Lecture 2: The best interests of the child principle
Introduction

In almost all jurisdictions, when it comes to issues relating to child welfare, the best interests principle is the key principle around which decisions relating to children revolve.

- At international level, Article 3(1) UNCRC is the most commonly cited reference for this principle:

  “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 principle also finds expression in a number of earlier and subsequent international texts:
  - Principles 2 and 7 The 1959 Declaration on the Rights of the Child;
  - Art 5(b) and 16(d) The 1979 Convention on the Elimination of All Forms of Discrimination Against Women;
  - Arts 7(2), 23(2), and 23(2) and (4) of The UN Convention on the Rights of Persons with Disabilities.
  - General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966

Note that the wording of the best interests obligation in Article 3(1) covers all actions concerning children, **whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies**.

Definition of the Best interests principle

Despite the fact that best interests is universally regarded as a central tenet of children’s rights, its precise definition remains elusive and its application highly inconsistent and contingent upon subjective interpretation.

In fact, the initial process of conceptualising and embedding best interests within a rights framework was by no means straight-forward or uncontested. During the drafting of the UN Convention on the Rights of the Child there was considerable debate as to whether a principle
grounded in ‘interests’ and ‘needs’ should be included at all within a Convention that explicitly endorses rights.

**But even though it is slightly illusive as a concept, the basic aims or functions of Best Interests are noble/valuable:**

1. A mechanism for rendering children’s interests visible in decision-making
2. To assist decision-makers in achieving an outcome that will have the most positive (or the least negative) impact on children
3. To create the circumstances in which children can be nurtured to develop into rounded, fulfilled and responsible citizens, contributing to a community that we all want to be part of in the short and longer term

**Applying the Best interests Obligation**

Remember in the last lecture I introduced you to the General Comments on the UN Committee on the Rights of the Child – more detailed guidance fleshing out what certain provisions of the UNCRC mean in practice. The **UN Committee on the Rights of the Child, in its General Comment No 14 on the Best interests principle**, has characterised the principle as:

- a **substantive right**, entailing an intrinsic obligation on all states to ensure that the child’s best interests are a primary consideration informing all decisions concerning the child;
- a **fundamental interpretative legal principle** requiring that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child’s best interests should be chosen; and
- a **rule of procedure** requiring procedural guarantees to be put in place to enable decisions around what is in the child’s best interests actually to occur and be evidenced in practice.

**Assessing the Best interests principle**
The approach to assessing children’s best interests, and the weight to be attached to children’s best interests, as compared to other interests, differs according to the legal context and facts of a case.

If you look at the text of Article 3, it tells us that best interests of the child is ‘a primary consideration’ indicating that it is one of a number of other ‘primary’ factors to be taken into account. Other areas of law and jurisprudence, on the other hand, refer to best interests as ‘the paramount’ consideration.

- So, what substantive or material factors need to be considered to enable a person to determine what is in the primary or paramount interests of the child? We don’t always have checklists to consult, so how can we tell if a decision-maker is acting in a way that puts children’s best interests first?
- Well, it is accepted that the best interests principle does not operate in isolation from other children’s rights; on the contrary, it is intimately linked with and instrumental to the exercise and enforcement of other rights set out in the Convention. So, if you look at the text of the UN Convention on the rights of the child, the best interests principle is explicitly referred to in:
  - Articles 9(1) and (3),
  - 18(1),
  - 20(1),
  - 21,
  - 37(c) and
  - 40(2)(b)(iii) of the CRC
  - One of the four General Principles, best interests underpins the interpretation of all other rights listed in the Convention.

**Common criticisms of the best interests principle**

- **What about others’ (adults’) interests?**

This argument objects to the way in which best interests blindly prioritises children’s needs over and above the interests of other parties implicated in proceedings, leading to an artificial, one-sided justice that undermines adult parties’ (notably parents’) rights, and neglects to acknowledge that a more balanced assessment of the different parties’ interests might be instrumental to upholding the interests of the child.
• **It leads to opaque and superficial assessments of what is best for children (usually by adults, in the light of what is best for adults)**

So, in a private family dispute, there are many interests at stake: the interests of the parents may not be the same as the interests of children, and yet in most cases, the interests of the parents and the interests of the children are conflated.

In some areas of law, there are fixed presumptions around what is in children’s best interests, based on cultural or religious or legal/political norms, for instance. This allows little discretion to determine best interests on a case-by-case basis. For instance, in cases of cross-border parental child abduction, it is generally presumed to be in children’s best interests to be returned immediately to their country of habitual residence. There is no scope to assess their individual best interests save in very exceptional circumstances.

The role of best interests is even more problematic and opaque in a criminal justice or immigration context. Take for example decisions relating to immigration. For the most part, states enjoy a high margin of appreciation in regulating immigration into their own regions with a view to curbing the potentially negative economic, political, cultural and social impact of such flows. Effectively, therefore, even if it did have an explicit mediating function, the best interests of immigrants – adult and children alike – will always be relegated to the notional ‘best interests’ of the broader public, save in the most exceptional of cases.

Similarly, children’s best interests in a criminal justice often pales into insignificance where the focus is on punitive sanctions, avoiding recidivism and obtaining justice for the victim.

• **It reinforces a highly paternalistic approach to decision-making as opposed to more empowering participatory approaches**

Many children’s rights scholars have argued that the best interests principle is used to ignore or undermine children’s expressed wishes and feelings. We’re going to come back to this point in the
lecture about children’s participation in decision-making. For now, it is worth highlighting that the UNCR sees best interests and children’s voice as intimately linked: courts are more likely to arrive at a decision that is in children’s best interests if they listen to and engage with what the child’s perspective, experiences and wishes more directly.

As a task in preparation for the workshop, it would be great if you could:

- Read General Comment No 14 of the UN Committee on the Rights of the Child
- Reflect on the following questions in light of your case work:
  - So how do you go about applying best interests in practice? – do you follow a particular process/guidance?
  - How do you balance children’s best interests against other people’s rights in a given situation?
  - What are the main challenges you face when determining children’s best interests?
  - Is General Comment 14 /UNCRC useful in assisting you when assessing children's best interests?