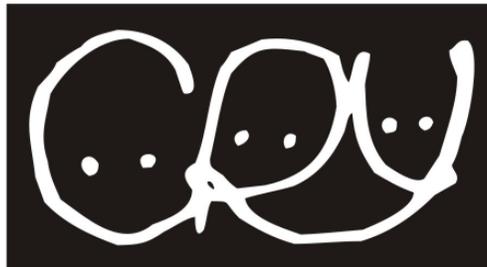


# Demystifying the Best Interests Principle in India

CRY National Child Rights Research Fellowship

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## INTRODUCTION

Comprehensive child protection systems are designed to prevent and respond effectively to child abuse, neglect, exploitation, and violence. In India, the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) charges Child Welfare Committees (CWC) in every district (administrative division) with the responsibility of ensuring the rehabilitation and protection of “children in need of care and protection.” State governments appoint a five-member CWC for each district that functions as a quasi-judicial body. The law requires such committees to make their decisions in the “best interest of children.”

Broadly, a child in need of care and protection is any person under age 18 who has been or is likely to be neglected, abused or abandoned by the parents or guardians. Typically, CWCs are flooded with cases of abandoned, destitute, abused children, rescued child labourers, children whose parents are terminally ill and more. Any person can produce such a child before the concerned CWC or the child may herself appear before the CWC. The CWC decides the fate of the child until she turns 18 years.

CWC decisions hinge on a “best interests” determination (BID), as mandated by the JJ Act. Article 3.1 of the United Nations Convention on the Rights of the Child (Convention) requires “the best interests of the child” to be the “primary consideration” “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.”

## EXPLORING THE “BEST INTERESTS” PRINCIPLE

The best interests’ principle in the Convention was not previously unknown to child rights jurisprudence. Variants of the Convention’s best interests principle are contained in other international instruments. In fact, the principle as embodied in Article 3.1 of the Convention is relatively more diluted in form compared to its previous formulations. In the Convention, the best interests of the child are merely *a primary* consideration and not *the paramount* consideration in actions involving children. In some cases, however, the Convention states that best interests must be the determining factor— particularly where children are adopted, or separated from parents against *their* will. Nevertheless, the Convention is an improvement over other formulations because it increases the scope for

applying the principle — it is applicable in “all actions concerning children.” In the Indian context, for example, the CWC actions would necessarily have to be in accordance with the best interests of the child.

The Principle as enshrined in Article 3.1 of Convention does not identify the key elements that characterise it. The *travaux preparatoires* of the Convention indicate that the content of this principle was not discussed. The main criticism levelled against it is that it is indeterminate and speculative in nature. Its indeterminate nature is a natural consequence of not only a lack of consensus amongst countries regarding values underlying its application but also the inability to make accurate predictions about what would further the best interests of a child. But organizations such as the United Nations Children’s Fund (UNICEF) have observed that the principle is not meant as an omnibus provision whose interpretation or use can trump or override individual rights guaranteed by other articles of the Convention; it assumes “particular significance” only where other more specific provisions of the Convention do not apply.

Another problem with the principle is with its use in cases of child abuse and neglect, where the state performs its *parens patriae* role and seeks to remove the child from the custody of her guardian. In such cases, a best interest determination being case specific and individualistic, makes state intervention into family more unpredictable. In addition, where an indeterminate standard is used, the decision to protect the child is arrived at by evaluating parental or guardian attitudes and beliefs against the judge’s individual values and beliefs. Lack of effective review mechanisms in such cases leaves very little scope for setting right any mistakes or preventing them in subsequent cases. Even if such review mechanisms are resorted to, the long drawn out litigation and delays adversely affect the child or make the child protection function of the CWC redundant in practice.

## **Best Interests as a Core Set of Inviolable Rights**

Two solutions have been proposed by scholars to counter the problem of indeterminacy of the “best interests” standard. First, the solution of a core set of inviolable rights that forms the “best interests” standard. Second, the solution of dynamic self-determinism advanced by Prof. Eekelaar, which is premised on the link between the “best interests” and child participation in decision-making, a link that has also been drawn by the Committee on the Rights of the Child.

On the one hand the Convention mandates that all decisions pertaining to children have to be in accordance with the best interests of the child, on the other hand, it also guarantees to a child the right to freedom of thought, conscience and religion under Article 14.1. In order to help the child exercise this right, parents can, according to the provisions of this article, provide direction to the child “*in a manner consistent with her or his evolving capacities.*” Furthermore, a child has the right to profess and practice her religion as per Article 30 of the Convention. Article 14.3 permits limitations to be imposed on the right to religious freedom on the grounds of public safety, order, health or morals, or the fundamental rights and freedoms of others. It has been argued that a provision for such an exception has implicitly introduced a hierarchy of rights.

Supporters of cultural relativism prohibit value judgments, and a relativist cannot disapprove of specific cultural practices. However, Prof. Alston argues that cultural values ought to be subordinated to human rights norms where the two cannot be reconciled. It is argued that practices such as female genital mutilation and foot-binding should be eliminated on these grounds.

Prof. Alston strongly urges that children’s rights may be envisaged as being contained in concentric circles with rights pertaining to the survival and development of children at the very core. He characterises this set of core rights as being inviolable within any cultural context. Therefore, Prof. Alston believes that the core rights related to the survival and development of a child are universal norms that should be enforced irrespective of peoples’ value-systems and beliefs. He then argues that as one moves farther away from the core rights, the remaining rights should be enforced depending upon whether they are compatible with the beliefs and value systems of various people. Therefore, children’s rights should be categorised depending upon their flexibility to accommodate cultural specificities.

Article 6 of the Convention guarantees a child’s inherent right to life and furthermore, recognises the right of a child to survival and development. The rights of the child to health and safety, food and clean drinking water, and an adequate standard of living have been considered to be the constituents of the child’s right to survival. These rights are crucial for the survival of the child and therefore, any cultural practice that poses a danger to the survival and development of the child should be prohibited.

## **The right to be heard: A substantive right in the child’s best interests**

The Committee on the Rights of the Child (the Committee), the body charged with monitoring implementation of and issuing authoritative interpretation of the Convention, has reiterated that the best interests principle is interlinked to the other three articles elevated to the status of general principles under the Convention—articles 2, 6, and 12. Article 12 deals with child participation. Hence all these articles have to be interpreted in light of each other. In its report of concluding observations to Lesotho, a very crucial observation was made by the Committee while assessing Lesotho’s implementation of the best interests principle. The Committee observed that the child’s right to be heard is important in ensuring that her “best interests” are served, thereby drawing a link between the “best interests” of the child and the child’s right to participation, guaranteed under Article 12 of the Convention. Where the decision is regarding the separation of the child from her parents, all interested parties should be given an opportunity to participate in the proceedings and make their views known. Hence there is no doubt that a child should be heard during a legal proceeding, particularly a legal proceeding such as a protection hearing aimed at determining the child’s best interest.

But there are many questions that remain unanswered. Who should represent a child’s best interests in a given legal proceeding? Does the child’s right to be heard merely a procedural right or a substantive right? And can the child be represented by her guardian, or should the child be represented independently?

Child participation as mandated by Article 12 of the Convention requires state parties “to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Importantly, article 12 neither lays down a minimum age for a child’s participation, nor specifies that the child should be mature enough to participate; it merely states that the child should be capable enough to have his or her own views. Hence, “I dislike being in an institution,” or “send me home,” are perfectly valid views even if expressed by a child aged three or four. It is merely the weightage given to such views that depends on the child’s age and maturity. Often the two issues are confused, with the result that the very right of a child to participate in protection hearings is scuttled on the ground that “she is too young,” or because “she cannot understand the larger implications of what she is saying.” The Committee on the Rights of the Child has often encouraged countries not to impose a

minimum age for participation, and instead give weight to the child's views based on her maturity.

Three modes of participation are envisaged by the Convention. Article 12.2 states that such participation may be direct (i.e. through the child herself) or through a representative or an appropriate body. In its General Comment No. 7 on Implementing Child Rights in Early Childhood, the Committee stated that state parties should ensure that young children are "represented independently" by someone who acts for the child's interests in all legal proceedings, and for children to be heard in all cases where they are capable of expressing their opinion. Therefore, it appears that at least for children in the age group of 0-6 years, independent representation is mandatory. However, the Committee has clearly stated that where a child is being represented, the representative should "transmit the views" of the child. And the duty of the representative should not be confused with the obligation to determine the best interests of the child.

This right of the child to be heard in all legal proceedings irrespective of their nature, that is criminal, custody-related, protection hearing and so on, was once again reaffirmed by the Committee on the Rights of the Child and other international organizations in 2006. The Convention is silent on some aspects of child participation. It also leaves to state-parties to decide the type of representation, that is, it does not restrict representation to merely legal representation. However, the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (a declaration that pre-dates the UN Convention) states that "the child should at all times have a name, a nationality and a legal representative."

Further, after its 2006 day of general discussion on "the right of the child to be heard," the Committee adopted a set of recommendations. In these recommendations, the Committee resolved that the right of participation is a general principle as well as a "substantive right." This right of participation transforms children's status from mere passive subjects receiving protection to active rights holders – the Committee terms this right of participation the "symbol for their [children's] recognition as rights holders," and listening to children's views cannot be "tokenistic."

One way of eradicating tokenism in participation is by giving full information to the child about the right and options for participation. According to the Committee on the Rights of the Child, the right of participation includes the right of independent representation in

consultation with the child, and the right to full information regarding procedures and outcomes of such participation. For example, it has recommended that states “establish specialised legal aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance.” Therefore, in the least, independent representation through a professional should be presented to a child as an option for participation. Further, the state should provide information to children regarding their right to participate, the mode of such participation, and the other aspects of the proceedings. This should be done in a child-friendly manner.

The Committee on the Rights of the Child has also recommended “mandatory training” on the implications of article 12 on all those involved in judicial and administrative proceedings. For example, the Committee has recommended to the Mexican government that it amend the “procedural civil codes to ensure that children are heard in judicial proceedings affecting them.” The Committee has recommended to the Latvian government that it “provide skills-based training to parents, teachers, and other professionals working with and for children, to encourage children to express their *informed views and opinions by providing them with proper information and guidance.*” The Committee on the Rights of the Child has repeatedly reiterated to several governments that they should not only inform children of their right to participate but should also inform them of how to participate and in what manner their views will be taken into account.

## **Standards from Indian Case Laws**

Best interests of the child has been analyzed in the context of custody disputes between parents. Since there is yet a case that needs to analyze best interests of the child viz-a-viz custody by parents and custody by the state under the JJ Act, these decisions may be extrapolated and analyzed in the context of the child protection functions of Child Welfare Committees in India.

The Supreme Court recently held that in determining the welfare of the child, “The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned.” Therefore each case should be decided on its own merits depending on all the facts placed before the child welfare committees.

A parallel may be drawn between the child protection jurisdiction of child welfare committees and habeas corpus jurisdiction of the state. In *Kamla Devi v. Himachal Pradesh*, the High Court held that “It is well established that in issuing the writ of Habeas Corpus in the case of infants the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of, statute. The jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its in fact ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a habeas corpus petition, as applied to infants, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the Court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as *Parens Patriae*, has in promoting the best interests of the child.”

Two crucial distinctions between child protection hearings and habeas corpus petitions concerning infants are that the jurisdiction of the child protection authority is drawn from the provision of a statute and not any inherent equitable powers. Second, infants usually do not have a capacity to participate and voice their views in a habeas corpus petition. Nevertheless, keeping in mind this critical distinction, one can draw a parallel between the nature of the decision that is required to be made in a child protection hearing and a habeas corpus writ concerning infants – the *parens patriae* role of the state where the state seeks to further the best interests of the child.

In *Carla Gannon and another v. Shabaz Farukh Allarakhia and another*, the Bombay High Court was hearing a habeas corpus petition filed by the mother to produce the child allegedly abducted by the father. In this case, the court citing *American Jurisprudence* said, “... The Court in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just...*in short the child’s welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.*” Drawing from this, one can say that parents are *entitled* to have their rights presented during child protection

hearings and that these should be independently considered while evaluating what is in the best interests of the child. However, while these are factored in, the best interests of the child is the “supreme consideration.”

In *Punnakkattu Hidayathulla v. Cherussola Soudath*, the Kerala High Court gave weightage to whether “disturbing the custody of the child was in the best interests” of the child. In this case, the parents were divorced and the female child was living with her mother. The father had filed a petition seeking custody of the child on the grounds that he had better income and was able to provide a better life for the child. The Court declined to accept the father’s argument and retained custody of the child with the mother. The two main considerations on which the decision turned was a) whether disturbing custody of the child was in the interests of the child and b) that a girl child should be given primary custody of the mother. The father was given visitation rights. The principle to be drawn from this case, for instance, is whether removing the child from its existing circumstances and placing the child in the children’s home does greater harm to the child’s best interests than if the child continues to reside with its parents.

In *Nil Ratan Kundu v. Abhijit Kundu*, the Supreme Court, in deciding a custody dispute, cited a host of English decisions. In *Re Mc Grath*, it was held that “the welfare of the child is not to be measured by money only nor merely physical comfort. The word welfare must be taken in its widest sense...Nor can the tie of affection be disregarded.” Without overstating the importance of the “tie of affection,” the authors would like to emphasize that the right of the child to parental contact is an important one and that should be factored into decision-making about the best interests of the child.

The Supreme Court reaffirmed the Himachal Pradesh High Court’s ruling that while determining the best interests of the child, “child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favorable surroundings” should be considered.

## **CHILD PROTECTION: CASE STUDY OF LAW AND PRACTICE FROM MAHARASHTRA**

Best interests is not defined under the JJ Act but has been defined in the Juvenile Justice (Care and Protection of Children) Rules, 2007, which were notified in October 2007.

Rule 2(c) of the JJ Rules states as follows: “best interest of the child” means a decision

taken to ensure the physical, emotional, intellectual, social and moral development of juvenile or child.” But “best interests” has also been recognized as a principle that should be used to interpret and apply the JJ Act and Rules. Principle IV under Rule 3 reproduces the definition of BIOC as stated under Rule 2(c) and further adds that the “best interests of the child” attempts to “enable each child to survive and reach his or her full potential.”

The law does not lay down any criteria for the assessment and application of BIOC. A careful reading, however, of the provisions may give an indication with respect to the approach of the law. For instance, under the head “Principle of Family Responsibility”, the Rules state that “All decision making for the child should involve the family of origin unless it is not in the best interest of the child to do so.” This implies that unless there is evidence to the contrary, the process of decision-making under the law clearly envisages participation by parents, and this is considered or deemed to be in the best interests of the child.

The primary tool used by the CWC to make decisions is the social inquiry or investigation report. Broadly, the social investigation report is a mandatory report of probation officers or social workers to whom the case has been assigned. The social inquiry report should be prepared in accordance with Form XII of the JJ Rules, 2007. This form is indicative of the nature of questions that the probation officer or social worker is required to look into. The probation officer has to consider the following aspects--name, age, health, education, occupation, monthly earnings, disabilities and other aspects such as social habits of all family members including step parents or legal guardian; attitude towards religion and “the ethical code of home”; social and economic status of the family; delinquency records of family members; present living conditions; relationship between parents, and parents and children; other factors of importance -- child’s mental, physical condition, child’s habits and interests, child’s outstanding characteristics and personality traits, child’s companions and their influence, child’s truancy from home, if any, child’s attitude towards school, teachers, class mates, child’s work record, neighbourhood and neighbour’s reports, and parent’s attitude towards discipline. The probation officer also has the discretion to make other remarks.

The social inquiry report itself is required to be submitted under the following heads – emotional factors, physical condition, intelligence, social and economic factors, religious factors, reasons for child’s need for care and protection, opinions of experts consulted, recommendation of case worker/social worker and rehabilitation plan if any.

Since the researchers were unable to gather any social investigation reports for our study due to issues related to confidentiality of proceedings, it is difficult to determine what the social inquiry report looks like in practice. Through years of interaction with probation officers in the Dongri children's home in Mumbai, the authors have observed that probation officers are unable to spend quality time with children and parents to conduct a child-friendly and non-threatening inquiry. Very often probation officers are also disciplinarians within homes and the one role compromises on the quality, effectiveness, and neutrality with which the social investigation report should be prepared. For example, a child who "misbehaves" in the home is automatically and irrevocably branded as a "problem child." Adolescents from whom "love letters" were confiscated were seen as "brought up badly."

Nevertheless, given that the social inquiry report forms the basis of CWC orders, we interviewed CWCs to determine what their views were on best interests to see if they use any criteria in making a BID. We interviewed seven CWCs across Maharashtra. These CWCs were chosen from different districts of Maharashtra.

The Maharashtra Juvenile Justice (Care and Protection of Children) Rules, 2002, notified by the State Government on 30<sup>th</sup> July 2002, does not lay down any assessment of criteria for determining "best interest" but it does try to emphasise on consultation of a child in need of care and protection during and after the inquiry proceedings initiated by the CWC.

## **Constitution and sitting of CWCs**

Before getting into an analysis of how a best interest determination (BID) is made in practice, it is useful to give a brief description of how the CWCs operate. This is important because the time and setting for communication between CWCs and children directly influences the nature and opportunities afforded to children for participation.

All the CWCs reported that they have five members, of which at least two are women. All of them are situated within the premises of the children's home or observation home. However, in one case, members complained that even though the office was situated inside the home, the premises were not suited for private discussions with children. Too many people and children are present at the same time before the CWC and therefore, it is virtually impossible to sit with a child privately and take the child's statement.

We also documented that in three out of the seven CWCs, all five members are not active CWC members, and the frequency of hearings vary as follows:

CWC 1: One woman member on the CWC does not come for the hearings. Hearings conducted on Thursdays only.

CWC 2: All active. Hearings conducted only on Tuesdays.

CWC 3: All active. Hearings conducted on Mondays, Wednesdays and Fridays.

CWC 4: All active. Hearings conducted on Wednesdays, Thursdays and Fridays.

CWC 5: All active: Hearings conducted on Mondays, Tuesdays and Wednesdays.

CWC 6: Only one member sits in one observation home; while three others sit in another home. One member is totally inactive. Hearings are conducted on Fridays only.

CWC 7: Only two male members are active and the remaining three women members are not active. Hearings conducted on Mondays, Wednesdays and Fridays.

### **Case load of CWCs**

CWC 1: 8 to 10 cases per month. Hearing once a week.

CWC 2: 120 to 160 cases per month. Hearing once a week.

CWC 3: 500 to 600 cases per month. Hearings thrice a week.

CWC 4: 30 to 45 cases per hearing. Hearings thrice a week.

CWC 5: 50 cases per hearing. Hearings four times a week.

CWC 6: No estimate. 2 to 3 new cases every month, in addition to the old cases. Hearing once a week.

CWC 7: 5 to 6 cases per sitting. Hearing thrice a week.

We were unable to get a breakdown of the nature of cases that are brought before the CWC. However, CWC members felt that lack of privacy or a conducive child-friendly atmosphere and case load left them with little time for interaction with children in an appropriate manner.

### **CWC articulation of BIOC**

To see how the law is operationalised in practice, and what factors are taken into account to make a BID, we spoke with CWCs to see whether they had developed any mechanisms for gauging the best interests of the child.

CWC 1: “The best interest of the child is getting him a safe environment to grow and develop. He should be given proper care and protection, nutritious food, education and emotional support.”

CWC 2:

- a. Member 1: Best interest of the child would first and foremost entail looking after the emotional needs of the child. The child’s best interest lies in being with the family and institutionalization should be the last option.
- b. Member 2: Best interests refers to the basic needs of the child, that is education, shelter, and health.

The CWC also stated that the “child should be completely rehabilitated.”

CWC 3: “Best interest of the child would encompass everything that is best for the child. For example, a child is not sent with the parent unless and until it is proved that the parent is fit to take care of the child. This is a step that ensures that the child’s interest is taken care of.”

“[There are] no fixed criteria. Criteria for best interests varies from case to case.”

No illustrations provided by CWC to explain its answer.

This understanding of best interests is interesting because the CWC members here started with the assumption that the parents of the child produced before it were automatically unfit, unless they were able to prove that they are in fact “fit parents.” Such an approach is possibly required where the child has experienced physical or sexual abuse, but especially in cases of “neglect” where there is no clear standard for what constitutes neglect, placing the burden on poor parents seems particularly arduous. It is also interesting to see such an approach in child protection hearings in contrast to juvenile justice hearings, where irrespective of the nature of the offence committed by the child, the child has a right to bail and live with his or her parents. On the contrary, where a child is produced before the CWC on allegations of neglect, the child is invariably institutionalized for at least four months.

CWC 4: “Best interests of the child means – a) Mental and physical well being of the child. b) Inducing a spirit of confidence in the child to live in adverse conditions. c) Ensuring a secure future of the child.”

CWC members reiterated that the criteria used to make a BID varied from case to case,

each case being decided on its own merits.

CWC 5: Evaded defining best interests and instead stated: “For a baby, adoption would be its best interest, and for older children foster care would be an ideal option but it is not that widespread in India.”

No criteria stated.

CWC 6: No clear answer of what best interests would be and what criteria are used to illustrate best interests.

CWC 7: “Best interests of a child refers to the care and protection of the child. Proper education, love, and support of the family members is necessary for the development of the child.”

From the above examples, it is evident that CWCs while in making a BID may take into account a range of criteria, were not mandated to do so, or record their findings on each of these criteria.

## **The right to be heard under Indian domestic law**

In deciding custody disputes or habeas corpus petitions regarding children, courts in India, including the Supreme Court have repeatedly held that the views of the child should be given weightage. In practice, the extent and manner in which children are allowed to participate in protection hearings vary greatly depending up on the individual CWC member. The question, however, is more fundamental – whether the substantive right of child participation guaranteed under international law can be invoked under Indian domestic law. The JJ Act is silent on how a child should be represented before the CWC and whether this is a right, but the central JJ Rules affirm the right to participation in its preamble, and further uphold the principle of child participation. Principle III of Rule 3 states that “Every child’s right to express his views freely in all matters affecting his interest shall be fully respected through *every stage of the process of juvenile justice.*” The process of juvenile justice, though not defined, would definitely include child protection hearings before the CWC. Such right includes “creation of developmentally appropriate tools and processes of interacting with the child, promoting children’s active involvement in decisions regarding their own lives and providing opportunities for discussion and debate.” In particular, the rules specify that juveniles in conflict with the



law have a right to a *guardian ad litem* during the proceedings.

Interestingly, the rules do not throw any more light on the issue of child participation or the manner in which it seeks to realize this right. In practice, however, the CWC appoints a probation officer or social worker for every case to conduct an enquiry. Therefore, we investigated whether such social worker or probation officer is mandatorily required to record the child's views. The format of the CWC order requiring an enquiry into the case (presented before it) does not mandate recording of child's views. The ten-page legal format for the social inquiry report (a report by the probation officer or social worker that is relied upon by the CWC) does not even pay even lip-service to the "views of the child." There is however, a window, a column titled "others," possibly allowing for some discretion of the probation officer or social worker. Optimists may argue that the "others" column in the ten-page legal format could be used creatively to record the views of the child. But the authors feel that the right of participation in protection hearings should not be relegated to such discretion.

Does this legislative silence or ambiguity imply that the domestic law does not fully recognize the right to child participation in protection hearings? On the contrary, the Supreme Court has repeatedly held that "it is now accepted rule of judicial construction that regard must be had to international Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law." Since there is no inconsistency between the Convention and the JJ Act or Rules, and on the contrary, the Rules have been introduced "with a view to furthering their right to survival, development, protection and participation," article 12 of the Convention and its interpretation by the CWC may be said to create a substantive right of child participation in CWC hearings. The Legal Services Authority Act, 1987 makes it obligatory upon the state to provide legal aid to all children who have to file or defend a case (any suit or any proceeding before a court). CWCs, functioning as a bench of magistrates with the powers of a metropolitan magistrate or judicial magistrates of first class, are therefore in effect functioning as judicial authorities.

Recently, in a great victory for child rights' groups in a long and hard legal battle in the Jain Sadhvi case, the Bombay High Court indirectly upheld the child's right to independently express her views in proceeding before the Child Welfare Committees. The petitioners in the case, the guardians of a girl child who had permitted the Jain community to initiate her into the monastery at age eight, had challenged in 2004, the need to produce the child monk before the CWC. In 2008 the Bombay High Court ruled:

However, the fact remains that today the child is about 12 years. Prima facie, we feel that the child at the tender age of eight years cannot take an independent decision as to what is right and what is wrong and even if a child enters into a commercial contract or agreement, such contract or agreement are treated as void. Even under the Penal law, there are special provisions for a child accused. Such representation should be provided by the concerned state legal services authority.... We have heard the learned counsel appearing for the parties. Mr. Sathe, learned Senior Advocate, has submitted that at the age of eight years, a child in a given case can take appropriate decision as to what is right or what is wrong for her future. However, in our view, at the age of eight years and without understanding the consequences of her action, if she is being allowed to renounce the world, the Court cannot sit as a silent spectator ignoring the fact that a girl child at the tender age has been allowed to renounce the world. The Court is the ultimate guardian of minor and if a minor is deserted by legal guardians, the Court is required to see the welfare of the minor and the interest of the minor.... it is the duty of the Court to delve into the matter and find out whether the child was in a position to understand the consequences of the decision taken by such child and whether it is in the best interest of the minor.

Even though the court confused the issues of right of participation and the weight to be given to such views, it indirectly upheld the right of the child to express her views independently before the Court, and not be represented by her parents or guardians. The Court opined that prima facie it appeared that a child at age eight “cannot understand” the consequence of renouncing the world (that is becoming civilly dead, not being able to marry or possess or own property and so on), but held that it was the duty of the court to find out “whether the child was in a position to understand the consequences of such a decision,” and hence constituted a committee to speak to the child to ascertain her views. Thereby the Court stayed away from using a stringent minimum age for child participation criteria based on a traditional or patriarchal view of children’s ability to express their views. Instead the Court upheld the right of the child to at least independently participate in the proceedings and represent her views to the CWC.

Merely locating a child’s right to participation does not help translate international law into domestic legal practice. Other concerns remain. These concerns are best illustrated anecdotally. As mentioned before, while it is commendable that many CWCs allow independent representation (sometimes by lawyers) in some cases, the fact remains that

the CWC approach to such representation remains unregulated, ad hoc, and guided by factors such as its perception of “the complexity of the case” and “whether the CWC members need legal advice.” One CWC member for example felt that “there was no need for legal representation in tried and tested cases.” The fact that the Jain Sadhvi case came to the attention of lawyers, even those seeking to represent an alternative to the parent’s version of the best interests of the child, can partly be attributed to a fortuitous combination of the complex nature of legal issues it raised and the vociferous protest raised by the Jain community and child rights groups in Mumbai. The need for representation, and more importantly, legal representation, it appears, is often confounded with the problem of lack of legal advice or expertise on points of law, which sometimes becomes imperative given that CWC members do not have to be lawyers. Further, it is only fair to point out that CWCs’ anxiety around involving lawyers representing all sides is not entirely misplaced—the infamous Jain Sadhvi case illustrates the danger of converting a time-bound four-month hearing before the CWC into a full-fledged timeless legal battle where, ironically, the best interests of the “child” will probably be debated closer to when she reaches adulthood. So one crucial question is, can a child’s participation (as a substantive right in her best interests) be independently facilitated without compromising the very best interests of the child by ballooning the case into a complex protracted legal battle? Therefore any model of independent representation for children should take into account the crucial aspect related to time.

The second challenge of allowing such representation is assessing such representation in light of the child’s developmental capacity; and a related question is what kind of representation; and whether such legal representation for the child can be conceptualized within the familiar framework of a client-attorney relationship with a client-directed approach.

### **Mode of representation: Direct, indirect, legal, non-legal**

As mentioned above, the Committee on the Rights of the Child has stated that in case of children in their early childhood, they should be independently represented. Within the existing child protection mechanism involving CWCs and related bodies, it is unclear who represents the interests of the child before the CWC. Usually, nongovernmental organizations or social workers who rescue a child, present the child before the CWC and argue on behalf of the child. But here again, the wishes of the child and the wishes of the nongovernmental organization are not treated as separate categories.

Further, several factors affect the manner in which a child can participate – creation of a conducive environment to conduct a child-friendly atmosphere; case-load of CWC members and time available to give to the child and other concerned parties for every case.

Further, there are some legal barriers to the direct and independent legal participation of the child before the CWC – Indian law technically requires that the child be represented through a guardian in legal proceedings. It is important to bring together a larger debate to ensure that such procedural hurdles are withdrawn in child protection hearings.

## **Models of representation and child participation**

Ensuring effective representation for a child is a complex issue involving several logistical challenges, and requiring the expertise of a range of professionals. Identifying the logistical challenges, analysing a few models of child participation in protection hearings from other countries, and raising a few pertinent questions will hopefully facilitate, as the authors hope, debates involving a variety of actors, and ultimately result in a model of child participation before the CWC. We hope that this model of child participation will be beneficial to all players involved, or in the least and most importantly, to the child. Though far from being exhaustive or even the tip of the iceberg, some logistical challenges to incorporating child participation in protection hearings are: to get the child accustomed to the idea that her parents, cannot represent her during the proceedings; support the child through immense physical and/or psychological trauma (in some cases); getting the child accustomed to an institutionalized set-up (at least in the Indian scenario). As one scholar rightly puts it, “[T]he decision makers in a child protective proceeding literally decide for the child the central questions of her daily life. Where is home? Who takes care of me? Who are my parents, my siblings, my extended family and my classmates?”

A large part of the objection to allowing for a direct legal representation for the child or on behalf of the child is that the hearing before the CWC is not meant to be adversarial. However, this is confusing, given that the CWC in practice has the powers of a “court.” Arguably, alternative dispute resolutions do have a great value in reaching timely decisions instead of protracted legal battles. Nevertheless, it requires further and intensive participatory research involving consultations with a wide variety of actors to debate both

the pros and cons of considering the adversarial approach or the alternative dispute resolution approach to child protection hearings in India.

## **The right to judicial review and best interests of the child**

While survival and development of the child can be used as the fundamental guiding principle in a given set of circumstances to determine best interests, child participation is also a crucial element of a best interest determination process. But other procedural concerns, we believe, also contribute to the best interests of the child. Hence, the best interests of the child, is not merely a substantive test, but also a procedural test. The UN Committee on the Rights of the Child has stated, for example, that where children are going to be separated from the parents against their wish, then the decision should be subject to a judicial review. This clearly shows that the determination of best interests has an in-built procedural safeguard.

In India, even though there is a mechanism for reviewing the decisions of the CWC in appeals before the Court of Sessions, the Sessions Court, being seldom trained in children's rights, is unable to determine the best interests of the child. Moreover, given that such an assessment is time sensitive, there is a need to evolve guidelines that ensure that it is not a protracted appellate process. The Jain Sadhvi case is once again illustrative of the danger of dragging on the determination of best interests of the child that defeats the very purpose of a child protection hearing. *Therefore, the authors believe that there is a need to study and review the appeals procedure of child protection processes.*

## **Voices of Parents and Children and their Understanding of the CWC Process**

Children therefore have a right to be heard under international and national law, but the journey from international law to practice is an arduous one. Very often, as is the case with many CWC hearings in India, the right of the child to be heard, if at all granted, is directly dependent on the progressive nature of the body hearing the case. It is not unusual to see a CWC member spending anywhere between 5 to 30 minutes, often in extremely intimidating settings, encouraging or bellowing (depending on the personality of the CWC member) at the child to share her views. Or in some cases, where lawyers or social workers have sought to intervene in child protection hearings, the CWC has

vociferously asserted, and at times threatened “legal action” because “there is no scope for a lawyer before the CWC.” On many occasions, the CWCs’ supposedly child-friendly venue within a children’s home has contributed to unexpected comical outcomes—the children’s home superintendent takes law into his own hands, refusing social workers and lawyers’ entry into and access to children to assist their participation before the CWC.

CWCs are the competent authorities to take decisions in the best interest of a child in need of care and protection, but in order to reach a final decision regarding the child, it is imperative that parents/guardians and the children themselves are a part of the process. In order to ascertain whether their participation plays a role in the process of determination, we conducted in-depth interviews of many children and parents from the children’s home at Umerkhadi.

The first child interviewed by us was Anwar (name changed). We spoke to him in the premises of the children’s home, Umerkhadi, where we saw him helping the staff by watering plants and working in the garden. Anwar is 15 years of age and is a child in need of care and protection under the JJ Act. He had run away from home at a very young age and was working as a sweeper on trains to earn a living. The police discovered brought him before the Child Welfare Committee. He has been in the children’s home for two months and still does not know or understand why he is here. He does not want to go back home either. Anwar also does not know who the CWC is and why they are interested in his case.

It is important to note the irony that Anwar was in the Home because he was working outside and when we interviewed him in the Home, he was working there too.

Most of the children who are produced before the CWC have no understanding of the reason for their separation from their family or from the circumstances that they were rescued from. They are also not aware of the role and functions of the CWC and it is apparent from the interviews with all the children that they think they have done something 'wrong' and therefore being 'locked up' in the Home is the punishment for this wrongdoing. Another example of this is highlighted in the interview with Shalini and her parents given below.

Shalini (name changed) is 10 years of age and has been in the children’s home, Umerkhadi for two-and-a-half months. Her parents are from Aurangabad and we also met and spoke with them on the same day. Shalini did not want to talk about how she came to

the Home but her father informed us that Shalini was traveling with him and her mother on the train, and they had gotten off the train at one of the stations in Mumbai to get water. Shalini also got off the train and one man offered her a *samosa* which she took. The police thought she was begging and therefore took her away from the station and brought her before the CWC. The police did not inform her parents at that time and they were frantically searching for her and was finally informed that Shalini was at Umerkhadi. The parents are aware that the CWC is a court for children only because the police told them it was. They said that Shalini has been produced before the CWC four times since she has come to the Home but they do not understand any of the procedures before the CWC. As far as they understand, the CWC keeps adjourning the matter to another date and accuses them of not taking proper care of Shalini every time they meet them.

All the parents we interviewed had the same reaction to the CWC. They felt that they were being interrogated and accused of not taking care of their children, rather than trying to find a solution for the best interest of their child together.

In the earlier part of the report, much emphasis has been given to the social investigation report and the role of the Probation Officer. Most of the children and the parents we interviewed knew their probation officers names and had met with them a few times and were also comfortable in their presence.

We interviewed Parvati (name changed) and her parents who were waiting outside the CWC for their case to be called out. Parvati is 8 years of age and we spoke to her father, who was present before the CWC with his wife and two other children, both younger than Parvati. Parvati has been in the children's home for one month and she was studying in the second standard before she came to the children's home. Parvati's father is in the cutlery business and he and his wife are blind. Parvati got lost one day and was brought before the CWC. Her parents had filed a missing complaint therefore the police informed them that she was in Umerkhadi. Parvati's parents had never heard of the CWC before this and this was their first date before the CWC therefore they did not know what to expect and were very apprehensive. The parents had met Parvati's Probation Officer earlier that day and were comforted because he was also in the same room as the CWC members. Parvati does not speak Hindi therefore we could not communicate directly with her.

Some of the children we interviewed insisted that their parents had not been informed

about their whereabouts, but we have not been able to verify these statements with their Probation Officers or the CWC members. This may just have been their understanding of the situation because their parents had not yet come to meet them.

Aseema (name changed) is 9 years of age and was studying in the third standard before she came to the children's home. She has been in the children's home for one and a half months and her schooling was discontinued. Social workers had seen her at the railway station when her parents had gone to fill water. She was brought to the home after that and does not know anything about the CWC or what they want with her. She also stated that the CWC has not informed her parents about her whereabouts as they have not come to meet her as yet.

Two of the children we interviewed were very happy with the CWC because they had agreed to send the children back to their families once the inquiry period was over. Their views on this were also considered and taken into account by the CWC.

Shaheen (name changed) is 16 years of age and has been in the children's home for three months. She ran away from home in Calcutta in May 2009 and come to Mumbai. She told us that her father was physically abusive towards her and her older sister hated her and did not treat her well. Shaheen does not have a mother. She does not know why the CWC keeps asking her questions or what they are but she knows her Probation Officer well and since her PO is in the room with the CWC. Shaheen is able to talk to the CWC freely. Shaheen did not like to stay in the children's home and even though she did not want to return home, preferred to go back home when compared to staying in the home. Her parents had not come and she had no knowledge of the inquiry or whether anyone had spoken to her family, or the next steps. All she was aware of was that the CWC had asked her if she wanted to go home and that she had replied in the affirmative, and that they had told her that she would be sent home soon.

Urmila (name changed) is 10 years of age and informed us that the police had brought her to the children's home and that she has been here for two months. Her parents are in Calcutta. She had come to Mumbai to be with her sister who was working as a domestic servant. Urmila's sister got her also a job working as a domestic servant in a home from where she was rescued by the police. Urmila does not want to go back to Calcutta as she does not get along with her parents who used to ill treat her. She wants to stay in Mumbai with her sister and her brother in law who are kind to her and treat her well. Urmila likes the CWC members who have promised her that they will only keep her in the Home for

another month and then send her back to her sister and brother in law.

The last people we interviewed were very disillusioned by the CWC as they felt they were being viewed as offenders rather than parents of their three young children.

Shashikant Mane and his wife were present before the CWC with their 3 children. The youngest child was less than a year old and the oldest child was 3 years of age therefore we could not interview them. Shashikant and his wife are pavement dwellers living in Mumbai. He was at work and his wife was in their hutment cooking on the day their children were taken away by social workers. All three children were playing on the side of the road without supervision. Shashikant does not know who the CWC is but he stated that they had no right to take away his children. He claimed that he and his wife were capable and willing to look after all 3 children and that they CWC must give his children back to him or he would hire a lawyer and make sure that they gave his children back. He also said that his children were too young to be separated from their parents

## **DRAWBACKS OF THE EXISTING CWC PROCESSES**

### **Lack of integration with other laws and welfare programs**

The greatest drawback of the existing CWC processes is discontinuity of parent-child contact even in cases where there is no apparent abuse or neglect or an immediate threat to the child's life. Moreover, the CWC process in fact results in a rolling back of children's rights instead of an immediate up-scaling of rights. For example, where children were being educated before coming to the Children's Home, being institutionalized resulted in discontinued education, a grave problem since once a child is removed from school, readmission and continuing education become an uphill task for parents from a lower economic background.

Second, parents from the lower economic background felt that they were almost being doubly punished for being poor. The researchers feel that the standards for assessing "neglect," "not taking care of the child," are at times divorced from the practical difficulties that these parents face. For example, this is particularly a problem faced by pavement dweller parents who seldom are able to realize their own rights to safe drinking water, housing, livelihood, and access to healthcare. At an operational level, integration of services that can enhance the quality of life for parents and children is critical to the

well-being of the child. It is interesting to note that one of the principles enshrined in the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, states that “child welfare depends upon good family welfare.” It is therefore important to ensure that before declaring poor families unfit because of neglect, improving the circumstances of the parents be explored before the child is separated from the parents.

There are many gray areas and linkages. In particular, two areas that are worth mentioning are rights of children viz-a-viz rights of disabled parents and rights of parents with health conditions.

Case study: In one case, the brother of a deaf and mute adult woman, Meera (name changed), were forcing her to give up her child before the CWC. The brother argued that Meera was not in a position to provide for and raise her child. The CWC accepted the brother’s argument, and contrary to the wishes of the mother, they declared her unfit and asked her to give up the child.

In this case what was lacking was clear representation of the rights of persons with disabilities and a consideration of the principle of non-discrimination of persons with disabilities. The CWC was not aware of the Persons with Disabilities Act and the provisions thereunder to seek social security support for unemployed persons with disabilities. Alternatively, the possibility of linking the disabled parent with organizations supporting disabled persons was also not explored as an option to raise the child in a non-institutionalized set up without taking the child away from the parent. The legal issues here that need to be considered are right of the child for parental contact, non-discrimination of parents with disabilities, and greater coordination, support, and participation of organizations who regularly support and help persons with disabilities.

Case study: Sita (name changed) was separated from her parents pavement dweller parents because the father was perceived as a health threat to the child since he had tuberculosis.

In this case, the CWC did not explore the option of linking the parents with healthcare providers who could provide adequate treatment and ensure that the health of the father and the child be taken care of. Instead, the child was separated from the parents the parents were declared unfit and counseled that the children’s home is the best alternative place for the child.

The researchers therefore believe that to operationalize the child protection function of the CWC, the cases that come before them should be classified broadly into a) cases where the parents or guardian is traceable b) where parents or guardians are not traceable and accordingly detailed protocols should be developed which pay attention to not only services for children but also for parents. The CWCs also need to understand that the range of laws and welfare schemes that are available not only for children but also for parents and ensure proper linkages with the appropriate authorities and programs.

The inquiry period also does not form a stepping stone towards the overarching rehabilitation process. The interviewers, in their visit to the children's home, also observed that children were being made to perform tasks like gardening, carrying vessels, carrying papers from the Probation Officer's office to the court etc and some of the children rescued and produced before the CWC are working children. The CWC regards parents who have working children as wrong, and rightly so, but they should also insist that the staff working in the Homes cease using these children to perform tasks that should actually be done by the staff themselves.

### **Poor informed participation by children and parents**

All the parents and children interviewed by us were unaware about the role, functions and the power of the CWC. It is therefore imperative, that an orientation program is held for both new children who come to the children's home and their parents, that informs them about their rights, the rights of the children and the powers and role of the CWC. This will ensure that children make informed choices and participate in their rehabilitation and reintegration and that parents will be aware of the myriad reasons as to why they are considered as 'unfit'. The CWC should also stress that being an unfit parent is a temporary situation that can be remedied by the parents themselves and that the State does not seek to separate the parent and child on a permanent basis but in fact wishes to help the parents provide a wholesome life for their child.

The CWC is an impartial adjudicating body which takes decisions in the best interest of the child but does not represent the child itself. It is therefore, necessary, that the child has an advocate or a representative who will convey to the CWC the child's views but these views have to be "informed" and hence the representative should be equipped to give the child as much information to the child as possible before the child's views are conveyed.

### **Need for a benchmark to separate child from parents in cases of**

## “neglect”

As we have seen, from the Social Investigation Report in India, the law has to some extent developed a “check-list” or aspects that need to be factored into decision-making. Barring cases where there are allegations of physical or sexual abuse, in cases of “neglect” or “inappropriate care,” these obviously hinge on interpretation of those involved in evaluating the circumstances. For example, in the Indian context, the probation officer or the social worker drawing up the Social Investigation Report – his or her value systems and moral judgments directly affect the decisions taken. Further, the CWC’s own perception and values will directly impact the nature of the decision made. While discretion is a very important tool for decision-makers to take innovative steps to protect children, such discretion should also be guided to ensure that decisions concerning the child are also not coloured by prejudice. For example, “capacity,” “attitude,” and “ability” of parents, in the ultimate analysis depend entirely on how these are interpreted in a given set of circumstances. These interpretations are obviously dependent on the judge’s own value systems and their training to be aware of, and overcome certain biases. This subjectivity is illustrated through analysis of the interpretation of some judgments from different jurisdictions showing how inherent evaluations and perceptions about the religion of the parent influences decision-making. These cases also illustrate that there is a need to develop a threshold level of evidence that can guide how the CWC should intervene.

Preconceived notions about a particular religion, and arguably caste or class, will invariably colour the nature of the judgment pronounced. Given this unavoidable situation, it is imperative that the scope for judicial assessment of harm be limited to tangible indicators. For example, assessment of actual physical harm is likely to be less subjective than assessment of emotional or spiritual harm. Therefore, while inquiring into what amounts to the best interests of a child in a particular case, child protection authorities should be allowed to seek detailed assessments by professional bodies to evaluate emotional or mental abuse in the absence of any physical harm.

Further, it is also important to identify the stage at which child protection authorities should intervene. For example - should child protection authorities wait for an event and then intervene after actual harm has been caused to the child or should they be allowed to intervene as soon as there is a threat of harm? Different courts have used different approaches. Courts have used tests such as actual harm, a substantial threat of physical or

mental harm, and risk of harm while evaluating religious practices. In the Canadian Case of *Sullivan v. Fox*, it was held that Courts cannot intervene unless there is evidence of “*physical abuse, active neglect, or immorality with respect to children*”.

Another test has been developed by Prof. Mnookin. He adopts a two-prong test for State intervention in child protection law. He justifies State intervention a) where there is an immediate and substantial danger to the child’s health and safety b) where there are no reasonable means acceptable to the guardian of ensuring the child’s health and safety without removing the child from the guardian’s custody.

From the varied approaches that are available, it may be said that child protection authorities should intervene a) when there is a substantial threat of physical abuse (i.e. where the health of the child is being affected) or active neglect with respect to children (i.e. where the child is being deprived of her right to food, water and education). This test is in keeping with the approach to that advocates for a core set of inviolable rights that are in the best interests of the child.

In particular, Prof. Mnookin’s approach of examining whether conditions in the interest of protection of the child are acceptable to the guardian should not be a pre-condition to State intervention. For example, as soon as a violation is reported, and there is a substantial threat of physical abuse or active neglect, the State should be allowed to intervene. The second limb of the Mnookin test can only be used to determine further course of action after the State has intervened and rescued the child. For example, whether the State should completely terminate parental rights and take over custody of the child would necessarily depend on whether the guardians are co-operating with officials in ensuring that the rights of the child are safeguarded. This dynamism is where the CWCs are currently lacking especially because they do not consider parents overall welfare and the option of improving parents’ situation and keeping the child with the parent especially in cases of poor families.

## CONCLUSION

In elucidating upon and inquiring into the content of the “best interests” principle, the Alston approach is undeniably important because every other approach is directly or indirectly dependant on the theory formulated by him – that there is a core set of inviolable survival and development rights that should be enforced irrespective of the cultural context. This may be a fairly self-evident proposition of law. However, the test used to judicially determine whether such rights have been violated forms the crux of this proposition. In cases involving potential abuse to the child, child protection law should use the test of substantial threat of physical harm or active neglect to the child. The substantial physical harm test would address the right to health of the child; while the active neglect test would address the right to food, water and education of the child. These rights may be said to form the core set of inviolable rights which are crucial to the survival and development of the child, which should be implemented in any given cultural context. The substantial threat of physical harm or active neglect also minimizes the scope for prejudice in decisions of child protection authorities.

If the substantial test of physical harm or active neglect coupled with the imposition of conditions is used in the Indian child monk example, it may be clearly said that the said religious practice is violative of the human rights of the child and the child should be declared a CNCP due to the following reasons: manually pulling out hair from the child’s head constitutes physical harm and not providing the child any food to eat and making the child beg for food constitutes active neglect

Another crucial aspect of a best interest determination is child participation. The method and manner in which children are allowed to be participated in CWC hearings is a gray area in India and the way forward is to conduct more consultations and discussions with CWC members, leading child rights activists, lawyers and other children’s rights organizations to determine how best to develop a model of child participation before the CWC.

Further, best interests of the child is not merely a substantive standard but also includes procedural aspects. Child participation, for example, is both substantive and procedural. Likewise, judicial review of CWC decisions at least in cases where the child is separated from her parents against their wishes is a mandatory requirement but such reviews should be conducted in a time-bound manner by a body that is trained in children’s rights and

has the ability to be guided by experts dealing with children. Such guidelines require to be further developed in India.

Under Indian law and in practice, the social investigation report forms the basis for decisions made by the CWC. Therefore, a detailed study regarding training given to probation officers and nongovernmental organizations drawing up social investigation reports, the time spent by such officers in dealing with children, the child-friendly communication methods used by such officers needs to be conducted. It would be crucial to professionalize probation officers as a specialist cadre of child development and child rights training and experience.

While children's best interests is the paramount consideration, the rights of parents should also be represented during protection hearings. This will particularly help parents from poor families to participate in protection hearings in a meaningful manner. In order to assist both children and parents to participate and cooperate in protection hearings, there is a need to educate them about the process and different options that are available.

CWCs should also be given legal training to understand the importance of convergence of different services to assist parents to provide for better care for children instead of separating the child and further CWCs should be aware of the range of laws that need to be taken into account while deciding upon the best interests of the child.



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## **Annex: Illustrating Subjective Assessments of Courts from other jurisdictions**

In the case of *Re R (A Minor)* (Residence: religion), the father of a nine-year old boy had been a member of the Exclusive Brethren for a significant period of time. However, at the time of his marriage, the father severed his relations with the Church. Subsequently, the boy and his father were re-united with the Brethren. In his association with the Brethren the boy had grown particularly close to one family, the Ws. After the mother's death, the Church forced the father to give up custody of his son in favour of the Ws on moral grounds. In the ensuing custody battle, the Court refused to grant a contact order in favour of the Ws and described the Brethren as "*lacking in compassion*". Nevertheless, the Court granted a contact order for the boy's relatives on the ground that they undertake not to "*speak or communicate with the child in any way in relation to religion or spiritual matters*".

In the above case, it can be seen that from the standpoint of "survival and development" i.e. right to health, food, water and education, very little harm was involved. Nevertheless the Court examined the inherent "*goodness*" of religious tenets. Courts while repeatedly mentioning that there is no correlation between 'good parenting' and religious beliefs / practices, nevertheless appear to factor them into decisions. In the context of child protection, it may be said that child protection authorities cannot purely base their decisions on the inherent goodness of religious tenets, as this may lead to unintended consequences.

Another issue that arises is whether a particular type of religious education can be said to be harmful to a child. This issue was dealt with in the case of *Hoffmann v. Austria*. Ms. Berger (now Mrs. Hoffmann), an Austrian citizen, married Mr S. At the time of marriage, Mr. S and Ms. Berger were Roman Catholics. Mrs. Hoffmann gave birth to two children, a son and a daughter, and both were baptized as Roman Catholics. Subsequently, Mrs. Hoffman left the Roman Catholic Church to become a Jehovah's Witness. Thereafter, she instituted divorce proceedings against her husband. During the proceedings, she left her husband and took her children with her.

In the custody dispute that followed, the Innsbruck District Court and Regional Court awarded custody to the mother. In doing so, the Court disregarded the argument raised by the father that the mother's religion would be harmful to the child's upbringing. The

Lower Courts' reason for awarding custody to the mother was based on the financial capacity of the mother and the emotional ties the children had with their mother. *The Court observed that the mother had undertaken to send her children to their father on Christmas Day and other such holidays. Moreover, the Court held that where necessary, the Court could order blood transfusions.* However, the decision of the Lower Court was reversed by the Supreme Court of Austria. The Supreme Court dealt with the issue of children's welfare in relation to religious education and observed, "*if the children are educated according to the religious teaching of the Jehovah's Witnesses, they will become social outcasts.*"

The mother appealed against the decision of the Supreme Court of Austria on the ground that the decision violated the European Convention of Human Rights. She argued that the Austrian Supreme Court's decision violated Articles 8(1), 14 and 9 of the Convention which guarantees respect for family, prohibits discrimination on the grounds of religion and guarantees freedom of religion, respectively. The European Court upheld her argument and concluded that while the Austrian Supreme Court's objective of seeking to protect the rights and health of children was a legitimate one, the manner in which the Court sought to protect these rights failed to pass the test of proportionality.

This decision of the European Court of Human Rights indirectly clarifies another issue, namely, that while religious education *per se* cannot be questioned, the effects of such religious education, where harmful to the child's health, can be mitigated by judicial conditions. In the above case, the Court held that blood transfusions could be ordered where the child required them. Likewise in the Indian context, where religious practices involve consequences which are harmful to the child, it may be argued that such harmful consequences may be mitigated through the imposition of conditions.

Another approach has been developed by the Canadian Supreme Court in the case of *Irene Helen Young v. James Kam Chen Young*. In this case, the Youngs were married in 1974 and had three daughters. Mrs. Young was brought up in the Anglican Church and she expressed a wish that her children be brought up in the United Church. However, the husband had converted to the Jehovah's Witness religion and was keen on giving religious instruction to their children. To this end, he read Bible stories and discussed his beliefs with his children. He also questioned them about religious matters when he was with them. *During the divorce proceedings, the husband was granted visitation rights on the condition that he does not take them to religious meetings or canvassing without the wife's consent.* The husband had executed undertakings to this effect. The husband

appealed against this order and the Court of Appeal set aside the restrictions on religious discussion and attendance. The Court held that it would be in the best interests of children to associate fully with their non-custodial parent, including his or her religious beliefs. Therefore, the Court held that restrictions could not be placed with respect to imparting religious instructions unless either *"the existence of, or the potential for, real harm"* could be proved. The Supreme Court upheld the decision of the Court. This case reinforces the fact that religious beliefs and instruction cannot be held to be against the "best interests" of the child unless there is the *existence of or the potential for real harm*.

A different approach has been followed by the American Courts in the case of *Pamela Zummo v. David Zummo*. In this case, the Court also took into account "emotional harm". The facts of this case are as follows - the father, David Zummo, and mother, Pamela Zummo got married in 1978. They separated in 1987. The couple had three children – two sons and a daughter. Whereas the mother was Jewish and actively practised her faith since childhood, the father was raised as a Roman Catholic. He attended Catholic services only sporadically. However, the parents had agreed that the children should be raised in the Jewish faith.

After separation, however, the father wished to take his children for Roman Catholic services as he believed that a bi-cultural upbringing would be beneficial to the children. In the divorce and custody proceedings the Court awarded custody to the mother. Furthermore, the Court granted conditional visitation rights to their father. The Court forbid the father from imparting any other form of religious instruction to the children apart from Jewish instruction. The father appealed against this order. The Appellate Court reversed the decision on the ground that the mother failed to prove that the belief or practice of the father which was sought to be restricted "actually presented a substantial threat of present or future physical or emotional harm to the children." A similar approach has been adopted by US Courts where even in the absence of any actual physical harm, Court looks into the religion of parents in order to promote the "spiritual well-being" of the child.

In the context of alleged harm to the child through religious practices or instructions, the issue that needs to be examined is whether child protection authorities should also examine emotional harm/ spiritual well-being or restrict their scrutiny to cases of physical harm that affects the health of the child. While Court intervention in cases of harm to the child is important and undisputable, one also needs to account for possible cultural prejudices of judges; and therefore discretion in evaluating harm should be guided to the

maximum extent possible. Often, such prejudice manifests itself in the language used to describe a particular religion. For example, if a party is a Jehovah's Witness, a member of the Exclusive Brethren or "Christian Fellowship", terms and phrases such as "*fanatical*", "*become possessed*", "*sect*", "*indoctrination*" are used, which tend towards being derogatory. A Scientologist for example has been described as a person belonging to a "*cult*" that is "*pernicious, corrupt, sinister and dangerous.*" On the contrary, terms such as "*fervent believer*", "*devout*", "*faith*" are used to describe parties who are Roman Catholics, Protestants or Jews. There have also been cases where the Courts prefer parents who impart religious instructions to parents who are atheists.

In addition to the language used, Courts take the liberty of being either sympathetic or unsympathetic towards certain religious practices and ascribing either positive or negative values to them. For example, in *Re R*, the Courts described the members of the Brethren discipline who separated the child from his father as "*lacking in compassion*". In *Borris' Case*, the Court went on to conclude that there were two teachings of the Pentacostal Church that would be "*confusing*" to children. Similarly, in *Burham's Case*, the Court held that the belief of the Fatima Crusaders that 'children born out of marriages where both parents were not Fatima Crusaders are illegitimate' would have an "*adverse impact*".

Judges' lack of familiarity with the religion or their prejudice is not only restricted to the type of language used but may also be evidenced by the very outcome of the case. For example, in *Hoffmann's Case*, there was ample evidence to suggest that the mother was capable of taking care of the children and that the children had a psychological tie with the mother. Despite this, the Supreme Court of Austria reversed the decision of the Innsbruck Regional Court and granted custody to the father on the ground that the mother's religion i.e. Jehovah's Witness would not be beneficial to the upbringing of the child. Similarly, in *Buckley's Case*, custody was denied to a mother on the ground that she was a Jehovah's Witness, and if the child was brought up under their instructions she would be "*different*". From the above discussion it is evident that preconceived notions about religions exist across various jurisdictions – Canada, England, USA and Europe.

In some situations, where the Judge is open-minded and tolerant of various religious practices, she may expect similar open-mindedness and tolerance with respect to the religions that she evaluates. This leads to limitations being imposed on the nature of the religious practice and the extent to which such practices may be carried out. For example in *Hoffmann's Case*, the Jehovah Witness' mother was given custody on the condition

that she permitted the child to spend her time on holidays with her father, as the Jehovah Witnesses were against celebrating holidays. In *Young's Case*, the father was not allowed to involve the child in “*religious canvassing*”. Similarly, in *D.P. v. C.S.*, the father was allowed to “*teach*” the child his religious beliefs but was not allowed to “continuously indoctrinate” her. In *Re H's Case*, the mother was permitted to read the Ladybird Bible to her child because she was “*moderate*” in her beliefs. *McNeil's Case* is an example of a situation where custody was given to the father on the ground that the mother practiced a fundamentalist religion, watched religious television, attended prayer meetings four to six times a week, spoke in tongues, practised tithing and had visions. In addition, it is observed that “*the most serious cause for concern*” arises from the fact that the mother considers it appropriate “*to take the children with her to church one morning and three evenings a week.*”



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