The Changing Standard of the “Best Interest of the Child” and its impact on the exercise of parenting… and children.

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Abstract: In this paper we aim to discuss the impact of some issues concerning the determination of the best interest of the child in parenting and children. The first generation of legal scholars after the Convention on the Rights of the Child usually fought to establish the exact meaning of the “best interest”. The actual generation of scholars faces new challenges, as the horizon seems now more complex. There are new issues to deal with. We try to cope basically with two of them; namely: a) those concerning the person or persons charged with the determination of the content of the best interest; and, b) some theoretical issues. In a) we deal with the disintegration of traditional analogies concerning parenthood, the influence of legal scholars in the determination of the best interest, the incidence of abstract and estranged soft law in concrete children’s interests, the tacit influence of laws and jurisprudence that do not involve children’s rights directly and the issue of who should speak for the child. In b), we examine the importance of defining the best interest’s formula as a standard or a principle, and the influence that these would have on the rights of children.

1. Under the guise of an introduction

The “best interest of the child” formula requires to be periodically revisited. In this paper we aim to discuss the impact of the modern hermeneutics on the best interest of the child in children and parenting. However, right at the outset, and to melt into the subject, it seems appropriate to introduce a leitmotiv to lead us into a reflective mood.

Olivier Messiaen (1908-1992), probably one of the most relevant French composers of the twentieth-century, had been married for about a year and his son was just born. At this point, he composed two cycles of “chants”: The Poèmes pour Mi, addressed to his wife, and the Chants de Terre et de Ciel, dedicated to his wife, his son and to family life. Our leitmotiv will consist in the latter. The Chants cycle compiles six songs, deeply related to the ideas we wish to outline in this paper. In them, Messiaen celebrates the happiness of a couple and entangles this with the joy caused by offspring. The whole of it reminds us of Jacob’s ladder, in which angels ascended and descended, alternating with human beings. Heaven opens in a transparent dialogue to family life. Yet, family life is not exempt of tragedy: death is also a subject to these songs. In any case, the final say or rather the final song is called Resurrection, sealing the whole cycle with a sign of hope. Ultimately, the son of Messiaen is called Pascal, that is: Easter-born child. Please, bear this suggestive little introduction in mind, as we try to develop our more insipid thoughts, to which we turn next.

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2. The fluid nature of children’s rights

The general acceptance of the “best interests” formula is undisputed. This is so, probably because it is rooted in a spontaneous attitude of the entire humanity to care for its fragile offspring, as a mean to preserve its species. Or even as an emanation of the very idea of justice, whose kernel is precisely the idea of equality. Concerning infancy, this is perfectly coined in the wording of the ninth paragraph of the Preamble of the Convention on the Rights of the Child, in a textual quotation of the homonymous Declaration of 1959: “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”

Notwithstanding this broad acknowledgement of the formula, it is widely argued that it is an ambiguous or vague phrase. The mainstream of criticism raised by the “best interests”, was linked with its indetermination. Maybe it is just the fate of every general standard: it escapes us inasmuch as we try to exhaust its meaning. This ambiguity turns the formula in a malleable material.

As a result, many attempts have been made in order to specify or even fix the fluid nature of the open formula. So far, the legal community has reached some common ground or

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2 There are no opponents to the standard, as far as we know. On the other hand, the Convention itself (whose core is precisely the “best interest” of children) has reached almost universal acceptance, a feat achieved for the first time in relation to International Human Rights Treaties. Cf. DETRICK, Sharon, A commentary on the United Nations Convention on Rights of the Child, Kluwer, 1999, The Hague, p. 1.

3 From Aristotle to Rawls, equality has always represented the very nature of justice.

4 The ninth paragraph of the Preamble stems from the third principle of the Declaration on the Rights of the Child of 1959


7 This topic was comprehensively discussed in MNOOKIN, Robert H., "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy," 226 Law & Contemporary Problems 3 (1975). Without any doubt, the quest for determinacy has been the main engine of scholarly production concerning children rights in the last years. In the same sense, highlighting the perils of this indeterminacy: FREEMAN, Michael A. D., Commentary on the Article 3 of the Convention on the Rights of the Child, Martinus Nijhoff, 2002, The Hague, p. 2. Before of that, the eloquent article of RODHAM, Hillary, “Children Under the Law”, Harvard Educational Review 43 (1973), in which she claims that the formula is “a slogan in search of a definition” (now a topic in articles concerning the best interest).


9 LOWE, DOUGLAS, id.
perhaps only some labile agreements. First of all, it is said that the nature of the formula is that of a principle or a standard\textsuperscript{10}. Secondly, based on the experience provided by the jurisprudence of the family, some scholars tried to systematize its content in open lists of rights\textsuperscript{11}. It has to be contended that even those two agreements are controversial. Firstly, the indistinct use of the concepts of standard and principle needs some clarification. Secondly, it is dubious that the singularity of the case by case method does actually provide a logical account for a universal principle. But we will come back to this later on.

Indeed, children’s rights have changed their shape substantially over the years. Most family law scholars point towards the changing of models in children’s rights\textsuperscript{12} in a time so short that it makes not more than a generation. Since the Convention on the Rights of the Child was sanctioned in 1989 only twenty years have passed. Authors as important as John Eekelaar have already drawn attention to the end of welfarism\textsuperscript{13} and the commencement of a new era in which children’s rights are envisaged through the paradigm of individual autonomy\textsuperscript{14}. Michael Freeman goes more or less in the same direction, when he criticizes new veiled forms of paternalism and calls for the children to have a broader scope to make decisions concerning their own good\textsuperscript{15}. The idea of protection has fallen in disgrace, no matter what the ninth paragraph of the Convention reads. It does neither matter that the word protection is used nearly twenty times in the Convention, contrasted with the two times the words promotion and participation appear in the same instrument. Many feel the protection-era has been overcome.

\textsuperscript{10} It is talked about the “paramountcy principle” (See LOWE, DOUGLAS, pp. 451 and similar passages), or about the “best interest standard”, the book by BREEN, Claire, \textit{The Standard of the Best Interest of the Child A Western Tradition In International And Comparative Law}, Kluwer, 2002, The Hague. The truth is that most scholars use both concepts as synonyms. We will deal briefly with this issue below.

\textsuperscript{11} See LOWE and DOUGLAS, pp. 468, for instance.

\textsuperscript{12} Philippe VEERMAN’S, \textit{The rights of the child and the changing images of childhood}, Martinus Nijhoff, 1992, The Hague. This book deals mostly with a comparison in absolute terms of the language of international declarations concerning children. Written nearly twenty years ago, it could not foresee the incidence of communitarism and the debilitation of the universality of human rights. Nowadays, one could speak about changing images (better said, changing children’s rights) not only studying a historical development, but also comparing cultural incarnations (interpretations) of these very rights (as, for instance, FREEMAN does).


\textsuperscript{14} The rights-based approach and the perspective of the democratization of family relations stem from a mainly individualist view of children rights. These views have been paradigmatically proposed by eminent scholars of the like of Michael A. D. FREEMAN and John EEKELAR. The issue of self-determination in children’s rights has also been addressed recently in the 2003 European Regional Conference of the International Society of Family Law, edited by MARTIN-CASALS, Miquel and RIBOT, Jordi; under the title \textit{The Role of Self-Determination in the Modernisation of Family Law in Europe}, Girona, 2006, pp. 183-284.

The great French jurist Philippe Malaurie said only a year ago that Family Law is undergoing a great instability\(^1\). Let us hope that being under the illusion of progress; we are not actually stepping backwards.

3. **New problems surrounding the determination of the “best interest”**.

The first generation after the Convention on the Rights of the Child usually fought to establish the exact meaning of the “best interest”\(^17\). The actual generation of scholars faces new challenges, as the horizon seems now more complex\(^18\). There are new issues to deal with. In the following paragraphs we will try to cope basically with two of them; namely: a) those concerning the person or persons charged with the determination of the content of the best interest; and, b) some theoretical issues regarding the nature of the best interests. As to the conclusions, after returning to our leitmotiv, we have opted for an open final, leaving to the qualified readers the task to make the inferences they consider to be appropriate.

4. **Who decides what is the content of the best interest of the child**

One of the new complexities is undoubtedly related the problem of who is in charge of the task of determining the content of the best interest of the child. It is an old issue, yet it presents new facets. A dynamic shift of trends is in progress. There are new protagonists. Noteworthily, some of them tend to be overshadowed by the more evident and traditional actors. Therefore their impact on the shaping of the “best interest” formula is frequently left by the wayside. If these new events are not made visible, we actually risk a lack of transparency concerning the process of determination of the rights of children.

The determination of the best interest formula occurs today at several levels. Not only does this happen at the small domestic horizon of the everyday matters. (Incidentally, every day matters are nowadays quite complex because of the broken families and the State emerging as a new protagonist in family relations). It also occurs at the level of the international, national and local law, since law makers have the attribution to distribute the powers between the State and the parents in the different aspects of the life of the children. Sometimes even, the distribution of powers attributes the children the capacity to make decisions concerning their own good, or even, as John Eekelar once put it, the liberty to

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\(^1\) In January 2010, Prof. Malaurie gave a speech in the University of Lyon, dedicated to the evolution of Civil Law in the first ten years of this century. This speech was later published under the title “Les dix premières années de notre siècle et le droit civil”, *La semaine juridique*, 12-04-2010, n° 15, Lexis Nexis, pp. 427.


\(^18\) I draw the common idea of the new complex horizon of family relations specifically from Craig LIND’s analysis in “Regulating for Responsibility in an Age of Complex Families”, in BRIDGEMAN, Jo, KEATING, Heather, LIND, Craig, *Responsibility, Law and the Family*, Ashgate, 2008, Hampshire, pp. 269. This study deals with the factual changes in family relations. We shall add to his idea of complexity many issues, such as the incidence of the monitoring of children’s rights (soft law), globalization, pluralism, self-determination and autonomy amongst other. Complexities involve not only societal changes, but political and theoretical ones.
make their own mistakes\textsuperscript{19}. The distribution of powers is now highly complex, because the determination of children’s rights have become less immediate. Sometimes it is virtual or even produced at a symbolic level. Let us have a closer look at these assertions.

\textbf{a) Every day matters: the vanishing role of parenthood}

In the first place, traditionally legal scholars thought that parents would be the best suited to determine the interest of their children. This view can still be found in the text of the Convention, even if it was assuaged since the original ten principles of the Declaration of 1959. In the second half of the 20\textsuperscript{th} Century, families underwent a progressive destabilization and fragmentation\textsuperscript{20}. Some scholars blame the proliferation of no-fault divorce laws\textsuperscript{21}. Some said that the trivialization of the meaning of marriage was to blame.\textsuperscript{22}. Due to the fact of broken marriages in a ratio from 2:1, and the steady augmentation of de facto cohabitations, the so called “natural environment” of an intact family for the children is increasingly rare\textsuperscript{23}. Malfunctions in the parental role multiply. Adults have to rebuild their life after the rupture of a couple. Thus, the attention they draw to themselves is expectedly deducted from the one due to their children\textsuperscript{24}. No wonder that the most relevant

\textsuperscript{19} “Children will now have, in wider measure than ever before, that most dangerous but most precious of the rights: the right to make their own mistakes”, in EEEKELAR, John, “The emergence of Children’s Rights”, Oxford Journal of Legal Studies, Vol. 6, Nº 2 (Summer, 1986), p. 182.

\textsuperscript{20} This phenomenon is a globalized one. A similar experience is described in French, American, English and Spanish sociologic and juridical literature. As a short illustration of this point: DE SINGLY, François, Sociologie de la Famille Contemporaine, Paris, 1993, Ed. Nathan Université. Recently, the analysis of Elizabeth ROUDINESCO, La famille en désordre, Fayard, 2002. The fragmentation of the family is the main topic of many books in English literature; some of them have been already cited. From a sociological point of view: TISCHLER, Henry L., Introduction to Sociology, Belmont, 2010, Wadsworth. In Spanish literature: A deep analysis in NAVARRO- VALLS, Rafael, Matrimonio y Derecho, Madrid, 1995, Ed. Tecnos. Recently, the many writings of Encarna ROCA i TRIAS. Describing the Argentine family: TORRADO, Susana, Historia de la Familia en la Argentina Moderna, Buenos Aires, 2003, Ed. La Flor. Recently, in the meeting convened by the Academy for the Study of the Jurisprudence of the Famiy and the University of Malta, Richard Wilkins presented us with a broad picture about the fragilization of the family in the most diverse countries.


\textsuperscript{22} WHITEHEAD, Barbara D., The divorce culture..., vide supra. WAITE, Linda, GALLAGHER, Maggie, The case for marriage, New York, 2000, Random House. NAVARRO-VALLS, Matrimonio y derecho... cf. supra.

\textsuperscript{23} See note 20.

\textsuperscript{24} WALLERSTEIN, Judith S., LEWIS, Julia M. And BLAKESLEE, Sandra, The Unexpected Legacy of Divorce. The 25 Years Landmark Study. New York, 2000, Hyperion. There are numerous converging studies (Amato, Hetherington, etc. We have studied these issues in BASSET, Ursula C., “El supremo interés del niño y el derecho al divorcio”, Diario Jurídico El Derecho, (Buenos Aires) 9.05.2008, with abundant bibliography).
studies from diverse countries show that children of intact families compared to their peers of de facto unions or broken families do generally better. If it is a so called “bad divorce” children tend to do much worse. They are usually torn into pieces by the strained relations of their parents. Studies conclude there is no such thing as a “good divorce”. Divorce has created a new factual category: children of divorce are handicapped compared to those of intact families, as convergent studies proof. For children, the best would be that their parents solved their differences and sustained marriage.

No surprise that the actual literature looks upon parents with some distrust. Family law scholars have called attention on the fact that the family is under surveillance. Parental functions are no longer viewed as exclusive. They have been classified in areas. Some of these still remain exclusive. Others are shared with the child, the State, a private institution or other adults. Some of them are now exclusive domain of the State or the child, the parents being barred from them. By way of illustration: sexual and reproductive education (and the moral guidance emerging from them) has been expropriated in most countries from the parents by the State. Religious education is in process of seizure: some States have decided to monopolize this area imparting laicism (which is, incidentally, a Weltanschauung, just as the great religions are, since it provides with a universal narrative of human existence). In some countries, home schooling is forbidden. Legal

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26 Ibid.


28 WALLERSTEIN, LEWIS and BLAKESLEE. MARQUARDT, as cited above. WAITE and GALLAGHER, as cited above, pp. 141 and ff.


30 « La famille moderne est ainsi sous surveillance...Pour Émile Durkheim, l’État remplace les parents de conjoints et l’environnement plus immédiat de la famille pour son contrôle. L’État...a soutenu, au contraire, l’action des hygienistes, des médecins, des psychologues, des travailleurs sociaux, des assistantes sociales, des thérapeutes conjugaux, des médiateurs familiaux –la liste s’allonge sans cesse...”, François de SINGLY, Sociologie de la Famille Contemporaine, Nathan Université, Paris 1995; p. 9.

31 View for instance, Article 5 CRC

32 Argentina has made an interpretive declaration to the Art. 24 of the CRC, stating the rights of the parents to decide what education to give concerning the reproductive health and moral and sexual education of their children. This interpretive declaration, as well as the CRC are part of our National Constitution, that is, our supreme law. Nevertheless, nearly all Provinces of our Country have passed ordering children of any age to receive sexual education at school and to ask for medical advice without the knowledge of their parents.


34 We are looking forward to the publication of the paper presented by the Spanish professor Carmen GARCIMARTÍN, in the Symposium on “Parenting and Culture” convened by the Academy for the Study of the Jurisprudence on the Family and the Pontifical University of Buenos Aires, in April 2011 about this issues.
representation might be autonomous; the natural representation of the parents is vanishing. We just learned that in the latest draft of the Constitution of Venezuela, parental rights would be apparently shared with the State\textsuperscript{35}. We had traces of this disassembling of parental rights already in the new additions to the Convention by comparison to the Declaration\textsuperscript{36}, even when parental rights were maintained in important matters\textsuperscript{37}. The latest developments in legal doctrine have played up this conception. Some authors have even coined the idea of a virtual disappearance of parental rights\textsuperscript{38}. Parents would have only responsibilities\textsuperscript{39}. The idea of parental rights would correspond with the awkward vision of the child as a property of their parents.

The new constellations of family relations have brought up a shift concerning parenthood. The very idea of common exercise of parenthood by mother and father, as a sort of replica of what happened in intact families is vanishing. If we lack a model of family life, any analogy turns unthinkable. Parenthood is disintegrating. First, we turn our eyes to stepparents. But there could be several. So, parenthood (or a resemblance of it) could be temporary and dependent of the affective bonds of adults. The idea is not even new. Actually, when a child was abandoned by his parents, some strangers took sometimes a temporary care of the child. But this is not the case. That temporary care came by accident or tragedy; this new temporary care is premeditated, frequent and is a part of our paradigms concerning parenthood.

The laws concerning the determination of parenthood and affiliation in the case of ART are again groundbreaking. If we can fraction the identity of the child in portions, we can then conceive several parenthoods. A child can have a genetic, phenotypic and social mother. Three mothers all at once, if there is an egg-donor different from the surrogate mother; and

\textsuperscript{35} The official News Agency of Venezuela has demented this, but the draft is circulating in the net. See: http://www.avn.info.ve/node/66524

\textsuperscript{36} Cynthia Price COHEN pointed out the new sets of rights concerning civil.-political rights and rights of ‘individual personality’ of children. (COHEN, Cynthia P., “The Relevance of Theories of Natural Law and Legal Positivism” in FREEMAN, VEERMAN, cit. The ideologies of Children Rights…, pp. 62-66). Article 14 poses an example, since it was extremely controversial. Upon their ratification certain Islamic countries, including Algeria, Bangladesh, Brunei Darussalam, Iraq, Jordan, the Maldives, Morocco, Oman, the Syrian Arab Republic and the United Arab Emirates have entered either a declaration or a reservation, in the sense that this article will not be interpreted as granting the child the right to freedom of choice of religion or belief. Other States like Poland and the Holy See, have entered declarations to the effect that a child’s right to freedom of religion shall be exercised in the respect of parental autonomy. (DETRICK, Sharon, A commentary on the United Nations Convention on the Rights of the Child..., cit pp. 248-249). Similar things could be said on behalf of Article 15 and 16.

\textsuperscript{37} Article 18 CRC, is a clear example of respect towards parental rights of guidance.

\textsuperscript{38} This idea is joked about by Andrew BAINHAM, who intelligently formulates the following title to a recent contribution of his: “Is there anything left of parental rights?” (in PROBERT, Rebecca, GILMORE, Stephen and HERRING, Jonathan, Responsible Parents and Parental Responsibility, pp. 23-42).

\textsuperscript{39} As it is underlined by Helen REECE, the original purpose in the use of the expression “parental responsibilities” was only meant to be ‘largely a change of nomenclature’ and ‘would make little difference in substance’ (“The Degradation of Parental Responsibility”, in PROBERT, GILMORE, HERRING, Responsible Parents and Parental Responsibility, id. p. 87). The first ones to distrust the nominalist theories concerning the wording of legal instruments are their very proponents. The changes of the wording have always a precise purpose.
those two differ from the one who decides to raise the child. If we admit these kinds of affiliations, why would we deny any other? The scope of parenthood has been broadened and its limits are blurred.

The breaking of families raises the issue of the care of children when the parents for whatever reason are not suited, but are yet able to play any role in the life of children. New analogies to parenthood are now examined. What is the role of grandparents? Should they have any rights? But then, it does not stop at blood bonds. What role does a committed neighbour play? What does the idea of “significant adult” play? Is it not a shift from traditional images of parenthood?

In sum, if we had previously a centripetal conception of parenthood, based on the so called “natural environment” of a married couple; now there are disparaging constellations lacking any resemblance with natural models. If there was some atavism in children bound to search for a father and a mother as a secure basis of development, with these new familiar structures the child would be probably unable to construe them.

b) Determination by legal scholars?

Half a century ago, the theories of Philippe Ariès made a great fortune. They were probably determinant of the conception of childhood that governed the last decades of family law. They were the principal source for the cliché of the child as an object of parental rights. Now these theories have been widely controverted because of the new evidence that was found about parenting in the Middle Ages. Maybe it will not be long until we realize that that interpretation stemmed from an anachronism concerning the structure of parental rights. There is a confusion mixing up present rhetoric about children rights, with the organization of society in former generations and the way parental rights were conceived. It is a hermeneutic fallacy. Then again, if past times had been really as bad as some authors try to convey, it would be hard to explain why youngsters grown up in the frame of our modern legal systems show such alarming degrees of violence, loneliness, have retarded their maturation, and have such difficulties to build committed and lasting relationships. Luckily, we can see signs of a drawback from stereotypes.

In any case, it is an undoubted fact that legal doctrine has a profound impact on the attainment of children’s rights. The theories developed under the impression that traditional models should be suspected of some obscure pursue to treat the children as a commodity to adult’s interests, had a large impact on the willingness to recognize parental rights concerning children. The infatuation on children rights had his dangers. Even if there is no

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40 MARQUARDT, Elizabeth, My Daddy’s Name is Donor: A New Study of Young Adults Conceived through Sperm Donation, http://familyscholars.org/my-daddys-name-is-donor-2/ (Last consulted: 2011/31/07).


doubt that the child is entitled to as much rights as an adult, the truth is that he must be granted a special set of rights concerning his vulnerability. The oblivion of the frailty of children turns them weaker. Liberalism is tricky when the vulnerable are concerned.

This was merely a witness sample of the point we are trying to make. There is an incommensurable responsibility in research about children rights. Legal scholars have the power to tailor them.

c) **Soft Law: the unseen backstage for the (re-?) formulation of rights**

Returning to the main argument, we would fall short if we confined our reflection to the day-to-day matters. The legal policies on children’s rights are of major importance in defining indirectly the meaning of the best interest. Children rights are defined every time a delegate from our Countries presents a report to the UN Committee on the Rights of the Child. Many of those reports are not known to citizens until they are published in the site of the Committee. If these should be one-sided or not based sufficiently on the evidence science provides, these lack of information would impact on the shape of children rights. It has to be borne in mind that the content of the reports shapes ultimately the recommendations the Committee makes to each State party. These recommendations ultimately would redefine policy goals in the concerned State. The transcendence of the reports, even if less evident, is enormous. It has a direct bearing on agendas related to children’s rights and specific directives concerning soft law on children rights.

Only the fact that they are not conveniently disclosed before their presentation to be discussed openly, triggers controversies. These reports are sources of determination of the best interest, therefore they should be brought up in daylight and disputed among the academic community of every State party. One could also ask if parents should not eventually have their say in these reports, since the shape of their relationship with their children would be involved by the outcome of the reports. Furthermore, for the sake of confronting the rhetoric on children’s rights, shouldn’t children be heard, since it is stated that in all matters concerning their rights their opinion should be taken into consideration?

In fact, it is quite surprising not to find reports expressing concern about the globalized phenomena of fragmentation of families and its negative impact on children. The reports rarely contain other issues than the status of socioeconomic rights (which is, though, deeply influenced by family structure) and reproductive rights.

It is difficult to assess which comes first in the order of causality: whether the reports or the recommendations by the UN Committee. There is probably a circular causality, but the main burden probably lies in the performative recommendations of the Committee. They set an agenda by setting the frame of the reports.

In addition, the contents of the recommendations are somewhat homogeneous, which stands out if we think about the variety of cultures concerned. Great importance is usually accorded to socioeconomic and individualistic rights. Relationship rights and the incidence of family life are hardly monitored. Sometimes they refer to family reunion or to the enactment of laws against international abduction of children. But they do not go any further. Remarkably, subjects of great consequence as the situation of families in the State parties are omitted. This is puzzling. As a result, soft law produced by monitoring committees avoids any collision with the autonomy of adults in order to configure their own life styles. Even when those autonomous decisions take their toll on children, who
suffer the consequences of these “adultocentric” choices (of adults involved and of indulging institutions). This occurs not only when dealing with relationship rights or family life, but also in the shaping of socioeconomic and reproductive rights. It is as if some rights of adults had a sacred halo: they are untouchable. Even if children are concerned.

Another controversial topic, to which major importance is allocated as we have already seen, is the so called reproductive health right, which includes access to abortion. For instance, they formulated observations to Argentina, because it has not widened enough the permissibility of abortion\textsuperscript{44}. This sounds contradictory, at least for those countries that have decided to protect every human life, whatever its development stage. Some state parties made explicit interpretive declarations in order to broaden the scope of article 1, so as to comprise unborn children\textsuperscript{45}. This is the case for Argentina, Ecuador, Guatemala and the Holy See. Even if such a declaration upon the Convention was not made, birth is irrelevant to the Convention on the Rights of the Child, and this is stated not only in the ninth paragraph, but also in the Art. 2, as a category suspected of discrimination. This contradiction has to do with a plain opposition concerning supposed rights of choice from a child-mother and the right to live of his unborn child. Probably the most contradictory issue here is that concerning abortion, the case law has stated that the Gillick standard does not apply when abortion is concerned\textsuperscript{46}. This is not only the case in English law. Parents can override the decision of a competent child, and decide an abortion against his will. This is what some have called the “absolute power of the already born”\textsuperscript{47}. Powerful adults already being able of autonomous agency could decide what are the boundaries of the rights of the unborn, totally dependent on them. Two categories of children are being created: the drawing line is the circumstance of birth. None of them is to be found in the texts of the Convention or any other Human Rights Treaty.

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\textsuperscript{44} CRC/C/ARG/CO/3-4, 11 June 2010, COMMITTEE ON THE RIGHTS OF THE CHILD, Fifty-fourth Session, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION, Concluding Observations of the Committee on the Rights of the Child Argentina

\textsuperscript{45} Argentina, for instance, has made an interpretive declaration to Article 1, stating that: Concerning article 1 of the Convention, the Argentine Republic declares that the article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of eighteen. Ecuador stated "In signing the Convention on the Rights of the Child, Ecuador reaffirms . . . [that it is] especially pleased with the ninth preambular paragraph of the draft Convention, which pointed to the need to protect the unborn child, and believed that that paragraph should be borne in mind in interpreting all the articles of the Convention, particularly article 24." Guatemala stated: "The State of Guatemala is signing this Convention out of a humanitarian desire to strengthen the ideas on which the Convention is based, and because it is an instrument which seeks to institutionalize, at the global level, specific norms for the protection of children, who, not being legally of age, must be under the guardianship of the family, society and the State. With reference to article 1 of the Convention, and with the aim of giving legal definition to its signing of the Convention, the Government of Guatemala declares that article 3 of its Political Constitution establishes that: "The State guarantees and protects human life from the time of its conception, as well as the integrity and security of the individual." The Holy See declared: "The Holy See recognizes that the Convention represents an enactment of principles previously adopted by the United Nations, and once effective as a ratified instrument, will safeguard the rights of the child before as well as after birth, as expressly affirmed in the 'Declaration of the Rights of the Child' [Res. 136 (XIV)] and restated in the ninth preambular paragraph of the Convention. The Holy See remains confident that the ninth preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted, in conformity with article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969."

\textsuperscript{46} FORTIN, Jane, Children’s Rights and the Developing Law, Cambridge University Press, 2003, p. 133

\textsuperscript{47} RHONHEIMER, Martin, Etica de la procreación, Rialp, 2004, Madrid, pp. 175 and ff.
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These are only some of the various issues prompted by the hidden power of definition of best interest of the child stemming from the relation between State parties and monitoring committees. Now we turn to some interesting aspects of internal policies.

\textbf{d) State policies: the unperceived power of the laws and jurisprudence tacitly implying children}

We could apply this line of reasoning analogically to the laws and policies by every State. Policies about children’s right forge an image of childhood and family life. The allocation of rights and powers designed by a State law may imply deep symbolic changes in the moral and juridical paradigms concerning children. This happens not only when the legislations is directly addressed to children’s rights. Perhaps, much more significantly precisely when it does not address them.

For instance, the regulation of marriage has implicated children as an end of marriage since we have collective memory of its meaning. By regulating same sex marriage we banish children from the concept of marriage. The ends of marriage are redefined and children are excluded from them. Marriage is now about the mutual affection related with a hedonistic approach, rather than the traditional altruistic conception of marriage, in which children were treasured. The symbolic exile of children from marriage has undoubtedly deep societal implications.

Another illustration of this, are the rules to establish parenthood in artificial procreation. It is said that the procreative will is enough to determine parenthood. And that sperm donors only intend to give genetic material, not to procreate, and should therefore not be burdened with parental responsibility. These may imply that some parents (the so called “genetic parents”) are dispensed from parental responsibility. Firstly, the juridical acts are qualified by their object and their ends, not by their intention. Intention can alleviate or aggravate the sanction, but not modify the object of the act. The object and the ends of donating sperm is to conceive. Granting some parents to escape parental responsibility merely because they do not intend to have it, is very odd indeed. It creates two categories of children. Children conceived by natural means have the right to sue their parents if they do not assume parental obligations towards them. Children conceived by artificial means are denied that right.

We could go on to think about the regulation of de facto cohabitations. Should they be encouraged or not? What is the best environment for children? The regulation of economic relations between spouses, or after the breakdown, and so forth.

In Argentina, we are discussing the reform of our Civil Code. The greatest concern is to potentiate autonomy of adults. Divorce should be simplified and made easy, the duty of

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\textsuperscript{49} We examined these issues when we had to confront the Argentine Parliament when the same sex marriage bill was debated. Our expert testimony was later published. See BASSET, Ursula C., “Estudio sobre algunos aspectos relativos al reclamo de reforma en torno al matrimonio”, \textit{Jurisprudencia Argentina}, Doctrina, 2010/08/04 (Buenos Aires, Thomson Reuters)

fidelity could be excluded by mutual agreement between the spouses, among other novelties strongly tied with same sex marriage. We have seen how divorce hurts children, we know how adultery hurts the faith of children, and we know how dependent children could be from their parents. Yet, the idea is to forget these facts (and the children involved) and legislate taking great care in preserving the autonomy of adults.

We have proclaimed in loud voices the end of parental rights in order to empower children’s autonomy and personality rights. However, children are more silenced than ever by law and legal doctrine. We speak about children, but we first make adults rights sure.


At this point, we cannot avoid recalling the figure of Alessandro Baratta (1933-2002), the leftist Italian professor, who made his whole career in Germany. He said that children were excluded from the social pact of the Modern world. For him, the fight for the recognition of equality for children is not tied with the recognition of their differences with adults, quite the other way round: every time that differences between adults and children have been underlined, children lost rights. Thirdly, and most significantly, he held that the fight for children rights has ever since been conducted by adults and not by children. Hence adults had always the chance to put forward their own interests in the name of children. No wonder lawmakers privilege adult’s rights.

And then, there were the theories of the democratization of the family. Thinkers with opposed views like the British sociologist, Anthony Giddens (1938-) and Alessandro Baratta proposed to democratize the family as a way to grant children to be treated with equality. Children should be given as much autonomy as possible. The famous English precedent, the “Gillick case” pioneered this view. As long as the children can fully comprehend the meaning of their decision, they should decide for themselves. Of course, Gillick has a long history, and some spoke even of a retreat from the Gillick doctrine, conditioned as it was by several posterior case law. England has a rich and reasonable jurisprudence. Even with its limitations, Gillick is still an icon. The reasoning is aligned with the idea of the virtual disappearance of parental rights. Parents should have duties rather than rights; and children, rights without duties. Parents should absorb the duties of children, children would absorb the rights. The matrix of these ideas is once again


53 Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 (HL)


55 Impossible to outline here the rich evolution about the wordings and conceptions concerning the change introduced in several compared legislations, that simultaneously abhorred the ideas of rights stemming from parenthood and reformulated them into new phrases like “parental authority” or “parental responsibility”. See in general: PROBERT, Rebecca, GILMORE, Stephen and HERRING, Jonathan, Responsible Parents and Parental Responsibility, previously cited.

individualistic: A distortion of the idea of children being naturally social, and growing naturally in a stable family, which they need for their optimal development\textsuperscript{57}. The aversion against the natural care of parents lies hidden as a cliché.

There is a concern about the participation and the promotion of children in the definition of their best interests. Children should speak up. Reading this and other literature, one would be tempted to conclude that the paragraph nine of the Convention is perhaps misguided. It undervalues the abilities of children, stressing instead their need for special care because of their immaturity.

Then again, as we have grasped in the former paragraphs, children’s best interests are now more than ever a domain for adults. Even when they transfer the decision to children, this is always a choice of adults (and does not always have a beneficial impact on the wellbeing of children)\textsuperscript{58}. We might have changed the adults in charge of the decision. We might have chosen adults mostly estranged from the children they are deciding for. But, naturally, it is always adults. The decision to opt for virtual and abstract choices concerning the best interest instead of a mediation of the natural and cultural environment for children has probably widened the scope of theoretically elaborated decisions that do not always correspond with the effective wellness of children. They seem aseptic and neutral. Are they really so? The refined theoretical underpinning sometimes is contradictory with what would be the optimal scenario for the development of children.

Are the children any better off with these new perspectives? It is at least dubious\textsuperscript{59}.

\textbf{5. What is the nature of the formula of the best interest}

Usually family law scholars call the best interest formula indistinctly a standard or a principle. The discussion concerning the nature of the best interest’s formula is not irrelevant at all. As we pointed out, it is of main importance that we have a candid approach to this issue, otherwise we will shed a veil of ambiguity on every decision we make resting on it.

Traditional theories have held that principles are the counterpart of spontaneous human inclination\textsuperscript{60}. Those basic inclinations towards which every human being tends to, are actually the seed of happiness\textsuperscript{61}. In their inclinations, human beings could read the purposes of their existence. These inclinations are actually intelligible\textsuperscript{62}. In realizing those

\textsuperscript{57}Ibid. pp. 12-15.
\textsuperscript{59}Even when her views are not completely shared by this paper, Laura Purdy tried also to make the point of the contradiction between the wellbeing of children and the rhetorics about children rights. PURDY, Laura Martha, In their best interest? The case against equal rights for children, Cornell University Press, 1992
\textsuperscript{60}THOMAS AQUINAS, \textit{Summa Theologiae}, I-IIae, q. 94.
inclinations, they would be happy (or close to that). The basic spontaneous inclinations are to preserve life (one’s life, the life of others); the preservation of the species through the mutual attraction between man and woman, then prolonged in procreation and childrearing; and the life in society and the knowledge of the truth. These three basic inclinations assure men to preserve its species. Traditional political and legal theories have found that principles are mandates that only recognize these inclinations and coin them as a most general law. Therefore, these principles have to do with human nature itself, they humanize law. Even if men decided to change these principles by consensus, they would not succeed to do so (maybe nominally, but not really), objective. They lie in human nature, even if one cannot see them.

For these theories, principles and standards are very similar, and could even be analogous. But principles are of a higher nature and are as stable as human nature is. Standards could be even a demonstration of the principle in an important number of particular cases or they could even be concrete, tied to historical facts and therefore mutable.

On the contrary, for some legal philosophers, principles arise from consensus. In this way, they do not greatly differ from standards. The problem when these views are put into practice, is that they confine the problem of the best interest’s formula within the boundaries of subjectivity.

A similar problem occurs with the multicultural or communitarian approach to children’s rights. When children’s rights are subject to a determination so broad, that it could even redefine the content so as to adapt it to a contemporary social view, it then happens that the principles become rather descriptive, like a snapshot of social practices. This is dangerous as to the subsistence of the very idea of rights, it is vulnerable to manipulations, and it definitely denies the universality of human rights (v. gr. Children rights) circumscribing them to a certain culture or period of time.

These approaches to the rights of the children contradict the purpose of the International Treaties on Human Rights. To ensure the respect of those rights, International Committees were formed so as to have a periodical control on the State parties. In some cases, International Courts would open a supranational instance of control. Every subject of a State party could eventually present a claim against his State for violating the rights granted by the Treaties. Everything presented itself as a new Utopia. Humanity was flourishing again.

But human nature is weak, and every new power begets new temptations. Sometimes the best intentions are turned into the worse pretext. Human nature has an extraordinary power to turn the best into the worse, the best intention regarding children into the best convenience of adults.

63 THOMAS AQUINAS, ibid.
65 Ibid.
6. Three corollaries and an open end

The famous French psychoanalyst Françoise Doltó once referred to the effects of premature exposure of children to adult life. She claimed that when parents were absent in the development of children, the latter were exposed to a premature adulthood without having had the time to mature harmoniously in the protective nucleus of family. This premature adulthood of children usually came to pass in the case of the divorce of their parents. Children of divorce had to deal with issues that their peers of intact families would never have to. They spent more time on their own, having to make decisions that in intact families would have been made by their parents or with their advice. Eventually, they would have to conceal information of one parent from the other. Children who were exposed to this premature adult life, tended to be more immature when they had reached adulthood. These prematurity in children being on their own retarded maturation, quite the opposite as many would think. Children have a right to be children. And they have a right to live their childhood optimally.

Hence, all concerned with children rights should try to enforce the best model for the development of children. Should these models include limiting and shaping society to these ends, State parties have already obliged themselves to do so by signing the Convention on the Rights of the Child. There can be no compromises when children’s rights are at stake.

It could be objected that we are not to draw policies that limit privacy or liberty. But we already are! Every time we promote a model (even the libertarian one) we are affecting liberties. May be we should candidly confront ourselves with our priorities. Which liberties are we favouring in advantage of whom. If the discussion is about priorities, and tokenism is to be abandoned, then it might be the time to revisit some old-fashioned views. Strengthening families could breed a virtuous cycle: the cycle of familiar solidarity.

Finally, our open end. That leads us once again to the idyllic *Chants de terre et de ciel* from our composer Olivier Messiaen. In them, the little child –Pascal- had his childhood fully granted. He could “dance” with their parents as the composer describes it in one of the songs, because he was loved by both of them. But, most important, both of them being together provided a “secure base” for the development of children. Tragedy was not absent of family life(or the State, or even international monitoring committees). But fatality is quite different from a deliberate choice of adults to undermine the basics children need to grow up. In any case, family life was not closed to itself, but opened to spiritual life of their members. The little Pascal, an “Eastern-born” child, was granted his childhood fully. ¿Are our children, with our elaborated theories on family law and children’s right granted that much?

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68 The referred song is called “Danse du bébé pillule”