



2026

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Recommended Citation

Dalmia, Anshul (2026) "Invisible, Manipulated, and Politicised: Rethinking the Conceptual Foundations of the UN Convention on the Rights of the Child," *National Law School of India Review*: Vol. 37: Iss. 1, Article 3.

DOI: 10.55496/FFKA1868

Available at: <https://repository.nls.ac.in/nlsir/vol37/iss1/3>

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INVISIBLE, MANIPULATED, AND POLITICISED: RETHINKING THE CONCEPTUAL FOUNDATIONS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD

*Anshul Dalmia**

Abstract: *This paper examines whether the rights articulated in the United Nations Convention on the Rights of the Child ('UNCRC') can be meaningfully assimilated within the broader framework of international human rights. It locates this inquiry within enduring jurisprudential debates on the nature, justification, and enforceability of children's rights. While international human rights law presumes a relatively stable rights-bearing subject, children occupy an ambivalent position—simultaneously recognised as rights-holders and as dependents mediated through an adult authority. Drawing on Tobin's critique, which cautions against the dangers of conceptual indeterminacy, the paper argues that the UNCRC exemplifies these risks. It contends that the Convention's normative appeal masks a deeper theoretical fragility, allowing it to function as a flexible and, at times, manipulable legal instrument. The paper proceeds by closely analysing the UNCRC's text, structure, and drafting history to demonstrate how this fragility manifests in practice. First, it argues that the Convention rests on an undertheorised conception of children's rights, lacking a coherent account of their basis and content. This results in a malleable framework that permits inconsistent interpretation across jurisdictions, thereby undermining the determinacy expected of international law. Second, the paper highlights the adult-centric character of the UNCRC, showing how the absence of meaningful child participation enables the imposition of external values and priorities onto children's rights. This structural imbalance facilitates the use of rights discourse to advance particular ideological or policy agendas. Third, it examines the effects of this indeterminacy, demonstrating how broadly framed concepts such as dignity and best interests invite subjective interpretation, while also reflecting the influence of Western liberal thought and its attendant political assumptions. Accordingly, the paper suggests that a more rigorous theoretical grounding, alongside a genuinely inclusive approach to articulating children's rights, is essential for the UNCRC to function as a stable and legitimate cornerstone of international children's rights law.*

I. INTRODUCTION

Children's rights have been widely contested jurisprudentially. Questions such as: 'What is the nature of these rights?', 'What is the theory behind giving them rights?', 'Who will enforce it for them?', and 'Can these rights be similar to international human rights?' have been the

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source of such debate. This paper seeks to evaluate the last question in the context of the UNCRC. In doing so, it aims to shed some light on the earlier three questions. Tobin's observations provide a useful lens that connects these questions and informs this broader inquiry. He states:

*In the absence of a secure conceptual foundation, children's rights risk becoming invisible to, or rejected by, those for whom they are not self-evident. They also become vulnerable to conscious or unconscious manipulation by those who wish to use them as a rhetorical device by which to advance a subjective vision of what children's right should mean ... A right for which there is no recognised conceptual foundation quickly risks becoming an empty rhetorical vessel into which subjective preferences or political agendas may be poured.*¹

While Tobin's critique is broad and in the context of children's rights generally, this paper examines the method and manner through which these concerns contextually materialise within the UN Convention on the Rights of the Child ('UNCRC'). Through this paper, I aim to move from the realm of philosophical justifications and jurisprudential arguments to a more specific investigation into the international legal instrument on children's rights. Particularly, I analyse the provisions and history of the UNCRC to demonstrate how Tobin's concerns materialise within it. I argue that the UNCRC lacks a secure conceptual foundation, thereby allowing subjective visions and manipulative agendas to shape its content.

In Part I of the paper, I examine whether the UNCRC rests on an insecure theorisation of children's rights, resulting in an incoherent and therefore vulnerable conceptual framework. This supports Tobin's first criticism: that the absence of a clear conceptual understanding of children's rights renders them susceptible to rejection. I argue that there exists a lack of collective theorisation which makes the content of the rights malleable in the hands of the global community, including ratifying states, scholars, and courts. This poses a serious threat to consistency and determinacy, two indispensable features of an international legal instrument.

In Part II, I examine the role of adults in shaping the understanding of children's rights in the absence of children's participation. This supports Tobin's second criticism that children's

¹ John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 411.

rights can be co-opted to serve individual agendas. By highlighting the role of adults in the drafting of the UNCRC, I argue that the UNCRC has become vulnerable to manipulation as it fails to accommodate varied notions of childhood and children's rights.

Finally, in Part III, I examine the effect of the under-theorisation of rights in the UNCRC. This has led to rights being manifested in vague dimensions—subsequently leading to the inclusion of subjective preferences. Additionally, I evaluate the Westernisation of the UNCRC, highlighting the political underpinnings of both its origin and text. This supports Tobin's third criticism that children's rights run the risk of being unrecognised through further subjectivity and politicisation.

II. UNDERTHEORISATION IN THE UNCRC: A STRUCTURAL MALADY

A. Examining the Absence

I contend that there is a lack of a secure conceptual foundation of children's rights in the UNCRC. This can be traced to the drafting history of the UNCRC. The drafting process relied solely on legal and political justifications for the inclusion of rights, i.e., on the need to have legitimate standards against which governmental measures could be evaluated.² The jurisprudential foundation, specific principles, or moral theory underlying these rights were neither prioritised nor agreed upon. This was mainly because the identity of rights was deemed relatively less important than their philosophical foundations, considering the mounting threat of children's deaths due to malnutrition and diseases.³

Therefore, while there was general consensus that rights needed to be provided, there was no conclusion on the philosophical reasons behind providing those rights, revealing a wide dissonance. Moreover, unlike other international instruments that are signed due to an agreement on the origin of the rights, the UNCRC was ratified on the belief that the international standing of the states would be improved.⁴ Thus, there was an absence of a secure foundation to the theorisation of rights. The pressing need for such a theorisation of rights is explored below in Part I(b).

² James Griffin, *On Human Rights* (OUP 2009) 203.

³ Geraldine Van-Bueren, *The International Law on the Rights of the Child* (Leiden 1995) 6.

⁴ See Generally Vanessa Pupavac, *Theories of Conflict and Children's Rights* (1997).

It becomes imperative to respond to the possible advantages of an under-theorised international agreement vis-à-vis the UNCRC. Adopting Sunstein's 'incompletely theorised argument' doctrine, it could be stated that there exists no concrete reason to establish a conceptual foundation within an international instrument. Sunstein generally posits that certain agreements are drafted to accommodate a pluralistic universe without an adherence to a particular theory.⁵ Since securing consensus on every provision would be extremely difficult, he argues that agreement should instead be sought on a broad universal framework while permitting minor local variations.⁶ Extending such logic to the UNCRC, it could be argued that this Convention should not be seen as an exhaustive end but rather an illustrative beginning.⁷ Further, using Sunstein's 'mid-level principles',⁸ which means an acceptance of general theory but a rejection of its specific manifestation, the importance of a secure conceptual foundation must be questioned. Ultimately, the result here was successfully achieved, i.e., states were able to agree on the provision of the rights. Thus, one could arguably make the claim that the absence of a foundation here is irrelevant as regardless of the means, the end was secured.

In response, I argue that mere provision of rights is not adequate. It is imperative that rights are tethered to a secure theory to enhance the legitimacy of children's rights. I test this hypothesis in the next section by showcasing the corollary, i.e., what an absence of theorisation can result in. I acknowledge that several contesting theories of children's rights under the UNCRC have been postulated such as will theory and similarity theory, among others. I aim to employ these theories merely as examples to demonstrate the importance of theorisation, while refraining from examining the foundations of the theory itself.

B. Establishing the Need

The problems underlying non-theorisation are evident in certain provisions of the UNCRC. The under-theorisation leads to a conflict between competing theories and emphasises the need to have a single unifying theory. I use Article 1 as the foremost example since it clearly demonstrates an under-theorised provision. Article 1 of the UNCRC defines a child as every human being below the age of eighteen, unless the domestic law allows the age of majority to

⁵ Cass Sunstein, 'Incompletely Theorized Agreements', (1995) 108(7) Harvard Law Review 1748.

⁶ *ibid.*

⁷ Judith Ennew, 'Outside Childhood: Street Children's rights' in B Franklin (ed), *The Handbook of Children's Rights: Comparative Practice* (Routledge, 2001) 202.

⁸ Sunstein (n 5) 1739.

be lower. The States were thus in agreement on the concept of childhood but did not theorise the boundaries of when childhood began or ended. This was left open-ended.

This definitional open-endedness leads to the possible consideration of two conflicting theories, i.e., the will theory and the social interest theory of rights. Under the will theory, in order to have a right, there must exist a capacity to enforce and exercise rights.⁹ Since States are the avenue where rights will be exercised, they have the power to influence the definition. However, this theory causes several problems. According to Herring, if such theorisation was accepted, it would deny rights to the most vulnerable members of the society who may not have the capacity to enforce their rights by themselves.¹⁰ Moreover, it does not protect the intrinsic qualities of childhood such as the ability to risk, wonder, and be innocent.¹¹ In comparison, the ‘social interest theory’ states that even if children may not have the capacity to enforce, it is in their interests to have rights.¹² Such a theory additionally highlights the obligations of the duty-bearer to fulfil those rights.

Using these conceptualisations, I contend that the absence of concrete theorisation leads to incoherent results which are likely to cause confusion and inconsistency. If the will theory was used as a basis, it would not lead to a successful achievement of rights. The theory is extremely selective, since it bases the provision of rights on the competency of children and thereby excludes several right-holders who do not fit this paradigm. However, a social interest theory would provide a universal application of rights irrespective of any age leading to a wider application. Hence, a different theory can have a severe impact on the applicability and eligibility of rights itself. Since the means are so significantly linked to the end, an insecure conceptual foundation would lead to rights being both rejected and not guaranteed.

Another rights theory (which for the purposes of the paper, we may refer to as the ‘similarity theory’) highlights that rights in the UNCRC are provided to children since they are similar to humans.¹³ Children are on the pathway to being humans and must be treated similarly. Article

⁹ John Eekelaar, ‘The Importance of Thinking That Children Have rights’ (1992) 6 *International Journal of Law, Policy and the Family* 221-235.

¹⁰ Jonathan Herring, ‘Vulnerability and Children's Rights’ (2023) 36 *International Journal of Semiotics of Law* 1509.

¹¹ Anca Gheaus, ‘The “Intrinsic Good of Childhood” and the Just Society’ in A Bagattini and CM Macleod (eds), *The Nature of Children's Well-Being: Theory and Practice* (Springer 2015) 35–42

¹² John Tobin, ‘Justifying Children's Rights’ (2013) 21 *International Journal of Children's Rights* 409.

¹³ Eekelaar (n 9).

2 involves the principle of non-discrimination while Article 14 mandates the State to respect the child's right to religion. Both these rights are human rights which are provided to children by virtue of them being on the path of 'becoming' adults.¹⁴ This theory finds further support from Eekelaar's concept of communal identity¹⁵ which formulates identity as an individual's identification with other individuals, herein the child's association with adults. Eekelaar's theory is being employed specifically since it depicts a unique predisposition—rights which are singularly provided but the identification of the content of the right is generally undertaken from the surrounding community. This theory equips us to highlight the following benefits of theorisation by contextualising rights such as those of religion and culture which similarly are rights provided to children but identified through families and parents.

In the backdrop of the similarity theory, Herring argues that children are essentially humans and are agents in their own right.¹⁶ Such an understanding ensures that *first*, rights with theoretical basis not only recognise the respect owed to right-holders under the law, but also act as a precondition for the right-holders to exercise some agency. For instance, Dixon and Nussbaum state that rights must be theorised to allow children to possess rights by virtue of their inherent capabilities.¹⁷ Additionally, Federle mentions how theorisation of rights will lead to true empowerment as it would allow right-holders to secure recognition and claim remedies.¹⁸ Hence, *second*, theorisation enables the empowerment of right-holders by providing security to a child's fundamental entitlements. Freeman argues that neglecting the foundational element has compromised the origin of rights, thereby jeopardising their legitimacy.¹⁹ If the reason behind providing a right is known, it is likely to be followed. For example, Archard states that children are on the pathway to becoming an adult which makes them eligible to be right-holders.²⁰ Therefore, clear theorisation underscoring the eligibility of

¹⁴ David Archard & John Tobin, 'The Definition of a Child', in J. Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019).

¹⁵ John Eekelaar, 'Family Law and Identity', (2018) 38(4) *Oxford Journal of Legal Studies* 822-840.

¹⁶ Herring (n 10).

¹⁷ Rosalind Dixon & Martha Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) 97 *Cornell Law Review* 549-594.

¹⁸ KH Federle, 'Looking ahead: An Empowerment Perspective on the Rights of Children' (1995) 68 *Temple Law Review* 1585-1605.

¹⁹ Michael Freeman, *The Rights and Wrongs of Children* (Pinter 1983) chapter 3.

²⁰ David Archard, *Children: Rights and Childhood* (Routledge 2015) chapters 2-3.

rights makes it highly unlikely that those rights would be ignored either by the Courts or the society.²¹ Hence, *third*, theorisation reposes faith and trust in the existence of children's rights.

Thus, I argue that the absence of theorisation can cause severe detriment: it can lead to conflicting theories being used to justify the varied content of the rights. The above-mentioned characteristics highlight the advantages of a secure conceptual foundation that grounds rights and provides clarity and consistency. Hence, in the wide doughnut of children's rights, there exists a conceptual hole.

In the above part, I have examined the absence of a conceptual foundation in the UNCRC, highlighted the need to have a concrete theorisation, and showcased the risks of the rights getting rejected in light of its features and advantages. Accordingly, I assert that Tobin's first criticism is justified in the context of the UNCRC.

II. CHILDREN'S RIGHTS: THROUGH THE 'ADULT' LENS

I argue that children's rights in the UNCRC have become vulnerable to manipulation by adults who want to advance an adult-driven meaning and understanding. The reasons are further explored in detail as follows.

First, while the rights are for children, they have been conceived on notions of childhood developed by adults.²² Several contesting theories such as the will theory or similarity theory, as highlighted above, have led to an adult-centred construction. This construction, either in the provision or subsequent implementation, does not recognise children as inherent right-holders. Thus, the conception of childhood itself becomes distorted.

Second, the rights which are provided are formulated and perceived through adults' perspectives. Article 3 is the perfect example. Article 3 states that in all actions concerning children, their 'best interests' must be a primary consideration. While it is ideal that children's perceptions of their 'best interests' are considered, it is usually the adults (i.e., through the courts, government, or the community) who determine what would constitute such 'best interests'. This principle is vague and therefore creates scope for manipulation. If we take one of the many instances—primarily rooted in medical treatment and custody cases—in *Re T*

²¹ *R (Williamson) v. Secretary of State* [2005] 2 FLR 374.

²² Tobin (n 12) 413.

(*Wardship: Medical Treatment*), it was seen that the ‘best interests’ of the child were effectively transformed to mean ‘better interests’ for the parent.²³ Eekelaar has further claimed that rather than providing the best interests to the child which might be completely detrimental to adults, children’s rights must be moulded to provide them fewer benefits, while simultaneously satisfying parents with some more interests.²⁴ While General Comment Number 14 unequivocally states that ‘an adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention’, it does not envision the child as a decision-maker in any capacity. Moreover, Kilkelly argues that the Comment incorporates a ‘weak standard’ vis-à-vis best interests since it considers the presence of ‘the child’s views, the child’s identity, maintaining family relations, the child’s protection and care, education and health’, which might be subjective and open-ended elements.²⁵ Thus, while the ‘best interests’ right is provided to children, it is decided by the adults using their limited vision of rights.

Third, children were involved neither in the drafting nor in the negotiations of the UNCRC, indicating a complete marginalisation of children’s voices.²⁶ This inconsistency is accentuated by Article 12 which provides the limited right to a child to have their views considered and heard in matters affecting them. Article 12(1), at the outset, clearly states that the right to participate and express freely is only extended to those children who are ‘capable of forming his or her own views’. Hart argued that this would allow only the participation of children of a certain age.²⁷ While there might be periodic and effective consultations which might be taking place, the limiting definition and text have the potential to be restrictive. Thus, the UNCRC provides a limited right to be heard coupled with the historical absence of children’s participation in the drafting process.

²³ *Re T (Wardship: Medical Treatment)* [1997] 1 All E.R. 906; *Re G* [2012] EWCA Civ 1233; Sally Jones, ‘The Ascertainable Wishes and Feelings of the Child’ (1992) 2 *Journal of Child Law* 181; J Eekelaar, ‘The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children’ (2015) 23 *International Journal of Children’s Rights* 3-26.

²⁴ John Eekelaar, ‘Beyond the Welfare Principle’ (2002) 14 *Child and Family Law Quarterly* 237-250.

²⁵ Kilkelly U. The best interests of the child: A gateway to children’s rights? In: Sutherland EE, Macfarlane LB, editors. *Implementing Article 3 of the United Convention on the Rights of the Child: Best Interests, Welfare and Well-Being*. Cambridge: Cambridge University Press; 2016

²⁶ Tobin (n 12) 413.

²⁷ Roger Hart, ‘Introduction and meaning of children’s participation’ in Catherine Rutgers, (ed) *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, International Debate Education Association Press, 2011.

On the contrary, it has been contended that children as a class are heterogeneous and have intersectional identities and diverse interests making it logistically difficult to include children's voices.²⁸ Moreover, young children may lack the ability, intellectual capacity, or even interest to participate. This could arguably lead to only adolescents' views being represented (if they are included in the process), thereby still skewing representation.²⁹ Further, it is extremely difficult to construct a conception of childhood in a vacuum without the relational approach to adults and communities which provide children with a sense of comfort and belonging.³⁰ While it is an unfortunate reality that adults will continue to decide children's rights and best interests, I do not completely object to their inclusion. Instead, what I claim is that there will always be a semblance of prejudice, bias, and stereotype involved in decision-making. However, this should not be treated as the ideal standard.

A legal remedy fashioned along the lines of Eekelaar's idea of dynamic self-determinism³¹ incorporated within General Comment Number 14 could be the panacea to this malady. Dynamic self-determinism allows the child to grow up in a secure environment where they can make independent decisions while being subject to external optimal revisions.³² This would involve providing space for a child to develop their personality, organically understand their interests and take decisions for themselves. Eekelaar places the concept of dynamic self-determinism within the UNCRC to reduce adult manipulation by instead enabling and encouraging every child in a diverse background to develop within their culture since dynamic self-determinism 'provides them a space' to reach their 'own mode of fulfilment'.³³

Thus, it is highlighted that the non-theorisation of rights made the UNCRC vulnerable to manipulation, by leaving space open for adults to advance their own notions of childhood and children's rights. Hence, Tobin's second criticism is justified to a considerable extent vis-à-vis the UNCRC.

III. Subjectivity and Politicisation: Two Sides of the Same Coin

²⁸ Karl Hanson & Noam Peleg, 'Waiting for Children's Rights Theory' (2020) 28 International Journal of Children's Rights 22.

²⁹ Tobin (n 12) 414.

³⁰ Jonathan Herring, 'Farewell Welfare?' (2005) 27(2) Journal of Social Welfare and Family Law 159-171.

³¹ John Eekelaar, 'The Interests of The Child and The Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law, Policy and the Family 42-61.

³² *ibid* 47-48.

³³ *ibid* 58.

A. Evaluating Subjective Preferences

Non-recognition of a conceptual foundation has significantly contributed to the involvement of vague and malleable preferences in the UNCRC. I depict this through three leitmotifs woven into the tapestry of the UNCRC – the usage of dignity, natural law, and morality.

First, the absence of theorisation has enabled ‘dignity’ to operate as a potential basis of rights. McCrudden stated that dignity was the driving force during the founding of the UN and the negotiations of its formation, and thus immensely contributed to the foundation of international rights.³⁴ Eglantyne Jebb, who wrote the Geneva Declaration of the Rights of the Child (later adopted by the League of Nations), attributed the Declaration’s origination to children’s vulnerability and dignity that warranted greater respect.³⁵ Dignity depends on attributing unique worth or special value during its use as a justificatory foundation. Thus, it risks becoming selective by potentially excluding younger children who lack self-governance. To the contrary, Archard argues that the concept of dignity implies that every child, due to their unique value and special character, should be provided rights despite being relatively vulnerable.³⁶ Tobin additionally highlights that ‘dignity’ is incompletely theorised since it is both coextensive (in the terms discussed above) and also forms the source of the rights itself (as highlighted by the Preamble of the UNCRC which states that rights are guaranteed recognising the inherent dignity of humans).³⁷

I contend that dignity is discretionary as it places emphasis on the uniqueness of children by denying rights to children who might not be able to govern themselves. Moreover, dignity as a basis for rights is extremely subjective since it makes the form and content of the rights malleable, thereby providing a lot of flexibility to States to re-define the rights or whimsically choose the rights-holders. Dignity as a concept is ambiguous since the underlying value of the theory lies in ‘moral commitment’,³⁸ which poses a definitional nightmare intersecting

³⁴ Christopher McCrudden, 'Human Dignity and The Judicial Interpretation of Human Rights', (2008) 19(4) *European Journal of International Law* 679; Jürgen Habermas, 'The Concept of Human Dignity and The Realistic Utopia of Human Rights', (2010) 41(4) *Meta Philosophy* 474.

³⁵ S Robinson, 'Children's rights: Historic developments' in Catherine Rutgers (ed) *Creating a World Fit for Children: Understanding the UN Convention on the Rights of the Child*, International Debate Education Association, 2011.

³⁶ David Archard, *Children: Rights and Childhood* (Routledge, 2004).

³⁷ Tobin (n 12) 407.

³⁸ Doris Schroeder, 'Dignity: One, Two, Three, Four, Five, Still Counting' (2010) 19(1) *Cambridge Quarterly Healthcare Ethics* 118-125.

contested subjects of philosophy, morality and the law. Thus, the absence of a recognised foundation has led to the ‘subjective’ theory of dignity being ‘preferred’.

Second, I argue that the lack of a theoretical foundation has led to the basis of rights being founded on natural law. The Preamble of the UNCRC states that inalienable rights are the basis of the Convention. This addition can be traced to the post-World War II period where it was a political strategy to provide rights to affirm the sanctity of an individual rather than enforcing the will of the sovereign.³⁹ Thus, there was a shift in this period which demanded that rights were provided to humans due to their inherent nature of being.⁴⁰ I contend that basing children’s rights on naturalist foundations makes the provision extremely subjective as it does not recognise the tussle between the dynamicity of childhood and essentialism. Essentialism, by its nature, means providing rights due to someone being essentially human. This is based on a universal conception of what it means to be a human and rewards particular features of such a majority-driven notion. For example, the UNCRC recognises a ‘white male’ notion of a child,⁴¹ which could be altered to provide for girl children, ethnic children, or queer children. This inherent behaviour enables the introduction of subjectivity, since conceptions of children might be changed by either the drafters or the States, leading to aberrations within rights. Hence, such naturalist tendencies are preferred when a conceptual foundation is not recognised.

Third, the non-recognition of a conceptual foundation for children’s rights has led to the involvement of a private unstructured sense of ‘morality’. Article 27 provides for a right to a standard of living that is adequate for their development. Article 32 additionally provides the right to not be exploited by harmful work. These rights are based on the assumption that children have special needs and hence deserve protection.⁴² Archard has classified rights that emanate from vulnerable needs as ‘moral rights’.⁴³ Dwyer emphasised the importance of providing a moral status to children since it leads to providing equal weight to children’s rights

³⁹ Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons, 1950) 112.

⁴⁰ Amartya Sen, 'Elements of a Theory of Human Rights', (2004) 32(4) *Philosophy and Public Affairs* 316.

⁴¹ Michael Freeman, 'Children’s Rights as Human Rights: Reading the UNCRC' in J Qvortrup, WA Corsaro, and M-S Honig (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave-Macmillan 2009) 388.

⁴² David Archard & Colin Macleod, *The Moral and Political Status of Children* (OUP 2002).

⁴³ Manfred Liebel, *Children's Rights from Below: Cross-Cultural Perspectives (Studies in Childhood and Youth)* (2012) chapter 3.

and prevents them from being discriminated.⁴⁴ Hence, morality is seen as fundamental to the theorisation of UNCRC-based rights.

I argue that such a morality-based theorisation enables subjectivity and discretionary behaviour. Morality allows people and decision-makers to amend rights based on their own vague notions of morality. Basing rights on a constantly altering platform does not provide a secure, uniform conceptual foundation. For instance, morality once classified children to be 'objects' of their parents.⁴⁵ Over time, morality also dictated that children be seen as individual agents, providing them a plethora of autonomous protections.⁴⁶ Moreover, now parents' rights have been classified as moral rights by virtue of the goods they inculcate in children.⁴⁷ Thus, pillars of rights must not be based on a shaky foundation such as morality that is infused with subjectivity.

Hence, dignity, natural law, and morality have been used as preferences, and therefore have become instruments to further subjectivity amongst children's rights.

B. Highlighting Political Agendas

The lack of a theoretical basis for children's rights in the UNCRC has led to the gap being filled by political agendas fuelled by Western countries.⁴⁸

Firstly, not every country was represented in the drafting process of the UNCRC.⁴⁹ While they were invited, every country did not have the resources to meaningfully participate. The presence of limited participation by itself does not demonstrate a political inclination. However, as argued by Pupavac, the drafting history and treaty dynamics depict a darker picture.⁵⁰ UNCRC was drafted in the backdrop of the completed industrialisation of Europe and North America when modernisation led to children being phased out of the adult

⁴⁴ JG Dwyer, *Moral Status and Human Life: The Case for Children's Superiority* (Cambridge 2011) 9-14.

⁴⁵ Tobin (n 12) 410.

⁴⁶ Tobin (n 12) 396.

⁴⁷ Harry Brighouse and Adam Swift, 'The Goods of Parenting' in Baylis and McLeod (eds), *Family-Making: Contemporary Ethical Challenges* (OUP 2014) 11-28.

⁴⁸ Elizabeth Faulkner & Conrad Nyamutata, 'The Decolonisation of Children's Rights and the Colonial Contours of the Convention on the Rights of the Child' (2020) 28 *International Journal of Children's Rights* 66.

⁴⁹ John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) *Human Rights Law Review* 378-386.

⁵⁰ Vanessa Pupavac, 'The Infantilisation of the South and the UN Convention on the Rights of the Child' (1998) 3(2) *Human Rights Law Review* 1-6.

workforce, relieving them of adult responsibilities and pressing the need for childhood to be a time for education and play. The UNCRC was seen to not represent a shared experience of childhood, leading to the alternative formation of the African Charter on the Rights and Welfare of the Child. For instance, the UNCRC allows for adolescents under the age of 18 to be recruited in direct hostilities as enshrined in Art 38. This does not address the unique children's rights issue in Africa—wherein hostilities are too regular and common for children to be routinely recruited. The UNCRC also fails to prohibit child marriage—a common issue in several Global South countries.

Secondly, rights in the UNCRC are based on a Western concept of childhood. Rather than recognising that children from developing countries are faced with poverty which might require them to work, the UNCRC provides children with a right to play, i.e., childhood is a time to play free from responsibilities,⁵¹ as embodied in Article 31. However, the UNCRC prevents the children from working under Article 32. It could be counter-argued that several developing countries provide the right to play,⁵² and that the UNCRC is not against children working, but rather against economic 'exploitation'.⁵³ However, I argue that while the Convention might not be dominated by Western ideas, it clearly privileges them. Traditional cultural practices solely associated with the Global South are punished. For instance, in the UNCRC's concluding observations, the Committee has upheld that arranged marriages, adoption practices, and Islamic traditions are harmful to children.⁵⁴ These practices lack a proven record of being detrimental to children's rights. However, proven harmful practices in the Western countries such as corporal punishment or sexualisation of adolescents have surprisingly not been held to be harmful by the UNCRC.⁵⁵

On the contrary, it can be argued that the UNCRC is vigilant about not usurping cultural identity.⁵⁶ Article 29 provides that education should be directed to respect children's cultural identity. Article 30 enshrines children's right to enjoy their language and culture. Article 31

⁵¹ Vanessa Pupavac, 'The Infantilisation of the South and the UN Convention on the Rights of the Child' (1998) 3(2) Human Rights Law Review 1-6.

⁵² Naomi Lott, *The Right of the Child to Play: From Conception to Implementation* (Routledge, 2023) 121-130.

⁵³ Tobin (n 12) 421.

⁵⁴ Sonia Harris-Short, 'Listening to the other? The Convention on the Rights of the Child', (2001) 2(2) Melbourne Journal of International Law 304-350.

⁵⁵ David Kennedy, 'The International Human Rights Movement: Part of The Problem?' (2002) 15 Harvard Human Rights Journal 108-109.

⁵⁶ Berry Mayall, 'The Sociology of Childhood in Relation to Children's Rights' (2000) 8(3) International Journal of Children's Rights 245.

recognises the right to fully participate in their cultural life, and Article 17 mandates the circulation of cultural materials. I, however, contend that the UNCRC propagates an essentialist construction of culture which limits its true inclusion. For instance, Article 5 accepts cultural rights only to the extent recognised by legal custom. It is designed to provide cultural rights only if it is consistent with the evolving capacities of the child. Thus, these conditions restrict true cultural inclusion.

Hence, Tobin's third criticism is accurate to a great extent, as the non-recognition of a conceptual foundation has led to the empty vessel of children's rights being poured with subjective preferences and political strategies.

IV. CONCLUSION

To conclude, I have highlighted that Tobin's criticisms take concrete shape when we closely view the UNCRC, ranging from its drafting to the provisions of the Convention. In Part I, I highlighted how the absence of a conceptual foundation demonstrates the need for a theoretical basis and showcased the imperative features in the absence of which children's rights might likely be rejected or invisibilised. In my analysis, I used legal theories, *albeit* contested, of the UNCRC to justify the first criticism coupled with cross-cutting themes related to communal identity, human rights, and alternative accounts of childhood. In Part II, I evaluated the vulnerability of children's rights to manipulation by adults, who might impose their own meaning and vision. I referred to a cross-section of diverse topics such as parental rights, children's welfare, and the nature of childhood interspersed with UNCRC provisions to affirm the second criticism. Lastly, in Part III, I analysed the inclusion of subjective preferences such as dignity, inalienability vis-à-vis natural law, and morality.

Additionally, I deconstruct the Western colonial notion, showcasing the involvement of political agendas. Here, I have relied heavily on the UNCRC along with varied subjects such as the status of children, nature of parenthood, and children's rights theory to corroborate the third criticism. The UNCRC, which is an international instrument establishing a basic structure for children's rights, must be a true voice of global consensus. Hence, I agree that Tobin's critique can be logically extended to a fair and well-substantiated criticism of the UNCRC.