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The best interests of the child in questions

On November the 20th of 2010, the french section of Defence for children international and the French association Janusz Korczak organized together a one day meeting to discuss this famous best interests of the child principle (BIC principle) as laid down in art 3 para 1 of the Convention.

Art 3 par. 1. 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.

Why did we feel it necessary to work on this principle ? Because we were deeply concerned about some shifts and worrying contradictions we observed concerning the use of the notion of the best interests of the child in France:

On the one hand, the article 3 para 1 of the Convention has been pointed out as one of the 5 or 6 general principles or « key notions » of the CRC ; the highest justice courts in France have also been admitting that this BIC principle was of direct applicability in french tribunals, thus giving it an obvious legal standing. Consequently, we have no choice : this principle has to be applied.

On the other hand, the BIC notion is deeply questioned : many lawyers in France are very sceptical on it ; they speak - I quote - of « a "soft" concept, a "magic formula, "a key principle" ... but "the key opens onto a waste ground", or else : a "brilliant principle...which would signal the demise of the right" ; they refuse to refer to it because the concept of the best interests of the Child is used, even by judges, in a personal and subjective manner, without any consideration for the rights of the child to be respected first ; that leads to arbitrary decisions which are not really in the best interests of the child, from our point of view. Moreover, we observe in France that BIC is more and more often put forward, particularly in laws, to deprive a child of some of his rights. Obviously, this use of the BIC against rights is not what the drafters of the Convention had in mind.

Consequently, since 2008 DCI-France has been developping proposals to avoid these abuses or misuses of BIC. They refer to some Thomas Hammarberg's and Jean Zermatten's works, in which they developped what we see as a kind of « rights consistent procedural approach » of the BIC.



These proposals were presented, discussed, and completed on 20th of november 2010 ; this meeting gave us the opportunity to return to basics : Bernard Lathuillière made us feel what would have been the BIC in Janusz Korczak's spirit and Nigel Cantwell, one of the founders of DCI movement who had participated to the drafting process of the Convention, reminded us the debates around art 3 all the drafting process long.

So, What are these proposals ?

To make it short, DCI-France suggests that instead of trying to give an objective definition, a definite content to the BIC - which can't never suit all situations for all children - the best way to approach the BIC in a given situation for a given child would be to express the BIC principle by a specific decision-making process, some kind of procedural way to take the decision.

I want to emphasize here that many many people are concerned with the process we are putting forward :

- first parents and family, because if they are not cited in art 3, the last sentence of article 18 para. 1 requires that *the best interests of the child be their basic concern* in upbringing their child.

"Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

- But many other adults are concerned : educators, teachers, volunteers inside associations or clubs working with children, social workers and social institutions of course, judges and judicial institutions, political decision makers, members of Parliament and legislative bodies, and so on, as largely as art 3 has provided for.
- We could also ask, in case the children are in capability to act or to decide, if they should not themselves follow this decision making process.

The process we promote would require from adults or every institution in charge of making an action or taking a decision, to ask themselves, from our point of view, about ten great questions. From each question, a kind of procedural obligation can be deduced as we'll see.

1/ The first question is : Is the decision for which I am responsible, impacting any child?

We think taking into account the best interests of the child (or children) must become a reflex within family practices, at school, in territorial collectivities, towns, departments or other administrative divisions, and also in parliamentary debates. This is very much the idea of article 3.

In fact, this kind of reflex would be compared to Janusz Korczak's teaching for the necessary and permanent attention due to young persons.





So when a decision is to be made, this must automatically lead to us asking ourselves if this decision will have consequences for a child or a group of children.

If this may seem obvious, we unfortunately still have a long way to go.

For example, recently in France, a law was voted establishing a potential secure detention of criminals deemed still dangerous once their sentence completed: this law was voted to protect victims - especially children - against sexual abuses. But no member of parliament thought that perpetrators of sexual crimes could also be minors; so today in France, a person who has committed - when he was less than 18 years old - such a sexual crime could be detained all his life long : this consequence is obviously contrary to the art 37 of the Convention.

Procedural obligation n°1 : Look at how the decision one is going to take might have consequences for children and, if so, evaluate what categories of children and what kinds of consequences.

2/ Question n°2 : Who is the most relevant person to, eventually, take the decision?

Let's take examples in different fields :

- *at school is the teacher the right person to decide on a punishment? Probably Janusz Korczak would not have agreed with these habits, which are still in use in our schools. On that point we can refer to the tribunal he put in place in the orphanage in Warsaw.*
- *In the child protection system, who is the best person to decide - or not - to separate a child from his parents and to make him or her be placed in a foster establishment or family? Is it the social worker in responsibility of foster care in an administration or exclusively a judicial authority ? This was a heated discussion point in last drafting of the law in 2007 which reformed the child protection system in France.*
- *But this question must also be asked in day to day life of the family. Of course generally, the parents are those who decide for their children. But could we imagine situations where parents could decide to let the child take himself the decision, according to his or her maturity and evolutive capabilities ?*

In any case, the obligation is to choose the one who is in the best position to take the decision

3/ The third question is, assuming I'm the decision maker: how to ensure that the best interests of the child (or of the group of children) is really a primary consideration in my decision-making process?

We know that the authors of the Convention have, at the end of long discussions, opted in article 3 for talking of A primary consideration, and not THE primary consideration. But the fact remains that, even though other considerations or interests can be taken into account, the best interests of the child must nevertheless be established as a very high-level priority





in the decision making process. The essence and the preamble of the Convention require that approach.

A proposal therefore could be made that, faced with the given situation, an examination should initially be carried out in terms of the sole interests of the concerned child (or group of children), regardless of all other contingencies. Once the decisions and choices which best correspond to the interests of the child are found, other considerations, in a second stage, if need be, might be examined .

This proposal aims to reverse a currently too common approach which most often leads to a solution which is well-suited to the adults - parents, educators, public authorities, etc. - and which fulfills their own interests, rather than the interests of the child.

We can illustrate the trend above with a decision taken a few years ago by the french minister of education to reduce the scolar week from five to four days. At the time, specialists of chronobiology knew and publicly said that shortening the scolar time was not in the interests of the pupils. But they were not heard because interests of parents and teachers , and other économic interests prevailed.

Concerning other interests to be taken into consideration, we can make some comments :

- in certain cases, such as adoption situations, the Convention requires the best interests of the child be THE primary consideration and not only A primary consideration. *Unfortunately, we observe that in France this requirement is far from being respected and adoption policies rather aim to reach adopting parents' interests.*
- In some policies, the interest of the whole society or of the parents is often claimed to clash with the respect of young people's rights and of their best interests. *For example in policies for juvenile delinquency prevention, the common interest is put forward to justify repressive penal treatments of young people which don't respect the CRC provisions. We think that it is a wrong idea and on the contrary, the respect of the rights of children in conflict with law will contribute to the wellbeing of the whole society in the future.*

At that point, particular situations remain very difficult : these are situations where several children or groups of children are concerned by the action or decision. Sometimes the interests of these children or groups clash each others.

We suggest in this cases that the person in charge of the decision should aim to conciliate the different interests - some time an ajustement of the conditions or of the environment of the solution is enough to solve the conflict.

This is for example the case of the reception in the foster care system of non accompanied foreign children which is sometimes presented as contrary to the interests of other children in need of foster care.

If the conflict can't definitely be resolved, and in the case the best interests of an individual child is opposed to that of a group of children, one may think that the best interests of the





group should prevail but each situation is new and must be examined with a new eye and a large minded view. The Convention does not give responses to predetermined situations : we have to imagine in each case the best solution; this is also what the BIC principle teaches to us.

4/ Question number 4 : did I take into account the plurality of the best interests at stake for this child or group of children and did I surrounded myself with all the necessary skills to fully understand these plural interests? How did I relate them to each other?

In English, we speak of the "best interests of the child", using a plural, whilst in French the Convention uses a singular: "l'intérêt supérieur de l'enfant". We think that the plural of the term in English is complementary to the singular translation in French:

Indeed, everyone will agree that there is a plurality of interests for the child, in the different fields of his life : this plurality can be illustrated by asking to several adults what is the best interest of a child in a given situation: each adult has his or her own perception of the child's best interest: the doctor will see his interest from a medical point of view, parents and peers from a more emotional point of view, teachers from the scolar point of view, educators from the point of view of emancipation, etc. They would probably put forward different solutions for the same child in a given situation.

So taking the decision involves doing a synthesis of these different and complementary approaches, making a sort of resultant in a "geometric" sense which leads to a single decision. There we get close to the singular french expression.

And yet no one alone has all the skills to best appreciate the different interests of the child: it is therefore necessary to work in a multi-disciplinary partnership to be able to arrive at a single decision.

So the procedural obligation induced by this 4th question could be as follows : the decision maker has to use pluridisciplinary commissions or interdisciplinary work as the basis, before proceeding with the best synthesis of the different points of view into a final decision, thus translating a collective knowledge and understanding to the benefit of the child.

5/ The fifth question is :

Did I respect the fact that the parents of the child are holders of an "expertise" concerning their child and are the first garantors of their rights (according to art. 5 of the Convention)?

Obviously, parents have invaluable knowledge in terms of the best interests of their child. They are themselves required to have the best interests of their child as THE basic concern in upbringing him or her, accordingly to article 18 para. 1 of the Convention:





"Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

Consequently, in all situations where the parents are not the decision makers, their involvement must be first and foremost.

For example, this trend has led, in the french reform of child protection system in 2007, to the fact that even judges must try to win parents over to their decision, including in cases of foster care and separation from them.

However, it is the manner of applying this principle which is essential: laying blame and responsibility, or even penalizing parents in response to actions carried out by their children, as we have been seeing increasingly in recent new "juvenile delinquency prevention" policies, goes in fact against the principle of protective partnership with parents as mentioned above.

The procedural obligation related to question number 5 could be : the decision maker must include the parents in the search for the best interests of the child. *A minima*, he or she must listen to them and take their opinion into due account.

6/ Question number 6 is one of the most important of the process : Did I duly take into account the expertise of the child regarding his situation, and his opinion regarding his best interests.

This is a requirement of article 12 of the Convention which is closely linked to article 3, as Jean Zermatten has very well highlighted. So I won't develop that point.

But the obligation deduced from this question n° 6 would be : the decision maker must absolutely listen to the child and consider the solutions that he suggests or the problems that he expresses, and he must integrate his point of view as far as possible in the taking of the final decision.

7/ question number 7 : Did I not give more weight to a subjective understanding of the interests of the child to the detriment of his rights? Did I take into account that the basic interest of the child is for all his rights to be respected ?

It is important to bare in mind that the authors of the Convention wished for this right granted in article 3, to be a kind of key for all the other rights, which acts as a lever and not as a brake with respect to the other rights.

We had to deplore that in the french law of March 2007 reforming the child protection system, the 3 considerations - the best interests of the child, his fundamental needs and his rights were taken into consideration on the same level and with no link one to the others. This can lead to the privileging of some aspects (fundamental needs for example) to the detriment of others (rights).





And yet these three approaches are linked: the rights granted to the child by the Convention result more or less explicitly from fundamental needs of children. We could say they are the legal translation of a search for the well-being and the best interests of the child in conformity to the knowledge of fundamental needs of the child in the 1980s.

So we think necessary to recall that **the primary interest of the child should be that all his rights are observed** .

It requires from the decision maker to ask himself the question, for each possible solution, of whether all the rights of the child are properly respected and to give priority to solutions which observe the overall rights of the child.

At that point situations have to be examined where some conflicts between several rights of the child remain unresolvable.

In this event it is important that the decision maker clearly notify the rights which he decided to prevail over the others and explain why.

For example, in transnational abductions by one of the parents, the right not to be abducted must probably prevail over other rights, even if social and economical environment are more favorable in the country where the child has been taken away.

8/ Question n°8 : Once the examination of the rights made, can I satisfy myself if all the rights of the child are respected, or once I have resolved the conflicts of rights ?

We have in mind that art 3 of the Convention requires that the decision maker go beyond the sole examination of rights.

First the mere respect of the overall rights is not enough to guarantee the best interests of a child because his or her relations with others, and in particular with their parents, cannot be reduced to a mere legal dimension.

Secondly, several solutions often compete, which all respect the rights of the child.

The search for the best interests must, therefore, following an examination of rights, be concerned with the achievement of the best possible well-being of the child, the fulfilment of his fundamental needs and the determination of which is the best solution from this point of view too.

9/ question number 9: Did I question myself on the best wellbeing of the child, not only in the short term, but also for tomorrow and until his adult life?

This double questioning, in the short and the longer term, is particularly important as children are persons who must be fully encountered at the moment of the decision but also are beings in full development towards their future adults life.





So we propose that the decision maker should take into account the current, as well as the future wellbeing of the child, and find the best solution out of all, for today but also tomorrow.

For example, this obligation is very important for adopted children who, when they get to adolescence, are often concerned with their origins.

Once the decision taken, two questions are still relevant:

10/ Question number 10 : did I tell to the concerned child and his or her parents what decision I have taken, and what is the proper justification of it ?

The achievement of the best interests of the child and of his best possible wellbeing is not only a question of what decision was taken. It also needs the active participation of the child and his parents. Its success will be largely helped if the child and parents have been properly informed about the reasons for the decision, and have made it their own project.

So we think an additional obligation might be to explain the decision and, as we could say, to "name" the best interests that have been found. That is to say to indicate to the child and his parents the rights which prevailed in case of a conflict of rights, the fundamental needs which appeared the most important to preserve and the conditions which were thought to be the best for his or her wellbeing nowadays and in the future.

It is also of a great importance, in the case the child has previously put forward a solution, to explain, if need be, why the solution he proposed was finally abandoned.

In the case of new laws or regulations affecting children and their parents, this obligation could take the form of a large information towards them.

For example, we could imagine that when the third additional protocole to the CRC will be ratified by France - we hope very soon - a wide campaign should be made to inform children and parents on all french and international means at their disposal to protest against violations of their rights.

11 / Last Question (number 11) : have I organized an appropriate follow-up of this decision ?

The evolution of the situation of a child or a group of children can be very fast so the decision which was taken and the solutions adopted must be periodically revisited. Their consequences in terms of wellbeing of the child have to be assessed and the decision to be adapted if it appears to be no longer in the best interests of the child.

So the last procedural obligation could be to organize, at the moment the decision is taken, the assessment of its consequences and the planning of its periodic review.



CONCLUSION

In brief, we think at DCI-France that it will never be possible to translate concretely the idea of the best interests of the child in terms of an objective content which could apply in every case, whatever the child and the situation.

We propose that the principle of the BIC as set in article 3 and art 18 of the Convention could alternatively be broken down into questions and expressed in terms of procedural obligations.

This approach may seem a little "mechanical", but, from our point of view it has already the great merit of being a sort of reflex, as requested by the Convention, reflex which can be applied by all actors to all the space-time dimensions of the lives of children.

Of course it is not a magical process but we are convinced it could be a good way out of arbitrary decisions

Probably these procedural obligations won't guarantee the miracle solution to be found nor enable to claim without any doubt that the decision made is effectively the best for the child (or children), but we hope that the adults who ensure responsibility for the decision shall thus be supported with the maximum of guarantees to avoid subjectivity and arbitrary decisions. As they will have given themselves all means to search the appropriate decision, they may then in full honesty tell the child: "It is for your own good that we have made this decision",

We also think that this concrete series of questions and obligations is well in the spirit of Janusz Korczak who developed concrete instruments rather than long talks, who preferred setting up institutions rather than believe that our love or our concern and solicitude for the child are sufficient to make his welfare. Far from declarations of good intentions or "humanitarian" actions, Janusz Korczak explained that he "became a "constitutional" educator" who did not harm children, not because he has an affection for them or because he loves them, but because a public authority exists that defends them against illegality, arbitrary decisions and the despotism of the educator¹.

Eventually, we think in DCI-France that a full application of the Convention, in Janusz Korczak's spirit, will never arise without some essential pedagogical work around this BIC principle. The general comment that the Committee on the rights of the child is now drafting is an essential tool in that direction and NGOs and DCI in particular have an important mission intending to promote this general comment when it will be published. Perhaps also the breaking down of the BIC principle into questions and obligations as I presented to you this morning, could offer a complementary tool in this pedagogical work, a tool which anyone, including children, could utilize.

¹ Comment aimer un enfant, Laffont 2006, page 344

