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THE IMPACT OF THE 'CONVENTION ON THE RIGHTS OF THE CHILDREN' ON JUDICIAL DECISION MAKING IN COMMON LAW JURISDICTIONS

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Abstract

Convention on the Rights of Child emerged in the context of excessive exploitation of children both economically and politically in the last few centuries in which the reign of capitalism was marvelously crass. In normal human interactions, the balance of power between two people which comes from social and economic capital influences the treatment with which the more powerful treat the less powerful. Average children lack all kinds of capital and are not treated in the best manner, especially if they are poor. CRC created an international legal framework which served as a definite postulation internationally to influence countries to protect all kinds of rights of the children. For this purpose, it is important to peruse the positive role of CRC on the judicial decision making in common law countries to view the influence of international law on the evolving local jurisprudence of the countries in protecting the most vulnerable children.

Keywords: International Human Rights Law, Convention on the Rights of Child, Best Interests of Children, European Convention on Human Rights

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Introduction

It is often stated that ultimately life is just childhood and then the relation of an adult with that period for the rest of life. Some people might not agree with this statement but even those people would recognize that childhood is a vulnerable and very important part of human life. In line with this acknowledgement, which is present throughout the world, Convention on the Rights of Child (the "CRC") was adopted by United Nations General Assembly in 1989 and was ultimately signed by almost all countries of the world. However, despite many countries incorporating CRC within their legal frameworks, it was observed that impact of CRC in the judicial decision making (the "JDM") was different in various jurisdictions. Therefore, for the purposes of this brief, JDM in two common law jurisdictions i.e., South Africa (the "RSA") and United Kingdom (the "UK") shall be perused. The reason behind the selection of these two countries is due to the fact that these countries are alike in their legal core, which is embedded in English common law, yet they are also very different in relation to their unique legal and historical landscape.

Moreover, this research brief shall also attempt to study JDM in RSA and UK mainly from the perspective of Article 3(1) of CRC which provides that signatories of CRC should devote themselves for the best interests of children (the "BI"). The reason for the selection of this specific Article is due to its expansive nature which can allow other rights including the other three core rights of CRC to correlate with it simultaneously.[1] This research brief shall first establish the inter-connected nature of the core rights of CRC which coalesce ultimately with BI. The second part of this research brief shall prove that the responsibility to implement provisions of CRC also lies with the judiciaries of respective countries and they should ensure its implementation while adjudicating cases. The third part of this research brief shall divulge into the legal decisions of RSA and UK to understand the extent to which Article 3(1) of CRC has impacted JDM in both of these countries. The fourth part of this research brief aims to critically understand the factors which could cause any 'observed divergence' in relation to the use of CRC in JDM of RSA and UK. The last

[1] "EU Commitments in the Field of Child Rights" (*Europa*) <https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.7.html> accessed April 30, 2023

part of this essay shall counter arguments which might challenge the relevance of Article 3(1) of CRC in relation to JDM in UK and RSA.

Correlation of BI and other Core Rights of CRC

United Nations Committee on the Rights of the Child (the "UNCRC") has interpreted BI as a complex concept which requires case by case consideration as the provisions of this Article are adaptable.[2] Moreover, UNCRC has stated that the use of phrase 'shall be primary consideration' in relation to BI in Article 3(1) of CRC places a strong obligation on the states since the drafters also used the word 'shall' in the said Article. UNCRC further reasoned that this phrase means that the children's BI shall be given more importance than other considerations due to the "special situation of the child which includes dependency, maturity, legal status and, often, voicelessness."[3] The adoption of Article 21 of CRC has further strengthened the application of BI as it has raised the test for its application for the party-states to 'a paramount consideration' from 'a primary consideration'.[4]

In line with the aforementioned dynamic approach of UNCRC for interpretation of BI, UNCRC also considered strong connections between BI and other core rights provided in CRC i.e., right to non-discrimination (the "RND"); right to survival and development (the "RSD") and the right to participation and inclusion (the "RPI").[5] For explaining the relation of RND and RSD with BI, the UNCRC noted that these rights are not a passive obligation but requires proactive measures on the part of state to ensure effective opportunities for all types of rights under the CRC. For this purpose, creation of an environment which ensures the 'holistic' development of every child was deemed necessary.[6] UNCRC also affirmed strong interconnection of BI with RPI and stated that the assessment of BI must include respect for the child's RPI with sufficient due weight to be given to the opinion of children in matters which shall affect them. Therefore, BI cannot be correctly applied if RPI is not applied as the former reinforces the latter by facilitating the essential role of children in decision making process.[7]

[2] UNCRC "General Comment No. 14", Para 32
[3] Ibid, Para 36 and 37
[4] Ibid, Para 38
[5] CRC 1989, Article 2; Article 6 and Article 12
[6] Ibid (n.2), Para 41 and 42
[7] Ibid, Para 43

The inter-connected nature of BI with other rights is further reinforced through 'Child Right Approach'. This approach means that a child should be viewed as 'rights holder' and not a beneficiary of an adult`s benevolence.[8] UNCRC elucidated that child rights approach ensures respect for all facets of the life of a child by providing rights such as dignity, life, survival, well-being, health, development, participation, and non-discrimination.[9]

Judiciary's Responsibility to Preserve BI in CRC

As noted *supra*, the party states are required to protect BI, and the state also includes the judicial branch of government as Article 3(1) of CRC specifically requires 'courts of law' to protect BI. BI and other core rights of CRC contain elements of both civil and political rights as well as economic, social, and cultural rights which demonstrate that BI and core rights are inextricably intertwined. Thus, BI is also 'justiciable' without any distinction in relation to its scope and states are required to consider BI in their judicial cases if the facts of the case directly and indirectly involve children.[10] The concern of the drafters of CRC to oblige judiciaries to specifically use CRC in their decision is best reflected in Article 4 of the CRC which requires the states to take judicial measures and provide judicial remedies if there is any violation of CRC. [11] Moreover, judicial bodies must consider systematically the effect of their decision on rights and interests of children.[12] For this purpose, members of judiciary should be specifically trained for the purposes of implementing the provisions of CRC. [13]

JDM in RSA

RSA judiciary has probably used CRC in one the most liberal manners while deciding cases involving children`s rights. In *Department of Health and Social Development Case,* judges deliberated on the constitutional validity of sections 151 and 152 of RSA Children`s Act and declared these sections as unconstitutional.

[8] UNCRC "General Comment No. 32", Para 72(a)
[9] UNCRC "General Comment No. 21", Para 10
[10] UNCRC "General Comment No. 5", Para 6
[11] UNCRC "General Comment No. 16", Para 29
[12] Ibid (n.9), Para 12
[13] Ibid (n.9), Para 53

Sections 151 *inter alia* empowered courts to order a child to be removed from parental care with the help of extensive police powers and to place them in temporary safe care provided this order appeared necessary for the safety and well-being of children. Section 152 *inter alia* even empowered a social worker or a police official to remove a child from parental care if that official person deems that it is the best way to secure child's safety and well-being. The judges reasoned that CRC considers every child's right to know and to be nurtured by his parents and preserve his/her identity without any interference. Furthermore, a child could only be removed from parental care through a state action if it is subject to judicial review and any such action must also deliberately follow BI in accordance with the requirements of CRC. The judges strongly observed that CRC must be read in an authoritative way in RSA as section 28 of the RSA Constitution itself considers the rights of children as of 'paramount importance' in every matter. While interpreting the phrase 'paramount importance', judges considered that it does not result in overriding every other consideration but requires an appropriate weight to be given to each consideration. In making this determination, the relevant court, nevertheless, must be cognizant of the fact that law still attaches BI the 'highest consideration'.[14]

In *M v S* case*,* the RSA judiciary reiterated the authoritative and expansive reading of CRC including the paramount interests of children. In this case, M was convicted of fraud, and she appealed against a lower court`s judgment which obliged her to serve in prison while disregarding the fact that M had small children. In the judgment, judges affirmed the ruling of a previous RSA case named as *S v Howells* in which the BI derived from Article 3(1) of CRC were held to be entrenched in RSA common law. Importantly, RSA judiciary observed that four core principles of the CRC shall act as a guiding policy in RSA in relation to children while the unity of these four principles is in the 'right of a child to be a child and enjoy special care'. Thus, there should be sufficient, independent, and informed attention to the paramount interests of children. However, the court still considered balancing exercise necessary as attention must also be given to the plight of people who were subject of the fraud. Therefore, the judges adopted a 'utilitarian' approach to balance competing interests and reasoned that if M worked to repay the money to the people who were subject to

[14] *C v. Department of Health and Social and Social Development,* [2012] ZACC 1, 3, 5, 18, 19

fraud, the community and her children will gain more than subjecting the mother to prison. [15]

In *Christian Education v Minister of Education,* RSA judges further observed that BI shall be of paramount importance even at the cost of conflict with parent`s beliefs and considered that CRC requires RSA to protect a child from all forms of violence and injury even if on the pretext of religious freedom. [16] In *Grootboom* case, the RSA judges further confirmed that CRC requires the RSA state to take steps to ensure that BI are observed in the country and the inspiration of section 28 of RSA constitution which require the state to consider the paramount interests of children has its origin in CRC.[17]

JDM in UK

UK was one of the earliest followers of CRC as it became a 'good' law in UK in 1992.[18] Perusal of UK case-law demonstrates that UK judiciary has considerably relied on CRC but generally in conjunction with European Convention on Human Rights (the "ECHR"). In *Procurator Fiscal*, the Privy Council heard a case in which a 13-year-old boy was charged with serious sexual offences against other children. There was considerable delay in the proper execution of the trial due to the fault of prosecution and the proceedings were adjourned for a long time. The Scottish Court found that prosecution has deliberately waited to delay the case which not only violates the Article 6 of ECHR but also Article 40(2)(b)(iii) of CRC as CRC entitles every child accused of crime to a trial "without delay". Lord Rodger reasoned that CRC is incorporated through the para 16.01 of the Scottish book of regulation and CRC was binding on UK at all material times. His Lordship further considered that the Book of Regulations itself notes that BI reflected in Article 3 of CRC must be applied in all actions concerning children including proceedings in the courts of law. [19]

In *Regina v Secretary of State for Education and Employment*, the House of Lords dealt with a case in which the heads of a number of Christian schools wished to use corporal punishment on school children as a part of disciplinary device. A ban

[15] *M v. The State Center of Child Law* [2007] ZACC 18, Para 16; Para 43
[16] *Christian Education v Minister of Education* [2000] ZACC 11, Para 40; Para 45
[17] *South Africa v. Grootboom* [2000] ZACC 19, Para 75 and Para 15
[18] *Procurator Fiscal v. Watson* 2002 UKPC D1, Para 105
[19] Ibid, Para 179-181

was imposed on this practice and the Christian schools believed that such a prohibition violated their freedom of religion under Article 9 of ECHR. House of Lord ruled against the Christian schools, but Lord Nicholas relied exclusively on ECHR. His Lordship observed that a statutory ban which infringes religious freedom must pursue a legitimate aim; must be prescribed by law and must be necessary in a democratic society with a pressing social need which must be proportionate to the legitimate aims pursued. Moreover, a belief must satisfy modest objective minimum requirements which is consistent with the basic standards of integrity of humans.[20] In this case, Lady Hale also delivered her own judgment and all judges agreed with her reasoning as well. Her judgment is important as she relies heavily on CRC in place of ECHR and takes a child`s right approach. Her Ladyship opens her judgment with powerful words: "This is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no-one here or in the courts below to speak on behalf of the children." [21] In pursuance of this approach, she relies on Article 3(1) of CRC and states BI when read in conjunction with other Article s of CRC categorically forbid torture and cruelty of children and respect their dignity.[22]

In *ZH* case*,* the Supreme Court of UK eloquently explained the legal status and importance of CRC in UK. In this case, a mother appealed to the Supreme Court that her removal from the UK shall constitute as disproportionate interference with her right to family life as guaranteed under Article 8 of the ECHR. The Supreme Court deliberated on the extent to which BI were affected by the removal of one of the parents from UK. Lady Hale, again, reiterated the child's rights approach and observed that BI broadly means the well-being of a child and that requires that child's own views must be discovered. Therefore, they must be considered as of 'first matter'. Lady Hale recognized that the competing circumstances in this case to BI were the reasonable requirements of the state to maintain firm and fair immigration control and to discourage the immigration history of the mother, which was appalling. However, her Ladyship considered that the children cannot be blamed for her mother`s faults as removing them from warm arms of a primary caregiver or sending them away to another culture with which they cannot be harmonized can be devastating for their upbringing. Moreover, Lady Hale reminded the government that BI is in consonance

[20] *Regina v. Secretary of State for Education* [2005] UKHL 15, Para 23
[21] Ibid, Para 80
[22] Ibid, Para 81

with the binding obligations provided in section 11 of the Children's Act 2004 and the expectation of the Strasbourg Court for the national authorities to apply Article 3(1) of CRC. Her Ladyship boldly extended the obligations of UK to uphold BI in relation to refugees and asylum seekers and that BI should be considered while making the decisions of granting refugee status. Lastly, her Ladyship interpreted the meaning of the phrase which deems BI as 'primary consideration' and reasoned that a primary consideration is not a paramount consideration in UK. However, no other consideration is considered inherently more significant than the BI of the children. Therefore, if BI outweighs all other considerations 'cumulatively', then a UK court should proceed with a decision which treats BI as of primary consideration in JDM.[23] In a way, Lady Hale conclusively declared that Article 3(1) of CRC requires UK to uphold the BI as a primary consideration in all of state actions.

Analysis of JDM in Light of Historical and Legal Milieus

In light of the aforementioned legal corpus, it can certainly be stated that BI provision of CRC played an important role in JDM in both UK and RSA. However, the perusal of the legal cases also reflects that certain patterns emerge in the use of CRC in RSA which make it unique from the use of CRC in UK. The first pattern in RSA is the use of constitution in conjunction with CRC since RSA is a constitutional democracy as opposed to UK which adopts the principle of legislative supremacy. Therefore, the judiciary of RSA consistently uses the powers of judicial review to strike down legislation. In these attempts, RSA judiciary also uses CRC to justify the expansive interpretations of fundamental rights provisions present within their constitution. This attitude of RSA JDM was best reflected in in the *supra* case of *Department of Health and Social Development* where the court read section 28 of RSA constitution with Article 3(1) of CRC to strike down Section 151 and 152 of Children`s Act. In contrast, such a simultaneous use of national constitution and CRC was not observed in UK. Rather, as observed in the above-mentioned case of *Secretary of State for Education and Employment,* separate interpretations of CRC and ECHR are used by judges in JDM. However, a pattern also emerges in UK JDM as again reflected in *Secretary of State for Education and Employment* and *Procurator Fiscal* wherein

[23] *ZH (Tanzania) v Home Department*, [2011] UKSC 4, Para 21-27

the ECHR is primarily used for securing children's rights and CRC is used more as a supportive and concurring tool.

The troubled history of RSA also reflects itself in JDM in RSA in relation to CRC. The past systematic injustices continue to haunt RSA and a simultaneous suspicion of state coupled with the encouragement of state to enforce bold measures can be observed in JDM of RSA judiciary. In this simultaneous exercise, again, RSA judiciary uses CRC. The encouragement for state, though the prism of racial injustice, is best manifested in *Christian Education* case where the judges stated that state's policy of integration of educational systems can result in a radical break with the authoritarian past.[24] Similarly, the suspicion for state can be observed in *Department of Health and Social Development* case where the excessive powers provided to state officials were viewed with contempt and were taken down through the use of CRC. Such an attitude is not observed in JDM in UK probably due to the fact that people and state structure in UK evolved hand in hand with each other and there is less suspicion of state structures in UK as opposed to many post-colonial constitutional democracies like RSA, Pakistan, and USA. Therefore, the UK judiciary generally views the state with less contempt and supports its progressive policies. This can be viewed in *Regina* case where the judiciary in UK used CRC to support the state's policy to end corporal punishments. Similarly, in *Procurator Fiscal,* the court's directions against the state were not to strike a general policy favoring state but was an isolated direction to the state to follow CRC as it is an enacted law. The use of CRC in *ZH (Tanzania) v Home Department* was also not to curtail the policies of state in relation to immigration as Lady Hale specifically recognized this specific concern of government. The case was more directed towards incorporating BI in line with CRC in UK legal corpus and for protecting a specific class of people who are generally ignored in policy making in UK i.e., the children of immigrants. Thus, as opposed to RSA, UK judiciary does not adopt attitude of simultaneous support and contempt toward state while using CRC.

Arguments Against the Relevance of CRC and Counter - Arguments

Some people might argue that BI present in Article 3(1) of CRC has not played any substantial role in the jurisprudence of the UK and RSA. They can rely on the above-

[24] Ibid (n.18), Para 50

mentioned patterns observed in UK and RSA and can state that the judgments of UK and RSA are just reflective of their respective localized conditions. They can also argue that the main documents which the UK and RSA judgment keeps on relying for protecting rights of children is ECHR and RSA Constitution respectively. Therefore, CRC is just 'play of words' or an 'additive pill' used in judgments which has no juice of its own.

However, the voices doubting the relevance of CRC in JDM do not realize that the ratification of international treaties is also a part of national evolutions. These treaties melt into the national laws and become a part of the legal evolution itself. The best example of this phenomena could be observed in the past use of ECHR in British judgments even though Britain now has left EU. Moreover, CRC is not just a 'play of words' rather it is a creation of rights-based narrative at global stage. CRC, at the very least, traps the state executives in its jargon and creates a 'moral deterrence' on the public level. Therefore, shades of the realization that CRC encompasses something which is of universal value was observed in *ZH* case where BI were considered to extend even in relation to the decisions involving the grant of refugee status.

CRC has also played a role in the development of national legal milieus in relation to children's rights. It does not serve as a supportive character rather acts as an origin of many instruments which are then used to preserve children rights in JDM. Examples of this assertion could be observed in section 28 of the South African Constitution and UK Children`s Act 2004 which originated from Article 3(1) of CRC.

Summation

In summation, it can be stated that CRC played an important role in strengthening BI in both RSA and UK. Judiciary in both countries used CRC according to the unique circumstances of each country. In both UK and RSA, CRC not only acted as facilitator in JDM for requiring states to provide BI to children but also acted as an instigator for the development of national laws which were then further relied authoritatively in addition to CRC in the JDM.