If anything, their developmental immaturity calls for stronger procedural protections. The Convention favours rehabilitation over retribution, because children generally have more capacity to change their behaviour than adults do. So criminal proceedings should hold children accountable in ways that fit their age, maturity, and prospects for reintegration, rather than aiming mainly at deterrence or punishment.

This thinking has shaped juvenile justice systems in many countries. Diversion programmes, restorative justice, counselling, community supervision, educational interventions, and family involvement increasingly take the place of formal prosecution and custodial sentences where that is appropriate. These approaches reflect the understanding that children's offending often comes from social disadvantage, family dysfunction, neglect, trauma, or developmental immaturity rather than settled criminality. So a child's best interests usually require addressing the causes of the offending, not just punishing it.

Real tensions remain, though. Public concern about serious juvenile crime often pushes legislators toward more punitive responses, including transferring children to adult courts or imposing long custodial sentences. This shows the ongoing conflict between child-rights principles and retributive criminal justice. The CRC does not deny that offences committed by children can be serious; it insists instead that even serious offending has to be handled through

procedures that respect children's dignity, developmental needs, and prospects for reintegration. The child's best interests act as a check on excessive penal responses, keeping juvenile justice meaningfully different from adult criminal justice.

The best interest principle also reaches other international human rights instruments beyond the CRC. Article 7 of the Convention on the Rights of Persons with Disabilities (CRPD) requires that, in all actions concerning children with disabilities, the best interests of the child be a primary consideration. This recognises that disability should never reduce a child's entitlement to equal protection or participation. Disability-sensitive assessments have to ensure accessibility, reasonable accommodation, and equal enjoyment of rights without discrimination. The CRPD reinforces the CRC's position that children's interests cannot be judged by uniform assumptions; they depend on each child's own circumstances, capacities, and support needs.

The Hague Convention on Intercountry Adoption turns the best interests principle into concrete procedural obligations for international adoption. Its focus on informed consent, subsidiarity, competent authorities, and preventing trafficking shows how a broad principle can become an enforceable legal safeguard. Together, these instruments show that the best interests principle now functions as a foundational norm of international child-rights law, shaping disability rights, family law, migration, adoption, juvenile justice, and child protection.

The references to a child's best interests scattered through the Convention are not accidental or repetitive filler. Each one applies the principle to a distinct legal context while keeping the same underlying aim: the child's holistic development, dignity, identity, participation, and full enjoyment of Convention rights. But these specific applications draw their coherence from Article 3(1), read together with Article 12, which set out the overarching framework for assessing and determining a child's best interests in any given case. It is to these two foundational provisions that the discussion now turns.

Analyzing article 3(1) of the convention- *“the best interest principle”*

Though, it has been discussed above that the phrase best interest of the child has been used eight times in the convention, but Article 3 (1) of the CRC is foundation of the best interest principle of the child. The other provisions in the convention which deals with the categories of the child, it is obligatory upon the state that the rights recognized under the present convention shall be protected in a manner that the best interest of the child is achieved. The interpretation of the best interest in this provision comes from article 3(1) of the convention.

Article 3(1) provides 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”.

Committee on the rights of the child, in its general comment no. 14, have dealt with the interpretation of article 3(1). The present provision has following ingredients:

- a. In actions concerning children
- b. Their best interest shall be a primary consideration
- c. Acting players-
 - i. public or private social welfare institutions,
 - ii. courts of law,
 - iii. administrative authorities,
 - iv. legislative bodies,

“In actions concerning children”

The term action here pertains to any action be it direct or indirect. The word “action” does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures¹⁰. As per the provision, the institutions which may take actions concerning a child would be a social welfare institution be it public or private, the legislative actions such as law concerning children taken by the legislature, administrative bodies and their decisions such as rules, regulations, orders etc. The provision also deals with actions taken by the courts of law. Courts while dealing with children in conflict with law shall always consider the best interest of the child as a paramount consideration.

Action being talked about to be taken here is ranges from for a single child to the group of children. Depending upon the circumstances in which a child is situated, the best interest for the child varies. Within the same category, the best interest may vary from child to child. so, all these considerations are to be kept in mind while dealing with the children and their best interest. Committee on CRC in its General Comment No. 7 on implementing child rights in early childhood remarks¹¹

“a) Best interests of individual children. All decision-making concerning a child’s care,

¹⁰ 10 UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 15 (2013).

¹¹ Of the convention.

health, education, etc. must take account of the best interests' principle, including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; and

(b) Best interests of young children as a group or constituency. All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests' principle. This includes actions directly affecting children (e.g., related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g., related to the environment, housing or transport)."

There is a pertinent question that whether article 3 extents to the parental interference as well? Reference can be made to article 5 of the CRC which exclusively deals with parents, family or legal. The said provision gives primacy to the family or the parents or the legal guardian to take care of the children "in manner a consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

This, however, does not exclude the application of the 'best interests of the child' principle in domestic set ups. "Indeed, it would be incomprehensible that only public authorities should be held to this principle, and that families would not be equally obliged to adhere to it. Hence, the general principle applies to and covers both spheres. Another response to this question may be found in Article 18 (1) of the CRC which imposes on parents and guardians an explicitly worded "guideline" that the principle of the best interests of the child should be followed when raising a child to ensure her or his development. According to this article, "the best interest of the child will be their (parents) basic concern"¹².

"Their best interest shall be a primary consideration"

There are two sub ingredients under this head. First, "best interest" and second, "shall be a primary consideration"

"the "best interests of the child" is a right, a principle and a rule of procedure based on

¹² Jean Zermatten, "The Best Interests of the Child: Literal Analysis, Function and Implementation, working report" 9 2010.

an assessment of all elements of a child's or children's interests in a specific situation"¹³. "*Best Interest*" of a child can be determined by understanding the circumstances in which the child is placed. It is a complex concept and shall be assessed case to case basis. Child's best interest are said to be protected when the conflict arises among the child's right enshrined into the convention and other human rights instruments.

"With regard to implementation measures, ensuring that the best interests of the child are a primary consideration in legislation and policy development and delivery at all levels of Government demands a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual impact of implementation"¹⁴.

In phrase "*shall be a primary consideration*", the word "shall" make a mandatory obligation upon the state to take into account the best interest of the child as a primary consideration. The provision does not leave any scope for discretion for the state parties while legislating in the interest of children. State shall legislate in the best interest of the children.

"The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked"¹⁵. "In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "a primary consideration" but "the paramount consideration". Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues"¹⁶.

Another point of interpretation in the phrase "shall be a primary consideration", is the letter "a". In situations where a decision-maker (judiciary, administration, legislator) is

¹³UN Convention on the Rights of the Child, Committee on the Rights of the Children, "General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)" 12 (2013).

¹⁴General comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para. 45.

¹⁵UN Convention on the Rights of the Child, Committee on the Rights of the Children, "General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)" 10 (2013).

¹⁶UN Convention on the Rights of the Child, Committee on the Rights of the Children, "General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)" 10 (2013).

required to render a decision, particular importance must be attached to the best interests of the child. Consideration must also be given to all possible impacts of the decision on the child or group of children in question. That said, this interest will not necessarily usurp all the other interests in a case (for instance of the parents, other children, adults, public services or the State). 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. “The child’s interests, however, must be the subject of active consideration; it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration”.

There are two instances where the drafters of international human rights instruments have used “*the*” when referring to the paramountcy of the best interests of the child¹⁷:

Article 21 of the CRC reads:

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

Article 23 (2) of the UN Convention on the Rights of Persons with Disabilities reads:

“States parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, warship, trusteeship, adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount. States parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”

“Public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”

These are the actors who would participating in deciding for the best interest of the child as a primary consideration. The *institutions* are not limited to the socio-economic institutions but also includes institutes which are related to the social, political, economic, cultural rights of a child. Private institutions are also included along with the public institutions. The intention is that any organization dealing with the child and their rights shall protect the rights of the child in a manner that the best interest of the child is protected. Overall welfare of the children shall be a primary consideration of any organization dealing with the children and their rights.

The term ‘*court of law*’ denotes any tribunal where legal proceeding is carried out with respect to determine the rights and liabilities of a child. it includes both, criminal as well as the

¹⁷Jean Zermatten, “The Best Interests of the Child: Literal Analysis, Function and Implementation, working report” 12 2010.

civil proceeding along with ADR mechanisms such as Arbitration, conciliation and Mediation. “The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so.”¹⁸

Administrative authorities may comprise of the institutions making decisions “concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others”¹⁹. These decisions must be guided by the best interest principle for the child.

The first step toward protection of the best interest of a child is to legislate the favorable laws with respect to the child which provide for a holistic development of the child. A state (*legislative bodies*) being party to the convention shall bring in domestic law at home in consonance with the convention in the interest of a child to protect his/her rights recognized by the convention in a manner to protect the interest of the child in the best possible manner. “The adoption of any law or regulation as well as collective agreements – such as bilateral or multilateral trade or peace treaties which affect children – should be governed by the best interests of the child”²⁰. The best interest of the child shall not only be recognized in the child specific law, rather it shall be included in every legislation which somehow relate itself to the child, even though it is not specifically related to the child. State shall approve the budget specially for the children to ensure their holistic development.

Factors taken into account while assessing the child's best interests

“Assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general”²¹. As stated above, the “best interests of the child” is “a right, a principle and a rule of procedure based on an assessment of all elements of a child’s or children’s interests in a specific situation.”²² For assessing and determining the best interest of the child, following steps should be followed:

“(a) First, within the specific factual context of the case, find out what are the relevant

¹⁸UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 9 (2013).

¹⁹*Ibid.*

²⁰*Ibid.*

²¹UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 12 (2013).

²² *Ibid.*

elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;

(b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.”²³

The committee on the rights of the child, in its general comment no. 14, have talked about “the Elements to be taken into account when assessing the child's best interests.” Following could be the primary considerations while assessing the best interest of a child, namely;

Child's view

Article 12 of the convention provides that children's views shall be considered for every decision that affects them. *Article 12* provides the child who is capable of forming his opinion has right to express in every decisional matter which is affecting him/her. Even in general comment no. 19 on *public budgeting for realizing the children's right*, the committee has observed that the view of child shall be taken as a mandatory requirement, as per article 12 of the convention, while budgeting for them.

Child's Identity

Children are not a homogeneous group. There are several categories of children according to the situation and circumstances they are placed in. The categories of children are discussed above but to reiterate, a few of their categories are children in street situations, children of separated parents, children of migrants, children of refugees, children with special need etc. if we see closely, the groups are not uniform in itself. Children within the group may be identified differently with different needs. Thus, a child's identity is very different from the other not inter-categories but also intra-categories.

A child's identity depends upon “personal, physical, social and cultural aspects, including their evolving capacities”²⁴. *Article 8* of the convention provides that child has right to preserve his identity and his unique identity shall be taken in consideration while assessing the best interest of the child. “For example, when considering a foster home or placement for a child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.”²⁵ The example above is an

²³ *Ibid.*

²⁴UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 13 (2013).

²⁵ *Ibid.*

illustration for article 20, para. 3²⁶ of the convention. Similarly, article 9, para. 4 of the convention protect the interest of the child who is separated from his parents because of his parent/s's detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child. The convention through various articles (discussed above) protects the distinctiveness of the situation in which a child is placed and advocates that the best interest of the child shall be assessed accordingly. State would be failing in its duty as a party to the convention, and that have resolved to protect the rights of the child, if it would not decide separately for the children/child placed in unique circumstances.

"The child's right to health"

Article 24 of the convention talk about "the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health". The Committee in its general comment no. 4 on adolescent health and development in the context of the Convention on the Rights of the Child has stated that "States parties have the obligation to ensure that all adolescents, both in and out of school, have access to adequate information that is essential for their health and development in order to make appropriate health behavior choices".

"The child's right to education"

The convention obliges the state parties to provide "quality education, including early childhood education, non-formal or informal education and related activities, free of charge." The state needs to spend more on education budget. The world today has moved way ahead of the conventional mode of education. State party shall recognize the current trend of imparting valuable education to the child in their best interest. The special education is a must for children with special needs. That is how the state would be able to protect the interest of the children.

Other than above discussed factors while considering the best interest of the society, other subsidiary factors which shall take into consideration are *"Preservation of the family*

²⁶ 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

*environment and maintaining relations*²⁷”, “*Care, protection and safety of the child*²⁸”, “*Situation of vulnerability*”.²⁹

V. Best Interest principle in “Indian legal system”

Constitutional Provisions

The constitution of India is the fundamental law of the land. Chapter III of the constitution provides certain qualified-cum-justiciable rights which puts obligation upon the state to protect these rights.

The Indian constitution protect the best interest of the child through its various provisions. Where article 14 of the constitution would be sufficient to make favorable legislations³⁰ in the best interest of the child, constitution supplements article 14 with other provisions which distinctively protects the interest of the child.

Examining article 15(3) of the Indian Constitution

Article 15(3) of the constitution reads in the favor of children. It provides that nothing shall prevent state from making any special provision for women and children. From this very fact, it was clear on the minds of the constitution framers that children need special care and protection and therefore the state may always legislate favorable/ special legislations to protect the best interest of the child.

Upon examining article 15(3) of the constitution, it appears that it is upon the discretion of the state to assess the need for special legislation in favor of children. Is it so? We cannot say yes. In fact, article 15(3) gives protection to the state from any attempt to challenge its move of providing special provisions for protecting the best interest of children. India as a state party to the convention, is under obligation to protect the best interest of a child and the present constitutional provision protects state here at home of its every move in favor of children. *Juvenile Justice Act* is one such legislation which protects the interest of a child who is in conflict with law. Although, whether the act protects the best interest of the child, as mandated

²⁷UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 14 (2013).

²⁸UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 15 (2013).

²⁹UN Convention on the Rights of the Child, Committee on the Rights of the Children, “General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)” 16 (2013).

³⁰ Class legislation with reasonable classification is permitted.

by the convention is a question of a critical examination.

Examining article 21A r/w article 45 of the Indian Constitution

The said provision is in the consonance with article 19, 23, 24, 28, 29, 32, 33 and 40 of the convention. The convention, through the abovementioned articles, provides that every facet of education shall be provided to the child. Problem with article 21A r/w article 45 is that it recognizes right to education of a child only up to the age of 14 years. The convention is clear on the maximum age of a child. unless it is in the best interest of the child, the age of majority shall be 18 years.

Examining article 24 of the Indian Constitution

Present article provides that “no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”. The original child labor law (*The Child and Adolescent Labor (Prohibition and Regulation) Act, 1986 hereinafter the child labor act*) banned employment of children below 14 in only 18 hazardous industries. The amendments (*Act 35 of 2016*) also make it clear that children between 14 and 18 years will also not be allowed to work in hazardous industries. Exceptions have, however, been made in case of works in which the child helps the family or family enterprises³¹. The condition is that such enterprises should not involve any hazardous occupation. Another condition set forth is that they should work after school hours or during vacations.

The recent amendment is quite problematic. Allowing children to work in family enterprises would be against their best interest. Few concerns which are very obvious that how would the child manage his school and then working in the family enterprise and obviously the child would not be paid for his labor in his own family, which he would have certainly got if had been working with some other employer.

Another pertinent concern is the term “Family”. Section 2(v) defines the term family “in relation to an occupier, means the individual, the wife or husband, as the case may be, of such individual, and their children, brother or sister of such individual”. The ambit of family is quite large and that may lead to exploitation of the child. family in Indian setup would hardly pay their children and therefore it becomes “*begar*”.

Thus, in the above case, best interest of the child, in the special circumstance where he/she has to do labor, has not been protected. The legislation needs to be reconsidered.

³¹ The Child and Adolescent Labor (Prohibition and Regulation) Act, 1986, Section 3.

Other provisions

Article 39(e) the Constitution ensures that “*the tender age of children is not abused*”. Article 39(f) provides that children are given opportunities and facilities to develop in a *healthy* manner and in conditions of freedom and dignity and that *childhood and youth are protected against exploitation* and against moral and material abandonment. The abovementioned provisions are in consonance with article 24 of the convention.

Article 350A of the Constitution provides that “Facilities for instruction in *mother tongue* at primary stage It shall be the endeavor of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities”. The present provision is in consonance with *article 29(1)(c) of the convention*.

Statutory Provision

There are several statutes dealing with child and its categories namely, *Children Pledging of Labor Act, 1933, The Immoral Traffic (Prevention) Act, 1987, Child Labor (Prohibition and Regulation) Act 1986, Prohibition of Child Marriage Act, 2006, Right of Children to Free and Compulsory Education Act, 2009, the Protection of Children from Sexual Offences Act, 2012 and the Juvenile Justice (care and protection of children) Act, 2015*.

In present section, researcher shall deal with two laws namely the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO act) and the Juvenile Justice (care and protection of children) Act, 2015 (hereinafter the JJ act). Where POCSO deals with the category of child as a “victim” of sexual crime, on the other hand the JJ act deals with the category of child as “offender”. POCSO has uniform age for child as victim i.e 18 years of age but JJ act has subcategorized the child offender as, one, a child in the age group of up to 16 years of age and, two, a child offender between age group of 16-18 years.

India, being party to the convention on the rights of the child, is under obligation to protect the best interest of the child. The JJ act defines “Best interest of child, under section 2(9) as “*best interest of child*” means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.” To what extent do section 15 of the JJ act justify the definition?

A child in conflict with law is a “*victim of circumstances*”. We ought to ponder upon that why have a child come in conflict with law. A child under such circumstances needs

reformatory care rather than punishing him (as an adult in certain categories). Section 15³² of the JJ act is problematic and unreasonable. Subcategorization of child into “one to be tried as an adult” is violation of the rights of the child recognized by the convention. Child, up to the age of 18 years is a child for all purposes. Looking into the heinousness of a crime and then deciding the fate of a child falling into this impugned category would not be in the best interest of the child.

A child in conflict with law is a victim of circumstances. If a child breaks the law, then it is failure on the parts of the parents, the legal guardian, the caregiver, the society and ultimately the state who could not protect the child from the ill circumstances which led to the present situation, that he/she came into conflict with law, of the child. Instead of punishing a child as an adult by looking at the heinousness of the crime that has been committed by him/her, our prime responsibility would be to take the child out of the present situation and to understand the circumstances under which the child offender has committed the present crime.

The two laws, POCSO and the JJ act, would not be able to argue for each other that the best interest of the child has been recognized as the paramount consideration. The researcher finds no reasonable criteria for treating child in two separate age groups.

VI. Critical examination of the “Best Interest principle”

The doctrine of “Best Interest” is based upon the theory of welfare test. The theory has not been immune from the criticism for the various reasons. Robert Mnookin has described the welfare test as “vague and indeterminate”³³. Though the best interest principle approach has found support from the United Nations Committee on the Rights of the Child (UNCRC)³⁴ and it has offered extensive guidance on how such lists should be framed and operate, but even then many jurisdictions have sought to curtail this indeterminacy and the judicial discretion that accompanies it³⁵.

³² (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18, Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

³³ Robert H Mnookin, “Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy” 39 LCR 1 (1976).

³⁴ Article 3(1) of the convention.

³⁵ Robert H Mnookin, “Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy” 39 LCR 2 (1976).

The vagueness and indeterminacy of the welfare test or the best interest principle have been the subject of academic discourse, because it has opened the door to unchecked judicial discretion, allowing subjectivity which are influenced by the person ideas of the welfare and has replace objective considerations and has given a way to “unguided decision-making”³⁶. “As a result, the values of the dominant political, cultural or religious group may be imposed on those who do not fit the standard pattern, leading to discrimination against those who do not conform and that way it may result into inequity”³⁷. Other observation is that indeterminacy leads to unpredictability and therefore it may lead to dispute among the parties and subsequently may results in increased resort to litigation³⁸.

Robert Mnookin, a critique to the principle, has drawn the reader’s attention to the “*indeterminacy of the principle*”. One issue that Mnookin flags is that the prediction that we draw for in present times might not suit in the future. The inference that the system draws for the future based on the present knowledge are mere speculations which might not be in the best interest of the principle though we do it in the name of the best interest of the child.³⁹ Thus, according to Mnookin, we cannot be very sure with decisions that we take in the present time, would be of same assistance, to the child/children, in future as well. This indeterminacy of the principle renders it difficult for the policy makers to follow the principle unquestionably.

Another critique to the best interest principle is pluralism and scepticism.⁴⁰ Mark Cherry remarks on moral pluralism is that “Universal moral truths cannot be read straightforwardly off of reason, canonical intuitions, or a sense of profanation or moral outrage so as conclusively to inform judgments regarding the best interests of the child”⁴¹. The principle is indeterminate because *the determinacy comes at price*⁴². To further explain it, there may be circumstances wherein the principle’s efficiency is open to rebuttable. Though it is not rebuttable that “the Judges may consider any matter without prejudice or prior exclusion of any possible interpretation of the facts”⁴³. but the indeterminacy in the principle leaves “room for

³⁶ Elaine Sutherland, “The Welfare Test: Determining the Indeterminate” 22 *Edinburgh Law Review* 3 (2018).

³⁷ Lynne Marie Kohm, “Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence” 10 *JL & Fam Stud* 337 (2008).

³⁸ Mnookin, Linda Jellum, and other “Parents Know Best: Revising our approach to parental custody agreements” 60 *Ohio St LJ* 615 (2004).

³⁹ John Eekelaar, “The interest of the child and the child’s wishes” 8 *International Journal of Law and the Family*, 45 (1994).

⁴⁰ David Archard, “Children, adults, best interests and rights” *Medical Law International* 13(1) 57 (2013).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ David Archard, “Children, adults, best interests and rights” *Medical Law International* 13(1) 57-58 (2013).

judicial discretion that will be exercised by judges and judges can dispassionately and impartially consider a child's case and that this is unacceptable"⁴⁴. Also, the discretion may be exercised in "capricious, arbitrary or subjective manner"⁴⁵. Judges may of course make their determinations in an 'individualized' manner but they need not do so but judicial discretion is not a synonym to "personal discretion" and is constrained by familiar principles and rules⁴⁶. Another possibility is the discretion may be prejudiced or biased or ideologically suspect. *Christine Piper*⁴⁷ and *Helen Reece*⁴⁸ flag the similar suspicion⁴⁹.

Alternate to the Best Interest Principle

The critique has suggested replacements to the best interest principle, which is more of a subjective approach. One of such suggestions is "to devise a statutory welfare checklist"⁵⁰. Robert Warshak claims that this approach can "minimize the drawbacks of the best-interests standard while retaining its virtues"⁵¹. "Many jurisdictions have taken this path and, since regulation of family law is the province of the individual states, the United States provides particularly rich pickings in terms of what can be done with welfare checklists. While both the Uniform Law Commission and the *American Law Institute* have offered model checklists, many states have formulated their own versions and the recent experience in Pennsylvania is instructive"⁵².

The welfare check list is not the ultimate solution to the present issue. The welfare checklist concept has its own limitations. The entries in the checklist cannot be exhaustive as they do not normally indicate the relative weight to be accorded to the different factors and therefore the judges shall be allowed to use their judicial discretion for "individualized decision-making to which every child is entitled"⁵³. Another pertinent concern is that who frame the check list. Lobbying may affect the particulars of the checklist and therefore may affect the bona fide interest of the child⁵⁴.

⁴⁴ *Ibid.*

⁴⁵ David Archard, "Children, adults, best interests and rights" *Medical Law International* 13(1) 58 (2013).

⁴⁶ *Ibid.*

⁴⁷ C. Piper, 'Assumptions About Children's Best Interests', *Journal of Social Welfare and Family Law* 22(3) 261–276 (2000). "identifies the unspoken but problematic assumptions animating judicial decision-making in this area"

⁴⁸ H. Reece, 'The Paramountcy Principle, Consensus or Construct?' *Current Legal Problems* 49(1) 267–289 (1996).

"identifies the biases in the actual judgments of those charged with interpreting what is in a child's interests".

⁴⁹ David Archard, "Children, adults, best interests and rights" *Medical Law International* 13(1) 58 (2013).

⁵⁰ Elaine Sutherland, "The Welfare Test: Determining the Indeterminate" *22 Edinburgh Law Review* 4 (2018).

⁵¹ *Ibid.*

⁵² Elaine Sutherland, "The Welfare Test: Determining the Indeterminate" *22 Edinburgh Law Review* 4 (2018).

⁵³ Elaine Sutherland, "The Welfare Test: Determining the Indeterminate" *22 Edinburgh Law Review* 5 (2018).

⁵⁴ Elaine Sutherland, "The Welfare Test: Determining the Indeterminate" *22 Edinburgh Law Review* 5 (2018).

Though Child is not a homogeneous category, there are few situations which are common for every child for the reason of him/her being a child. We can have some standard rules and regulation which would cater the best interest of every child. But then as discussed above that the welfare checklist that is made cannot be common in all the circumstances for child of every category. The checklist may provide for the minimum standard of welfare entries. Further it shall be left to the discretion of the judges or the authority responsible for the case of the child to add to the list the entries that may be required and are necessary for the child in particular whose case are under discussion.

Even in the case of any policy decision made for the child shall be such that it shall contain few of the foundational parameters that are commonly required by the child in every category. For example, Education is needed for every child and thus it shall be common for child as one common noun category but then for the child who are forced into child labor, due to their poverty situation, the best interest considerations may vary and therefore while deciding for this category of the child, the decisions/policy shall have adequately considered the peculiar situation of a child in labor and accordingly decide.

VII. Conclusion

The best interest principle is the bedrock of the child jurisprudence. We, as parents, the guardian, the caregiver, the society and the state, are under obligation to provide best care and protection to the children, according to their peculiar need, for their holistic development. The rights recognized under the convention shall be the ideal law and any action of any entity violating these rights is subject to be declared as illegal.

India as a state party shall respect the rights recognized by the convention and shall bring the legislation, dealing with the child, in sync with the rights recognized by the convention. The convention shall be the point of reference for any action pertaining to a child. Any action of the state which affect the right of the child shall explain for itself to be in the best interest of the child.

Article 3(1) of the convention is the bedrock of the convention and any decisions being taken by the institutions shall be made after taking view of the child, as provided under article 12 of

“That was the experience in Australia when those supporting “shared parenting” prevailed and the existing legislation was amended, in 2006, giving equal weight to the benefit of the child having a “meaningful relationship” with both parents and the need to protect the child from exposure to domestic abuse.”

the convention.

The best interest principle provided in the convention may be the torch light which show the required path to the state parties. These principles may be the minimum foundational principles that a party may adopt and, as the convention clearly provide, the state parties may formulate the policies that may be suitable to the particular state for the want of local considerations. The critique also supports the idea that though we may have certain checklists which may provide the objective theorization of the best interest but then it is also clear that the discretionary power of the judges/the other authorities shall not be blocked. The child has different considerations for he/she being placed in different circumstances and therefore the subjective approach along with the pre founded objective approach would cater to the best interest of a child, objectively and in real sense.

