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The Right To be Treated Well: Towards the Recognition of a Greater Right in the Protection of Children

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I. Introduction

Twenty years after the passage of Convention on the Rights of the Child (CRC), children continue to be frequent victims of violence and maltreatment. Although substantial progress has been made to improve the strength of domestic institutions and create laws that favor pro-child policies and programs, nearly 1 billion children worldwide face some form of maltreatment annually (UNICEF, Hidden in Plain Sight – Statistical Analysis, 2014). Current international frameworks, namely the Convention on the Rights of the Child and its corresponding General Comments, offer a conceptual framework for child protection and State obligations that have pushed forward important reforms in many countries, strengthened child protection and promoted the rights contained within the CRC.

This article calls into question, however, whether the current international rights framework for child protection is adequate to ensure children's healthy development, or whether a new right is needed that would provide a legal basis for the construction of laws and policies that mandate children are treated well, and which would transcend the assumption that a child is protected or his or her well-being is ensured when there is no obvious detriment to that child. Recognizing the limitations and sometimes arbitrary way in which international concepts of child protection and the promotion of well-being are applied by the State, and also taking into the specific developmental needs of children based on social science research, this article argues that it may be time to recognize a new pro child right: *The Right of the Child to be Treated Well*.

Such a right is an acknowledgment that a higher standard of child treatment should be recognized in which acting in the best interest of the child or merely not acting at all, is not the same as an obligation to treat children well in accordance with current research into children's emotional and physical needs. (for example, Felix Lopez Sanchez, *Necesidades Infantiles: La Respuesta de la Familia, La Escuela y La Sociedad*). This article, building off a prior book chapter authored by Dubin and Martinez (2017) argues for the need to consider the codification or recognition of the Right of the Child to be Treated Well as a new legal standard underlying and empowering other rights within the CRC.

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II. Convention on the Rights of the Child: Is the Best Interest Principle Sufficient to Ensure Children are Treated Well?

Savitri Gooneskere (2007: 19) argues that despite the advances of implanting the CRC into country legislation, state practice, culture and other factors often influence interpretation and application of child rights “so as to legitimize arbitrary decision making.” In particular, he raises questions as to whether the principle of *Best Interest of the Child*, which may be argued to invalidate the need of a Right to be Treated Well, leaves too much open for interpretation, and “customs and practice that be considered contrary to the international law on child rights...are justified from a socio-cultural perspective (2007:19).”

To highlight the difficulty in applying the best interest standard to guarantee that children are treated well, in the case of *Baures v. Lewis* (167 N.J. 91, 770 A.2d 214 (N.J. 2001) in New Jersey, the Court had held that a custodial parent was able to relocate to another state if the move was in good faith and “not inimical to the child’s best interest.” This standard, which was overturned in 2017 in *Baures v Baures*, assumes that as long as there was no apparent detriment to the child, the move aligned with the best interest standard of the CRC. Sixteen years after this judgment, the Court reversed this ruling. Justice Patterson, writing for the Supreme Court of New Jersey, ruled that according to social science research, the omission of harm or detriment against the child should not automatically satisfy the best interest standard and has been since “called into question.” The judgment highlights the variability of the application of best interest and the tendency to interpret this principle as satisfied through omission or an assumption of non-detriment.

Emilio Garcia Mendez also offers a similar critique of the application of Best Interest, noting that, “the best interest principle has been frequently used solely to legitimate arbitrary and discretionary judicial and administrative decisions with the sole effective result of restricting and violating children’s rights.” While he goes on to acknowledge that this is an erroneous application of this this Right, he argues that a correct application would be ensuring “maximum possible fulfillment of rights and their minimum restrictions.” (UNICEF 108). And even where the Right to Best Interest is not concerned directly, what constitutes violence, maltreatment and well-being varies considerably from country to country. Michael Freeman points out that, “Because of different histories and cultural traditions as well as divergent ideologies, concepts, such as what constitutes abuse in different parts of the world var (page 5, Freeman).”

III. The Legal Basis of the Right to be Treated Well

The Right to be Treated Well finds support within the CRC and is a Right that could theoretically attach to other rights to provide impetus for policies and actuations by the State aligned with this common principle. According to General Comment 13 of the CRC concerning

the right of children to be free from violence, States have the obligation to “embrace the child’s physical, mental, spiritual, moral, psychological and social development” in order to achieve “optimal development.” General Comment 13 urges a shift away from the child merely as a victim of rights violations and instead focusing on “respect and promotion of human dignity and psychological integrity of children as rights-bearing individuals.”

The term “embrace,” though not explicitly defined, provides an entry point for the Right to be Treated Well to intersect with and support other articles of the CRC. By identifying priority areas of child development such as mental and physical development, and when understood through the lens of the Right to be Treated well, the legal obligation on the State provides a clearer marker of the legal mandate to push forward programs and policies that align with good treatment.

Further justification for this Right can be found in General Comment 14 of the CRC concerning the Right of Best Interest. This Comment strengthens the idea that States have an obligation to protect and care for children to achieve well-being and development, and make take positive measures to do so:

The term “protection and care” must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as “to protect the child from harm”), but rather in relation to the comprehensive ideal of ensuring the child’s well-being and development. Children’s well-being in a broad sense includes their basic material, physical and emotional needs, as well as needs for affection and safety.

The General Comment goes on to state that emotional care, physical safety, health and education form part of the obligation of the State to take pro-active steps to realize these and other rights for children. The Right to be Treated Well, if recognized, would have an undergirding effect by ensuring that the policy approaches taken by the State integrate this Right within all other rights seeking to be realized. In other words, this Right latches on to other rights of the child a to guarantee a minimum standard of treatment for children – the rights bearer - and actuation by the State in a way that aligns with current notions of children’s needs.

The Right to be Treated Well is supported by the policy approach pursued by UNICEF to begin a “transformation of the mindset of societies” regarding the treatment of children (UNICEF, *World Report*, 2015 page 6), recognizing the moral and ethical obligation of children and the special needs they have in their formative years. Furthermore, the Right to be Treated Well is an essential and logical component to ignite the possibility of realizing other rights in the CRC. Only once children are treated well can the right to “full and effective enjoyment of all the rights” be fully realized, a concept not dissimilar from Amartya Sen’s argument of achieving development by actively promoting freedoms and defeating unfreedom through public action by the State.

IV. What is the Right to be Treated Well?

The Right of Children to be Treated Well is not an arbitrary standard, but one grounded in the recognition that Children have particular needs that require special support. The famed Spanish Professor of Psychology, Dr. Felix Lopes Sanchez, argues that children need a “certain type of treatment, not whatever treatment.” And that they need “a certain type of care, not any type of care.” The Chilean Psychiatrist, Jorge Barudy Labrin, who has also written extensively on the concept of good treatment of children, argues that in each aspect of children’s lives: emotional, physical, and biological, children have specific and identifiable needs that require particular forms of pro-active attention and development. He goes on to argue that personality is linked to brain activity, and functioning and structure of the brain is linked to children’s modes of personal interaction and experiences. Much, he argues, depends on positive stimuli and the ability of children to receive and feel love and affection, construct their own identity in a safe space, and have their human rights respected. (<http://www.l-h.cat/gdocs/d4297859.pdf>). Because of these particularities, he argues, children require a form of treatment that contributes to their development needs.

The Right of the Child to be Treated Well attaches onto other rights contained in the CRC but is also its own independent right that obligates the State to undertake policies linked with positive treatment in line with current research. Dr. Barudy identifies certain parental outcomes that are often linked with the child being treated well, such as empathy and attachment. The question then for the States is how to bring its policies and programs in line with this obligation to ensure that budgeting and other decisions taken promulgate approaches and programs linked to identifiable outcomes associated with children being treated well

An example of how the Right of the Child to be Treated Well might be applied domestically can be found in the Spanish Autonomous Community of Aragon, Spain. The response to child protection by most Autonomous Communities in Spain has been articulated around one of two pillars. The first is through criminal laws and procedures, which by nature is punitive and reactive only when criminal acts occur. The other is through legislative action, which in Spain has led to a varying application of the CRC in different Communities, with some meeting CRC standards better than others. For instance, certain Communities, such as Galicia, Madrid and Murcia, have codified laws that recognize children as rights bearers and grants them the “right to adequate care by parents, guardians or foster parents...(Article 42c;. also Article 5.3 of the Law of Murcia; art 3-d of the Law of Madrid).”

The Law of Aragon, however, has gone further by passing a law (Article 9) on the Right of the Child to be Treated Well. The preamble reads as follows:

Children and adolescents are entitled to protection to ensure their full development as individuals within a family, preferably with their parents, parents or guardians represent the normal context of child development and are the first level of responsibility that must meet your needs using existing resources in society. The family environment is the level of immediate support to children and their parents.

The Law goes on to stipulate that, "Children and adolescents have the right to be treated well and be protected from any form of violence, threats, abuse, abandonment, neglect, theft, illicit transfer and kidnapping, labor, economic and sexual exploitation and against any form of ill-treatment." This Article obligates authorities to prevent abuse through institutional mechanisms and education and, "promote and coordinate comprehensive policies with different administrations in defense of the rights of children to ensure good treatment of children and adolescents."

The Right to be Treated Well in Aragon is treated as a transversal right and obligates the Community in all ambits to take an approach that aligns with this Right. For example, according to the Right, the Law extends through infancy and adolescence and requires a coordinated approach of all policies affecting children. In the education ambit, for example, the Community has the responsibility to foment participation of parents and make decisions that meet needs of students aligned with this Right (BO. Aragón 20 julio 2001). To make policy determinations, the Autonomous Community of Aragon began its Strategic Plan for Children by first determining the specific needs of children, such as emotional and social development, and school and family needs for different age groups. This approach was guided by the work of Dr. Jorge Barudy and cited in the Strategic Plan as "opening new doors" for addressing children's needs (Plan Integral de la Infancia 2010 – 2014). What differentiates this Right to be Treated Well plan from others is the bottom up approach it takes to determining policies. Unlike in many other countries, including in Spain, approaches are often top down and without first isolating specific needs of children to ensure not the avoidance of violence or maltreatment, but the support of the State in ensuring children and treated well.

V. Conclusion

The purpose of this short article is to suggest that the current children rights framework, while useful, could be improved by the inclusion of a transversal Right that places an obligation on States to develop pro-active policies that support children being treated well in all ambits, sectors and fields of their development. Recognizing the particularities of children's development and specific needs at different stages of their development, social science research lends support to this idea that an undergirding right such as the Right to be Treated Well, would be a positive step towards greater recognition of children's rights