



The Paramountcy Principle – a Rights-based Legal Analysis

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ABSTRACT

Best interests of the child – a concept serving for the realization and protection of the child's fundamental rights – has been a subject for debates since its formation. While indeterminate and flexible to each single case by its nature, it is still deemed to be one of the most effective tools with regard to children rights law. The present Article aims at illustrating the value the concept should be accorded to, together with the degree of its implementation in the legislation of Georgia, rather than concentrating on the notion's indeterminacy. For this reason, the Article will demonstrate meaning, importance, place of the best interests of the child at both – international and local levels.

KEYWORDS: Best interests of the child, Primary consideration, Paramount consideration

INTRODUCTION

Best interests of the child – a concept serving for the realization and protection of the child's fundamental rights – has been a subject for debates since its formation. While indeterminate and flexible to each single case by its nature, it is still deemed to be one of the most effective tools with regard to children rights law. The present Article aims at illustrating the value the concept should be accorded to, together with the degree of its implementation in the legislation of Georgia, rather than concentrating on the notion's indeterminacy. For this reason, the Article will demonstrate meaning, importance, place of the best interests of the child at both – international and local levels.

Best interests of the child, deriving from Article 3 of the UN Convention on the Rights of the Child (CRC)¹, is a child rights principle, hence – a key in-

strument in guaranteeing protection and realization of the rights of children. Currently functioning within the framework of CRC, the concept has emerged in the Declaration of the Rights of the Child (1959),² the first international document with ten principles, declaring the principle. According to Principle 2 of the Declaration, "*child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.*" Establishing the best interest principle internationally with regard to children, can be said to be a revolution in the child rights protection law, as it is a proof of recognizing children as right holders, not just objects of protection. Moreover, it is an instrument, serving solely for the protection of vulnerable persons, such as, e.g. persons with disabilities, women being at risk of discrimination³, etc.

1 UN Convention on the Rights of the Child (November 20, 1989) is a main and universally recognized legally binding document ensuring protection of children rights. 196 states have ratified the Convention. See United Nations Treaty Collection, Convention on the Rights of the Child, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en.

2 Adopted by United Nations General Assembly on the 20th of November, 1959.

3 See, In the Best Interests of the Child, Harmonizing Laws on Children in west and Central Africa, <https://re->

Yet, the efforts of strengthening child rights protective mechanisms have turned out to be insufficient considering the Declaration's nonbinding nature, as well as, existing facts around the world relating to serious violations of children rights, such as child trafficking, labor, prostitution, high child death rate and so on⁴. These reasons have led to creation of a legally binding document – UN Convention on the Rights of the Child (CRC), giving special weight to the best interests of the child. The concept is the central and fundamental principle of the convention governing disputes that affect children.⁵

LEGAL ANALYSIS

The initial draft of the CRC entirely included the text enshrined in Principle 2 of the 1959 Declaration.⁶ However, later, Article 3 of the CRC has been designed as follows: „*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.***”⁷ Thus, the wording of the current international child rights protective instrument is different from that of the 1959 Declaration, requiring a child's best interests to be “a primary consideration” rather than “the paramount consideration”. In order to understand the reasons of the stated formulation, it is relevant to determine the meaning of the both concepts.

According to the wording of Article 3, the States Parties are not entitled in their discretion to decide whether to give a primary consideration to the best interests of the child concerned. Rather, it implies that the best interests of the child shall not be considered in the same way as any other interest.⁸ However, it does not mean that the best interests of the child are of the absolute priority. In other words, “a primary con-

sideration” does not entail that the best interests of the child shall be of a primary consideration in each single case while with the collision of other interests.

To be more specific, “a primary consideration” means that while balancing interests, first of all, the child's interests shall be considered, correspondingly, it does not exclude that any other interests might prevail. The principle implies the assumption that a decision maker may grant higher weight to any other interest. In other words, the desirable result for a child might be subject to review, while in collision with any other interest that can be a primary consideration, as well.⁹ The “paramount consideration”, on the other hand, is more precise and requires that in the decision making process it is the best interests of the child that shall be guiding and directional and not – any other interest. In this case the test is much stricter and the decision maker is bound by the following obligations: 1. Identify a means that fits in with the child's interests most of all; 2. Make a decision about application of this measure.¹⁰ The main idea is that, e.g. a court does not balance interests, but applies the interests as the decisive factor of the decision.¹¹ Quite the opposite, “a primary consideration” assumes, that there might be several primary interests, equal with a child's interests, but be regarded as superior.¹² An example of such an approach can be an act, including a legislator's clear message that the certain interests shall be assessed as a primary value, e.g. ensuring strict immigration control.¹³

It has been argued that Article 3 of CRC must have been formulated as requiring best interests of the child to be not simply “a primary consideration”, but – “the paramount consideration”.¹⁴ However, such a condition would be somewhat a strict message to the State Parties, since according to the paramountcy principle, it is not only vital and essential to consider the best interests

sourcecentre.savethechildren.net/sites/default/files/documents/6325.pdf.

4 UNICEF Georgia, Programmes, http://unicef.ge/uploads/CRC_text.pdf, p. 3.

5 UN Committee on the Right of the Child, (2009), CRC/C/GC/12, General Comment No. 12: The right of the child to be heard, para. 2.

6 Freeman, M., (2007), Article 3. The Best Interests of the Child, in Alen, A., Lanotte, J. V., Verhellen, E., Ang, F., Berghmans, E. and Verheyde, M., Eds. A Commentary on the United Nations Convention on the Rights of the Child, Leiden: Martinus Nijhoff Publishers, p. 25.

7 Convention on the Rights of the Child, UN, November 20, 1989, Article 3 (1).

8 *Ibid*, para. 36, 37.

9 Cantwell, N., (2011), Are Children's Rights still Human? in Freeman, M., The Value and Values of Children's Rights in The Human Rights of Children from Visions to implementation, Invernizzi, A., Williams, J., Eds., Ashgate Publishing, p. 50.

10 Chisholm, R., (2002) “The Paramount Consideration”, 10th National Family Law Conference, Melbourne, <http://classic.austlii.edu.au/au/journals/FedJSchol/2002/2.pdf>, p. 3.

11 *Ibid*.

12 Taylor, R., (2016), Putting Children First? Children's Interests as a Primary Consideration in Public Law, Vol 28, No 1, Child and Family Law Quarterly, p. 62.

13 *Ibid*.

14 Freeman, M., (2007), Article 3. The Best Interests of the Child, in Alen, A., Lanotte, J. V., Verhellen, E., Ang, F., Berghmans, E. and Verheyde, M., Eds. A Commentary on the United Nations Convention on the Rights of the Child, Leiden: Martinus Nijhoff Publishers, p. 60.

of the child, but the principle shall be the key and determinant element in the legislative proceeding.¹⁵ Hence, the paramountcy principle means that, in all actions concerning children, the best interests of the child shall be determinative, decisive. Where the best interests of the child shall be of the paramount consideration, the requirement makes the decision maker consider the best interests of the child as the only factor while assessing and determining such interests.¹⁶ Anyway, assessment and determination process largely depends on a decision maker.¹⁷ Thus, while not being an absolute right, such interests could be overridden in certain exceptional cases. Furthermore, when taking the best interests of the child as the paramount consideration, courts are bound to deliberate other interests, as well, such as e.g. rights of parents. The crucial point lies in applying the “determinative criteria” rationally and for special purposes, without infringing other constitutional rights and values.¹⁸

Correspondingly, the following question arises: what is the reason that the main international protective instrument of children’s rights does not provide the best interests’ principle with the highest degree of protection, given that exactly the Convention declared this right as a principle? According to some authors, the aim of applying the paramountcy principle instead of “a primary consideration” was not to diminish the value of the principle, but to ensure its flexibility, bearing in mind, that in certain cases some other interest would prevail.¹⁹ The Committee on the Rights of the Child states that the concept of the best interests is rather compound and it should be assessed and determined in line with every single case, in other words, the concept is flexible and adaptable.²⁰ The Committee believes that the determination of the best interests of a child concerned, shall be made considering their special context, situation, needs and with regard to collective decisions, such as legislative decisions, the best interests of children shall be determined according to their special situation and vulnerability.²¹ The approach is shared by a number of scholars – taking into

account the abstract nature of the principle, it is better to maintain flexibility of the principle; moreover, even it had been possible, it is not recommended to establish its homogenous meaning.²² Clearly, given the specific nature of the best interests of the child, it is vital to assess and determine such interests according to the individual circumstances.

It is pretty rational to assume that ensuring flexibility of the best interests’ principle would lead to universal recognition of the Convention through the UN Member States. This assumption can be strengthened by an argument regarding the issue of abortion. It is not clear whether the rights enshrined in CRC apply solely after birth or before birth, as well. In other words, CRC says nothing about it. The aim is to give wide margin of appreciation to the Parties of the Convention in regulating abortion. Otherwise, it is likely that CRC would not attain universal acknowledgement. It can be said that the same factor was the reason for refraining from providing the best interests’ principle with the higher protective guarantee. On the other hand, it is also worth mentioning that the paramountcy principle does not give an absolute weight to the best interests of the child, thus, it is difficult to claim that the principle would hinder the State Parties from applying it to each single individual case; rather it might have led to adoption of strong guarantees for the protection of that principle. Even though, CRC establishes the paramountcy principle in some special cases, such as adoption.²³

Although CRC does not include any other direct statement of the paramountcy principle, Article 9 (1) states that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child.” According to the interpretation, if parents have disagreement about separation of the child, the paramountcy principle shall apply.²⁴ The same Article specifies circumstances where separation is necessary: “... in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”²⁵

As a result, sometimes the best interests of the child shall be the paramount consideration, some-

15 *Ibid*, p. 25.

16 *Ibid*.

17 *Ibid*.

18 Boyd, M., T., (2015), *The Determinants of the Child’s Best Interests in Relocation Disputes*, The University of the Western Cape Faculty of Law, p. 16.

19 Mower, A., G., Jr., (1997), *The Convention on The Rights of the Child*, International Law Support for Children, Greenwood Press, pp. 23-24.

20 CRC/C/GC/14, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Committee on the Right of the Child, para. 32.

21 *Ibid*, para. 32, 33.

22 See, e.g., Jensdóttir, R., (2016), *The concept of the child’s best interests in the work of the Council of Europe*, *The best interests of the child – A dialogue between theory and practice*, Council of Europe, p. 85.

23 Convention on the Rights of the Child, UN, November 20, 1989, Article 21.

24 *Al Maktoum v Al Hussein & Ors* (2020), # B4/2020/0190, # B4/2020/0383, para. 80.

25 Convention on the Rights of the Child, UN, November 20, 1989, Article 9 (1).

times – a primary consideration, however, there is a consensus according to which the principle, in general, is of a great importance. In all actions concerning children, an agreement shall be made at least on the specific interest that can be regarded as the best alternative for the child concerned. For more clarification, it is appropriate to briefly discuss the role of the best interests' principle in protection of the rights of children.

In one of its decisions, the European Court of Human Rights (ECtHR) stated that in the decision making process concerning a child, the key aspect is to determine what is the best interest of the child; the best interests of the child, taking into account their nature and seriousness, are likely to prevail those of parents.²⁶ In the decision against Switzerland, the European Court ruled that there is a wide consensus about the idea that in all actions concerning a child, the best interests of the child shall be the paramount consideration.²⁷ The best interests of the child has two aspects. On the one hand, it involves that the child shall maintain contacts with the family except for the cases, when it contradicts to his or her best interests. additionally, restriction of maintaining contacts shall be imposed only in extreme situations and everything shall be done in order to reunite the family. On the other hand, a child's interest lies in growing up in a stable and quiet atmosphere, where a parent does not have the right to put at risk the child's welfare.²⁸ The European Court applies the paramountcy principle in different situations while examining cases involving children,²⁹ including circumstances, such as removing a child from family forever. This will be justifiable only in situations, when it is necessary for the best interests of the child concerned.³⁰

Thus, the European Court actively applies the principle of the best interests of the child in cases concerning children and upon specific conditions establishes the paramountcy principle. Obviously, this means that concept of the best interests of the child does have a central impact on the case law of the ECtHR. Above all, it is an important message to the Member States.

Georgia, being one the State Parties of CRC, is making an effort to harmonize its legislation with the

Convention, however, it is quite surprising that the translated version (in Georgian language) of the Convention on the Rights of the Child is different from the original version. The best interests' principle of the original version is formulated as follows:

"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**".

The Georgian translation suggests the following:

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child **shall be considered in the first place**" – "პირველ რიგში გათვალისწინებული იყოს ბავშვის საუკეთესო ინტერესები".³¹

The following formulation – "in the first place" does not express the real essence of the original text. It is, in fact, identical to the formulation set forth in Article 3 – "a primary consideration". Apparently, this wording has had an influence on the Georgian legislation. Neither the Child Rights Code, nor the Law of Georgia on Adoption and Foster Care mentions the paramountcy principle. Article 1 of the latter Law is expressed as follows: "The purpose of this Law is to promote the exercise of the priority right of children to be raised in a family environment and **to give preference** ("უპირატესად გათვალისწინების") to the best interests of children during adoption and foster care." According to the wording, the aim of the Law with regard to adoption is "to give preference" to the best interests of the child, rather than to recognize it as a decisive standard.

Nevertheless, certain provisions of the Law are close to the paramountcy principle, namely, the meaning of the principle of the best interests of the child is established as follows: "the principle that recognizes the priority of best interests of a child over the interests of other subjects,"³² according to Article 4 (2): "Any decision made on the adoption or placement of a child in foster care shall serve to create a stable family environment for the child, considering the best interests of a child..." Obviously, the provisions of the Law do not suggest the clear and unambiguous reference to the paramountcy principle.

Article 1198 (1) of the Civil Code of Georgia states, that "Parents shall be entitled and obligated to raise their children, take care of their physical, mental, spiritual and social development, and bring them up as decent members of society, taking account of the best interests of the children." It is clear that the prin-

26 *Krisztian Barnabas Toth v. Hungary*, # 48494/06 (ECtHR, 2013), para. 32.

27 *Neulinger and Shuruk v. Switzerland*, # 41615/07 (ECtHR, 2010), para. 135.

28 *Ibid*, para. 136.

29 European Union Agency for Fundamental Rights (2015), *Handbook on European law relating to the rights of the child*, Council of Europe, Publications Office of the European Union, p. 106; See *Mohamed Hasan v. Norway*, # 27496/15 (ECtHR, 2018), para. 161-163.

30 *M.D. and Others v. Malta*, # 64791/10 (ECtHR, 2012).

31 Convention on the Rights of the Child, UN, November 20, 1989, Article 21.

32 The Law of Georgia on Adoption and Foster Care, Article 3 (ჯ).

ciple of the best interests of the child is established in connection with parental duties and obligations, however, such a provision does not exist with regard to the other rights. For example, the same Article (1198 (3)) entitles parents the right to determine with whom and where their child is to live. In such cases it is of a vital importance to consider the best interests of the child, thus it is essential to adopt the principle regarding the mentioned parental right. It is worth mentioning that while the legislator set forth the best interests' principle concerning parental duties and obligations, it is absolutely vague that they have not adopted the principle in every other situation where the principle plays a central role. For instance, the court shall settle the following matters: upbringing of children in case of disagreement between parents,³³ with whom to live a child if parents live apart due to divorce or for any other reason,³⁴ decision about adoption.³⁵ None of the provisions include principle of the best interests of the child. This fact points to an important gap, since taking into account the obligation of harmonization national legislation with CRC, it is significant to establish not only principle of the best interests, but also to adopt the higher standard – the paramountcy principle. Correspondingly, in these latter cases, as well as, in matters of adoption, the paramountcy principle is necessary for ensuring syn-

chronization with CRC and the highest standards regarding interests of the child.

CONCLUSION

To sum up, the importance of establishing the paramountcy principle in the Georgian legislation derives from several factors, such as ensuring harmonization with CRC, a great possibility for the national courts to directly apply the principle and, thus, create uniform practice. From the general perspective, if the interests of the child are not the decisive aspect in all matters concerning the child's care, wellbeing, there will be a great risk that any other interest may prevail. Setting up the principle in the national legislation will impose an obligation on a decision maker, e.g. court, in all matters concerning a child, to determine interests of the child and make a decision according to such determination. This will solve the accompanying difficulty of the best interests' principle, related to the risks, such as granting higher weight to any other interest, when it is harmful for the child's wellbeing.

Considering the abovementioned discussion, measures to be implemented regarding Georgian legislation, can be formulated as follows:

- Establishment of the paramountcy principle;
- Establishment of a clear link between “a primary consideration” and “the paramount consideration”.

33 Law of Georgia Civil Code of Georgia, Article 1200.

34 *Ibid*, Article 1201 (2).

35 *Ibid*, Article 1242.

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