

Best Interests of the Child's Status in the Iranian Legal System and the Precedent

Maryam Ghanizade Bafghi*

Abstract

Although the Convention on the Rights of the Child (CRC), which was ratified by the Iranian parliament in March 1994, had a paramount role in considering children's interests, the notion of the Best Interest of the Child (BIC) was not entered in the Iranian legal system by then. BIC is more recognized in the *Imamiah* jurisprudence which is the base of the legal system, as *Ghehta* which is a golden key in the decisions concern to the children. It seems that joining the convention and assigning Article 3 to the best interest of the child has promoted its usage and applications in the law and the precedent. Principle 21 of the Constitution, Articles 1041, 1169, 1184 of Civil Code, Articles 88, 354 of Islamic Penal Code and Articles 29, 41, 42, 43, 45 Family Protection Act are notable samples of this application. Besides, Family judges nowadays take decisions based on BIC more than before. However, the ambiguity of the BIC and diversity of the interpretations used by the courts have made malfunctions in the system and in some occasions have led to contradictory decisions in the same situations.

Here, in the first step, we are going to clear the BIC by reviewing Islamic scholar's views and determining the criteria by considering it in the growth levels. The second step will be BIC status in the Iranian Legal system and the precedent. This study showed that the fluidity of the BIC should not cause insufficiency and at least we need general criteria based on the growth levels.

Keywords: Best Interests of the Child, Criteria, Iranian Legal System, Judicial Cases.

Introduction

Best Interest of the Child's concept (BIC) was not born by CRC (1989) and we can observe its traces in Geneva Convention (1924)¹, Universal Declaration of Human Rights (1948), European Convention on Human Rights (1950), Supplementary Convention on the Abolition of Slavery (1956), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974) and The Convention on the Elimination of All Forms of Discrimination against Women (1979). However, article 3 of the CRC expressly introduces the notion as a special standard in a child's decision makings² in the frame of "a *Primary Consideration*". This standard by itself may solve many problems and be an effective help in day-to-day or the courts'

* Assistant Professor of Private Law, Faculty of Law and Political Sciences, Kharazmi University, Tehran, Iran Email: m.ghanizadebafghi@yahoo.com

¹ Humanity "owes to the Child the best that it has to give."

² Article 3: 1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. *States Parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

decisions. Although the CRC enjoys three special features (the broadest³, the fastest⁴, and the most comprehensive⁵ convention) it is BIC standard couldn't make harmony and unification about the decisions concern to the children as it was expected. The reason was the ambiguity of the concept and different interpretations in the same situations around the states' members; the authors of the convention whether knowingly and intentionally or carelessly didn't clarify the concept and practically let it to the hands of executors.

Iranian Legal system has joined the convention in February 1994 and according to article 9 of its Civil Code and parliament's enactment, now it is considered as domestic law in Iran. Moreover that in Imamiya jurisprudence although there is no specific chapter for the children, it is considered under different chapters such as marriage, divorce, custody, succession, etc. The concept of *Ghehta* is the nearest notion to the BIC which must be considered in any child-related decisions.⁶ However both concepts i.e. *Ghehta* and BIC are potential for the different interpretations which, as mentioned before, leads to the distraction of executors.⁷

A. Human Being in Islamic Point of Views

Before examining the concept of the child's best interests, we should examine the Islamic point of view on the human beings' aim, and on childhood as a period of his life and the subject of CRC and BIC. In analyzing human nature, Islamic scholars believe that he has two aspects; corporeal and non-corporeal. As a result, ignoring either of these aspects will cause problems in his path and in approaching his goals. In "corporeal aspect", the human is made from soil⁸ which on one hand shows special abilities for him in comparison with other creatures and on the other hand expresses his restrictions. The non-corporeal aspect, which is his unique feature, is not male or female (gender-free) and all humans possess it in common.⁹ Both of these are designed for the aim of achieving growth and perfection.

It should be mentioned that the human being, with his special nature, lives from the beginning moments of his creation in a place -the material world- that has its own related characteristics. Knowing these features will be helpful and effective in his way. Islamic scholars consider the most important features of this world as below:

- *Progressive revelation (Tadrij), Time and Place*; everything in this world has its time for becoming. In other words, things depend on time and place to be and happen.
- *Capacity*; all things in existence have their own capacity and means of progress, and related rights and responsibilities¹⁰.
- *Potential abilities and talents*.
- *Changes*; nothing will be fixed in this world and change is a permanent feature.
- *Balance*; every existence should have a balance between its internal and external aspects; otherwise, it cannot continue its life.
- *Due*; everything in this world has a special due date after which the intended result cannot be achievable.

Therefore, in specifying a human being's interests in each level of his or her life, especially childhood, these interests should be determined by considering a human's status and his goals. Paying attention to the interest of one side by ignoring the other cannot assist efforts to achieve his or her proper ends.

³ Only two countries have not joined the convention.

⁴ The convention came into force one year after its ratification.

⁵ The convention includes cultural, economic, social, civil, etc. rights.

⁶ For example, a child may marry based upon his father's permission, and the father is obliged to consider the child's interests in determining if permission is granted.

⁷ It should be mentioned here that in none of the jurisprudence texts, there is no reference to the 'best interests', only 'interests', although a comprehensive review of the texts shows that in determining interests, the 'best' always has priority.

⁸ Quran, Chapter 3-15-86, Verses 59-2-6.

⁹ Quran, Chapter 4, Verse 1.

¹⁰ Quran, Chapter 2, Verse 286.

B. Interests in the Islamic Scholars' View

I. Islamic Scholar's Views

In Islamic jurisprudence, 'interests' are called *Ghebta*, and most Islamic scholars believe that 'considering interests and losses' is the essence of Islamic legislation, and all of the rules and instructions of Sharia are based on paying special attention to the interests or rejecting losses¹¹.

But what is the meaning of the terms interest and loss? Different scholars have presented different explanations of interests. Some of them have considered it, literally, as the opposite of loss¹² and the loss as the cause of imbalance, so interests are a cause of stability and balance¹³. The author of *Al Tahghigh* states that interest means being pure in opinion, action, and creation, without any losses¹⁴. Some of them consider both worlds i.e. this world and the other world¹⁵ as the scope of interests, which are a rational and necessary utility that the Sharia obliges an individual to pursue, and will affect man's acts and omissions. In this regard, interests are things that include both aspects of human activities. Additionally, as the two world's interests are convergent, there is nothing in a human's interests which conflicts with the other world's goals. Finally, it depends on man's capacities, circumstances, and the main goal of the act or situation¹⁶. Generally, the word 'interests' has been used many times in Islamic jurisprudence and even can be claimed that its history is as long as the history of Islamic Jurisprudence itself. It is useful to mention that in the Sunni point of view, some of the scholars have designed five destinations for Sharia which is interpreted as the "Five Interests of the Sharia"¹⁷. In the Imamiye point of view, interest has been used more in the context of the Islamic government as a part of the governor's discretionary power, though this widespread application doesn't mean that 'interests' have not been used in other aspects. Family Law, especially child-related issues, is the areas where the concept of a person's 'interests' and it is different interpretations are relevant.

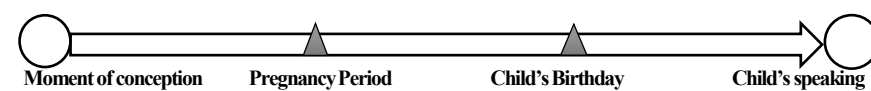
II. Human Being's Growth Level

One of the methods for determining a child's best interest is considering his/her growth levels. Probing the main Islamic sources shows that there is an accurate division on different parts of a human being's lifetime, each with different needs and requirements. Recognizing the capacities and related norms in each level is the best way of determining BIC. An individual's growth and development in this world inevitably occur gradually, through various stages. On this basis, human being's life is divided into three levels¹⁸.

The first level begins at the moment of conception, includes the pregnancy, and ends when the child starts speaking. The second level begins by speaking and ends when he reaches maturity. It is obvious that in this category, speech represents an important milestone.

The second level may be divided into two parts: the first, which has the same characteristics as the first level, and the second part, which resembles the third level. The third level encompasses the individual's reaching of full intellectual maturity and any subsequent period of senility.

First Level



¹¹ Shatebi, Abu Eshagh, *Al Movafeghat fi Ahkam al Osul*, Dar Ehya al Kotob al Arabia, 1997, p. 120.

¹² Ibn -e- Manzur, Mohammad, *Lesan al Arab*, Dar Ehya al Toras al Arabi, 1996, p. 115.

¹³ Ragheb Isfahani, Abulghasem Hussain ibn Mohammad, *Mo'jam Mofradat Alfaz al Quran*, Ismaelian, 1992, p. 126.

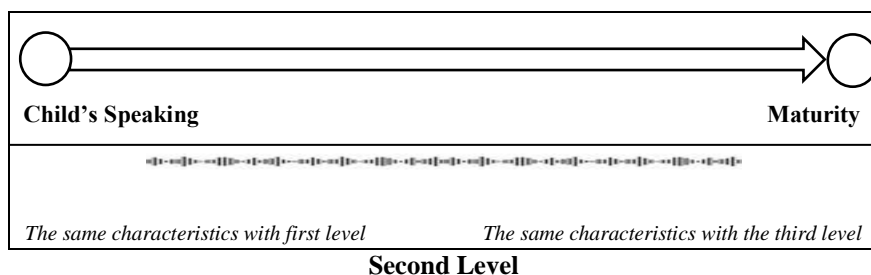
¹⁴ Mostafavi, Hasan, *al Tahghigh fi Kalamat al Quran al karim*, vol 6, Book Publisher, 1989, p. 360.

¹⁵ Najafi, Mohammad Hassan, *Javaher -al kalam fi sharhe Sharaye' al Islam*, vol. 22, Beirut, Dar al Ehya al toras al Arabi, 1992, p. 324.

¹⁶ Qoran and Etrat Student School of Tehran University, *Analyzing the Growth Process*, 2013, p. 131.

¹⁷ Shatebi, Abu Eshagh, *Al Movafeghat fi Ahkam al Osul*, Dar Ehya al Kotob al Arabia, 1997, p. 61.

¹⁸ Qomi, Abulghasem, *Ghavanin al Osul*, Vol 1, Dar al Kotob al Islamiya, 1983, p. 92.



It is clear that an individual's life has different stages in each of them there are capacities and goals that should be identified. Children are not excluded from this principle and his or her best interests are based on these capacities and targets.

C. Determining BIC According to the Growth Levels

I. First Level

The first level encompasses a mother's pregnancy. As one of the goals of this level is to deliver a physically and mentally healthy child, it is in the child's best interests that the mother is well-nourished, and not subject to any dangers or unnecessary stress. For example, according to the Islamic tradition of criminal law, if a pregnant mother is convicted of adultery, which has a harsh punishment in Islamic law, the punishment will be postponed till she delivers her baby as the punishment may threaten the child's life.

A child enters the world with *pure nature* and all of his needs should be met by maintaining it¹⁹. The first physical need after birth is nourishment that his mother can provide. Additionally, the mother's embrace and her emotional bonds with the child may provide a sense of security for him. Thus, the best interests of the child require the mother's presence during breastfeeding. In other words, at this level a child is totally dependent on his parents, especially the mother and other people such as relatives and family friends will affect the child via its parents. Thus, the child who is deprived of one or both parents will face irrecoverable damages. Therefore, this can be considered as another of the child's best interests.

The most important goal at this level is preparing a child to speak. In the Islamic perspective, the power of presenting internal thoughts is called "*Notgh*", and its means is *Kalam*. *Kalam* may emerge through words, posture, hints, and even gestures. There is coordination between *Notgh* and senses while the thing that a child listens, sees, smells, touches will register in his mind as a conception, and then these notions create *Kalam's* foundations. Therefore, the more senses are strengthened, the greater the speaking power (*Notgh*).

If we consider sense as the activator of *Kalam*, and in order to make a child's senses strong in terms of maintaining the purity of his nature, its environment, social contact with people, and their conduct, educations and words should be as proper as possible. At this stage, we know that a child is not mature enough to perceive the correct norms, so the norms should transfer from the environment to the child.

The best interest of the child requires a calm, healthy and sprightly environment which is not subject to violence in all its forms. The child should not experience inappropriate scenes such as parents' arguing or battery and assault. Furthermore, parents themselves, as the ones who have the most contact with the child, should be physically and mentally healthy and have love and respect in their mutual relations and the relations with the child. Therefore, growing up in a home with struggling parents is against BIC.

II. Second Level

This level, which is prior to reaching maturity, should be paid considerable attention because if the child cannot succeed at this level, he will face many problems in his adulthood. In this stage, the child is not as dependent as before but is not independent enough to be responsible and competent for all

¹⁹ Koleini, Mohammad inb-e-Ya'ghub, al Kafi, edit4, vol 5, Dar al Kotob al Islamiya, 2000, p. 342.

his affairs. Thus, in this period some of the duties are on his own while others should be done by parents, other social guardians or even the government. Moreover, at the beginning of this level, the child has more in common with the individual he was in this first stage of his development, while at the end of the level will be similar to his mature self.

The most important goal of this level is to prepare a child for life as an independent person who can be considered responsible for his actions. This is called "Affordability" in Islamic sources²⁰.

There are some sources that introduce requirements that have a determining role in affordability. They include activating the child's *thinking power, recognition, consultation, and politeness*. In other words, at this level, the child's capacities in these areas should be developed²¹.

D. BIC in the Laws and the Judicial Precedent

I. Laws

The Iranian legal system has contained BIC both in a direct and indirect manner. Indirect manner refers to the economic and familial policies, Developments Programs²², Citizen Rights' Charter, etc. and the direct manner refers to the Constitution (principle 21), Civil Code (Articles 104,1137,1169, 1184, 1240, 1241)²³, Islamic Penal Code (Articles 49, 88, 354), Criminal Procedure Code (71, 287, 523), Family Protection Act (29, 41,42,43,45), Protection of children and Teenagers without Guardian or with Inappropriate Guardian Act (Articles 5,6,14,15,20,22,23,26,31), Non-litigious Affairs Act (Articles 79, 80, 81). In all these mentioned laws, although BIC has enshrined and used frequently, there are no standards to clarify what the exact meaning is.

II. Precedents

Most of the Iranian judges in family and children litigations tend to follow the exact wording of the laws and sometimes they use psychologists and social workers' point of views. As the author surveyed in 2 judicial complexes, most of the cases in the family judicial complex are in custody ground and some of them are in adoption ground. Article 1169 of the Civil Code²⁴ is applied frequently but the BIC is not evaluated initially and separately as the judges believe that the article is in accordance with BIC, while it seems that it doesn't work always. For example in the case No. 9509970217, on 2017.01.09 the court firstly granted the custody of a thirteen year old boy to his father but after his mother's claim on the fragile and inappropriate relationship between the child and his father and considering child's views, the Appeal Court changed the previous decision and his mother was replaced.

In children and juveniles' criminal complex, the judges are more tend to create personality file and consider a child's views. But the problem is that as there are no standards for the BIC, the interpretations are really vast and various and there is a narrow following up for the delinquents. For example, in the case, No. 950407 on 2016.09.10, a juvenile who was accused for the assault and battery to a police officer, was condemned to pay 10 million *Rials*.

His personality file stated that *"he is the only child of the family and his parents got divorced in his childhood. The father then was died as the result of a drug overdose and the mother remarried afterward. Now she is living in another district. His aunt is the only guardian who herself has six children."*

²⁰ *Ibid.*

²¹ Okhovat, Ahmad Reza, *The Periods of Social Thinking's Growth*, vol. 2, Quran & Ahllobayt publisher, 2013, p. 104.

²² There are 6 development programs after the revolution (1979); They are enacted every 5 years in the parliament.

²³ The subjects are custody, guardianship, financial/ non-financial possesses, etc.

²⁴ Article 1169: *"for the custody of the child whose parents are living apart, the mother is entitled to 7 years old and after that priority is by the father."*
"After 7-year-old in the case of a claim, custody will grant according to the BIC and the court's diagnosis."

Social worker added in her report that “all the decisions should be taken according to his inappropriate economic, cultural, social and familial situations .Besides, he needs more education, social skills, religious information, calm atmosphere, and friends”, she said.

In this case, although the reasons for his action were precisely analyzed there was no following up.

Having no benchmark for the concept of BIC is the crucial problem that led to the plurality of the decisions in the same cases.

Conclusion

Nowadays BIC is an undeniable concept in all child-related affairs but the laws and even the precedent have not clarified the criteria. For finding a clue we considered human being's goal and on this basis put the lifeline in different levels. Each one has its own goal and BIC/*Ghebt*. Child's breastfeeding, avoiding abortion, preparing gentle atmosphere and guiding children indirectly, avoiding violation in all its forms, considering child and the mother's health, male circumcision, being with and recognizing child's family are some of the standards which should be considered in the first level of growth.

For the second level, a child should know about the way of his creating, his organ and their functions, being familiar with the concept of time and due, access to play as an important method of learning, activating different kind of thinking, presenting suitable information about the world and his surroundings and making them familiar with the notion of privacy, teaching teamwork activities, avoiding discriminations, not making them work which is not compatible with their capacity, connecting to the other members of the family such as grandparents and the siblings, etc. The above-mentioned standards are the general criteria and we should consider others based on the subject such as custody, adoption (*kefalah*), etc.

References

- Ibn -e- Manzur, Mohammad, Lisan al Arab, Dar Ehya al Toras al Arabi, 1996.
- Koleini, Mohammad inb-e-Ya'ghub, al Kafi, edit4, vol 5, Al Islamiye, 2000.
- Mostafavi, Hasan, al Tahghigh fi Kalamat al Quran al karim, vol 6, Book Publisher, 1989.
- Najafi, Mohammad Hassan, Javaher -al kalam fi sharhe Sharaye' al Islam, vol 22, Beirut, Dar al Ehya al toras al Arabi, 1992.
- Okhovat, Ahmad Reza, The Periods of Social Thinking's Growth, vol 2, Quran & Ahlolbayt publisher, 2013.
- Qomi, Abulghasem, Ghavanin al Osul, Vol 1, Dar al Kotob al Islamiya, 1983.
- Qoran and Etrat Student School of Tehran University, Analyzing the Growth Process, 2013.
- Ragheb Isfahani, Abulghasem Hussain ibn Mohammad, Mo'jam Mofradat Alfaz al Quran, Ismaelian, 1992.
- Shatebi, Abu Eshagh, Al Movafeghat fi Ahkam al Osul, Dar Ehya al Kotob al Arabia, 1997.