

BEST INTEREST PRINCIPLE: A CENTRAL FEATURE OF FAMILY LAW

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Abstract

The welfare of a minor has been taken as his/her material, intellectual, moral and spiritual well being. There are a variety of views, some of which may be contradictory, on what constitutes 'welfare of the minor'. 'Welfare' is considered a question of fact to be resolved on consideration of the material evidence placed before the court and not on any presumption. At the same time there is the presumption on the part of the court that the welfare of the minor invariably lies with the mother. International law recognized the principle of 'Best Interest of the Child' in 1925. The principle can be seen in the first international instrument dealing with children's rights namely the Declaration of the Rights of the Child, 1959. Although the phrase is not used specifically in the International Covenant on Civil and Political Rights, the Human Right Committee has nevertheless referred in two of its general comments, to the paramount interest of the children, in cases involving the dissolution of marriage. The best interest principle has also been included in instruments of decisions of regional human rights bodies. As has been frequently observed, although the question is views from the child's best interest, the answer is frequently given from an adult perspective. The concept of the best interest of the child, however, needs to be more than 'raw judicial intuition', only in areas relating to custody and guardianship as society relies upon law and international law to provide objectivity and an element of predictability.

In this Research Article, the international and comparative laws and the major case laws relating to custody, Guardianship of children during family break-up, juvenile justice legislation, the role of juvenile courts, family courts and children's courts and the principles if interpretation of the Best interest of the child and the welfare of the child various countries are discussed. This is a very significant extension of the principle which was initially used only in divorce or custody cases. Thus there, was a need to examine, evaluate, review and reform all the legal processes including substantive, procedural and case laws in the best interest of the child in the Indian context. Where judicial discretion is exercised, there is often an absence of child-centered focus in legal proceedings. Given both the growing importance of the principle and our obligations under international law, there was a need for this study. In this study, the concept of the best interest of the child has been regarded as a modern and a progressive

formulation of the paramount principle of welfare and care of the child as the ultimate objective of both these concepts is to provide justice to the child.

Keywords: Best interest of the child, Custody, Guardianship, Jurisdictional problem, Paramount consideration, Victim

1 Introduction

The best interest principle has been a central feature in family law at the national level of various countries like U.K., France, Zimbabwe, India, United States and Canada. Today it is part of international law. Prior to the twentieth century, in the British common law, the concept of the rights of the child was entirely alien.² Instead it accorded strong recognition to the ‘superior parental right’ of a man in a family unit created within marriage, and was more concerned with safeguarding his parental rights than the interests of children.³

In the eighteenth century, in the English Common Law, the term children’s right was not so popular. Children were regarded as chattels of the family and wards of the state with no recognized political character or power and very few legal rights. Blackstone wrote little about children’s rights, instead stressed the duties owed by them to their fathers.⁴ Early American courts also accepted this view.⁵

1.1 The Best Interest Principle in Various Legal Systems

Gradually, the law evolved in the direction of greater sympathy towards a rather limited notion of children’s rights. Using equitable rules, the court of Chancery was able to intervene on behalf of the Crown to make the child a ward of the Court or enforce orders, relating to his or her education.⁶ These developments in equity led to the formulation

² . Alston, P. Gilmour, B- Walsh. *The Best interest of the child – towards a Synthesis of Children’s Rights and Cultural Values*- (Unicef: Innocent Studies, 1996) , p.43

³ . Goonesekere. S. The Best Interest of the Child: A South Asian Perspective, in Alston (ed)., *The Best Interest of the Child: Reconciling Culture and Human Rights* (1994) , p. 119.

⁴ Blackstone. Commentaries on the Laws of England, Volume1, 18th ed. (London : A Strahen and W. Word fall for T. Caddle 1700-1795)

⁵ . See. E.g James Kent, *Commentaries on American Law*, vol 1, 14thed.(Boston: Little Brown , O.WHolmese. d 1873) See Section 43of the Australian Family law Act.

⁶ *Id.*, p.119

and application of the best interest principle and gradually produced a corresponding change in the principles of common law so that by the beginning of the twentieth century, the common law had come to treat the principles as a 'paramount consideration' in custody disputes.⁷

The Guardianship of Infants Act of 1925

This Act provided that in making a decision relating to the custody and upbringing of children's; the courts should make the child's welfare, "the first and paramount consideration". During the time of the British Empire, laws were enacted expressly incorporating some form of the welfare principle into the laws of numerous colonies.⁸

The Guardians and Wards Act, 1890

This British colonial statute continues to be the basic law on guardianship in India, Bangladesh and Pakistan. It is through this guardianship law that the concept of the child 'welfare' first entered the legal systems of various countries.

In another British Colony, Zimbabwe, the best interest principle also applies concerning custody guardianship matters. The courts make a decision relating to the custody of children in a situation of marital dissolution by taking into account that the paramount consideration must be the welfare of the children concerned.⁹

In French law also the development of children's rights and the implementation of the principle of the best interest of the child were part of a gradual process. It was not until the nineteenth century, that laws were implemented to protect the child. The development of children's rights and the implementation of the principle of the best interest of the child were part of a gradual process. It was not until the nineteenth century, that laws were implemented to protect the child. The view prevailed at that time was that in the event of a divorce, custody of children should be granted to the person obtaining the divorce "unless the court order's to the best advantages of the children, that all or some of them shall be entrusted to the care of wither the other spouse or a third party."¹⁰ The French law further evolved after the Second World War, with legislation relating to family law becoming increasingly child-centric.¹¹

⁷ . *Id.*, p 120

⁸ Alston P. and Gilmour-B., Walsh. *The Best Interest of the Child-Towards a synthesis of Children's Rights and Cultural Values*-(Unicef. Innocenti Studies, 1996)

⁹*Ibid.*

¹⁰Rubelin-Devech. J., "The best Interest Principle in French Law and Practice", In Alston (ed), *The Best Interest of child; Reconciling Culture and Human Rights*; 1994 pp. 259-80.

Australian Family Law Act

A set of principles applies to those courts exercising jurisdiction under the Act. The courts shall have regard to the need for protecting the rights of children and to promote their welfare, inter alia the requirement to have regard to the child's welfare.¹² In the New eland, Guardianship Act, 1968 the welfare of the child is the first and paramount consideration.¹³ Today in England and Wales, the child's welfare is the court's paramount consideration in determining any question concerning the upbringing of a child or the administration of a child's property or the application of any income arising from it.¹⁴

Thus it is clear that it was in the form of the welfare of the child or welfare being paramount consideration that the principle of the best interest of the child initially emerged.

1.2 The Best Interest Principle In Indian Laws

As in several countries, in India also, the welfare principle or the best interest principle is found in family law especially the law relating to custody and guardianship of the minor.

The term guardianship refers not only to actual care and control over the person as well as the property of the child but also the right to decide about its future. Custody on the other hand in its narrow sense includes only actual care and control though in the wide sense it may be created at par with guardianship. In the Indian context, guardianship and custody are bifurcated i.e. the guardianship may vest in one person and actual care and control may be transferred to the other.

The personal law of Hindus, Muslims, Parsees and Christians lays down principles relating to the guardianship and custody of a child. Hindus are governed by the Hindu Minority and Guardianship Act, 1956 (HMGA). Others are governed by the Guardians and Wards Act, 1890 or by personal law. The Guardians and Wards Act, 1890 (GWA) provides the procedure and rules for appointing a guardian in case the natural guardian is unfit to be a guardian.

¹¹*Ibid.*

¹² See S 23, Guardianship Act, 1968.

¹³Children Act,1989, S, 1(1)

¹⁴ In *Hendrik's* case in 1982, it was said that where "there is serious conflict between interests of the child and one of the parents which can only be resolved to the disadvantages of one of them, the interest of the child..must prevail"

The Marriage laws, i.e Hindu marriage Act, 1955, the Indian Divorce Act, 1960, the Parsi Marriage and Divorce Act, 1936 and the Special Marriage Act, 1956, contain provisions for the custody of children. The custody orders are made on a temporary or permanent basis by the Court. While the matter is pending in court, a judge will arrange for a loving one parent to have custody of the children. Visitation rights or access is given to the other parent even if he or she is at fault. There are more laid down rules for granting the custody. The court will look into the welfare and interest of the minor child in granting custody. If the children are old enough their wishes are considered by the court. Usually, custody of very small children is given to the mother as she is considered necessary for nurturing the child.

The best interest of the child or the welfare principle is embodied in section 13¹⁵ of the Hindu Marriage and Guardianship Act which states that: when declaring the guardian of a Hindu Minor, the welfare of the minor shall be of paramount consideration. Section 17¹⁶ of the Guardian Wardship Act states that the court shall be guided by what appears in the circumstances to be for the welfare of the minor. Section 15(2) states that facts should be taken into account in determining the welfare of the minor and section 17 (3) caters for the preference of the minor.

Applications for custody to access to children can be made while matrimonial proceedings are pending. Such applications for custody can also be made independently without filing matrimonial proceedings.

2.1 Jurisprudential and Conceptual Development of the Discourse on the Best Interest Principle.

Those who make decisions about children are increasingly required by law to act in the child's best interest. Articles 2(1) of the UN Convention on the Rights of the Child lays down that in all actions concerning children, the best interest of the child shall be a primary consideration. The principle of best interest as it stands today has evolved over a while in the legal system. It began with the concept of authority and control and then graduated to care and welfare and now it is the best interest.

1.2.2 The Concept of Authority and Control

¹⁵ See S 13. Hindu Minority and Guardianship Act, 1956 S 13 States that in the appointments or declaration of any person as guardian of a Hindu minor by a court, the welfare of the Minor shall be the paramount consideration.

¹⁶ S 17 of Guardians and Wards Act, 1890. S. 17 states that:

- 1) In appointing or declaring the guardian of a minor, the court shall subject to the provision of this section be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
- 2) In considering what will be for the welfare of the minor, the court shall have regard to age, sex and religion of the minor, the character and capacity of the proposed guardian with the minor or his property.

Before 1839, it was an established common-law doctrine that the father had absolute rights over his children. His rights of custody and upbringing were absolute. Black stone sets out the position in common law:

The legal power of a father (for a mother as such was entitled to no power, but only to reverence and respect) over the persons of his children ceases at the age of 21. Until that age arrives, the empire of the father continues even after his death, for he may by his will appoint a guardian to his children. He may also delegate part of this parental authority during his life to the tutor or schoolmaster of his child; who is the loco parent and has such position of power, the parent committed to his charge, viz, that of restraint and correction, as may be necessary to answer the purpose for which he is employed.¹⁷

This Empire of the father or even the portion of that was conferred schoolmasters were rarely trespassed upon by then state.¹⁸ An example is the case of *Hall v Hall*¹⁹. Here a 16-year-old boy complained about ill-treatment at Eton. The court informed him that his guardian was the best judge of his education and ordered that the child be compelled to return to Eton if he refused to do so voluntarily. In this case, the court's notion of what is in the interest of the child is to be noted. The courts made no investigation into the child's assertions nor do the court challenge the father's supreme authority in any way.

In England, at the end of the eighteenth century, a seven-year-old child might be executed for theft. A child in the last decade of that century could legally be sold by his parents. Few children regularly attended school past the age of 10. Fewer still his were educated. For most children, and apprenticeship arranged by the father with an employer who planned to work the child from daylight to dark was the best that might be expected. If the apprenticeship was too brutal to withstand, the only recourse was to the street and a life petty crime. It was not an unpopular choice.²⁰

Specialist Courts for dealing with apprentices in London with the power to order a lock-up had existed since medieval times. If the young person had committed a criminal offence, however, he or she was treated the same as adult-that is that the person aggrieved, rather than any formal policy or public body, ordinarily decided whether to prosecute and the sentence, upon conviction, was invariably draconian. Those children convicted of offences were sentenced the same as adults, including death for many theft offences. According to historian Harry Potter, the last documented execution of a child²¹ aged below 16 took place in 1833. Transportation of children continued till 1868.

¹⁷ See Blackstone, *Commentaries on the Law of England* (14th Edition), 1970, p.43.

¹⁸ Beding field David, *The child in Need, Children, the State and the Law*, Family Law, 1998, p.54.

¹⁹ (1749)3 Att 721.

²⁰ See Beatrice Gottlieb, *The Family in the Western World*, Oxford University Press (1993), pp 163-166.

²¹ Potter, *Hanging in judgment: Religion and the Death Penalty in England*, Continuum Publishing Co. 1927, p.178.

The Moles worth Committee in 1837 investigated the imprisonment of children on the hulks and reported that fully one-third of the children imprisoned failed to survive the sentence and the children were routinely raped on arrival at the hulks.²²

2.3 The Concept of Care and Welfare

Historically, the principle originated in the ‘welfare’ concept. The welfare principle was reflected in the dominant ideology of the family. The Victorian judges, who developed the welfare principle, favoured male-dominant family. The Victorian family was idealized as patriarchy, in which the concept of childhood, at least is by most accounts an eighteenth-century creation.²³ The historian Lioys de Mause, in his prefatory essay- *The History of Childhood*- puts it like this: The history of childhood is a nightmare from which we have only begun to awaken. The further back in history one goes, the lower the level of children, and the more likely children are to be killed, abandoned, beaten, terrorized and sexually abused.²⁴

The concept of the child’s welfare has a long history. Equity, the system of Justice dispensed in the Court of Chancery on behalf of the monarch as the parents patriae had already by the middle of the eighteenth century came to recognize the need for a jurisdiction which, would protect the child’s welfare. The concept was indeterminate, it had no essential meaning. The “welfare of the child” principle was a deliberately indeterminate standard incorporated into the law to allow the prevailing social and cultural views about the needs of the child. Father’s authority was supreme, in which, both the wife and the children knew their place in the home as his dependents.

The law reflected and upheld the patriarchal family by denying the wife any legal rights over her children or her property and by respecting the “sacred rights of the father” over his dependents and their property. The welfare principle itself incorporated this family ideology so that children’s ‘needs’ were largely interpreted following the father’s rights. It was accepted that the father knew best what was for the welfare of his children. At common law, the father’s wishes concerning his children, if no more than reflecting the patriarchal society of pre-eighteenth century England.

Indian traditional view of welfare is based on ‘daya’, ‘dana’, ‘bhiksha’, ‘ahimsa’ ‘sama-bhava’, ‘swardharma’, and ‘tyaga’. The essence of which are self-discipline, self-sacrifice and consideration of others. The well-being of all

²² See Cyril Burt, *Young Delinquents*, London, 1927, p.87.

²³ See Phillipe Arie, *Centuries of Childhood*, 1996, p.68.

²⁴ Lioys de Mause, *The History of Childhood*, London, 1974, pp 20-21

depends on these values upheld by people. The constitutional concept of welfare seeks to create a social order in which freedom; equality and social justice are the central values.

The developmental concept of welfare aims at reducing in progressive phases, the problem of exploitation. Regarding the vulnerable and disadvantaged sections that are unable to meet their own welfare needs, the State and the voluntary agencies are expected to cater to their needs. Historically, social welfare in the narrow sense has never been an area of prime concern vis-à-vis economic production functions. Conceptualized in a narrow sense, social welfare refers to the programs meant for the upliftment of weaker and vulnerable sections.

Believers in the modern rights-based welfare state are silent about asserting a basis 'right' for children to be treated by the State as a category separate and apart from adults, with special procedures and different substantive rules than those existing for adult citizens and litigants. The welfare of the children principle is elevated (at least the welfare of children as perceived by social workers and the judiciary) over the rights of parents when deciding cases concerning the care and upbringing of young people and the likely drastic and life-long consequences of abuse and neglect at an early age.

There is a widespread belief in our society that divorce had damaging consequences for the children of the marriage and that such consequences ought to be minimized. In modern divorce law concern for the welfare of the child has therefore been elevated to an overriding principle according to which parental needs or desires will be determined. The 'welfare of the child' is, therefore, the yardstick by which parental freedom of action as regards their future and the future of their children must be measured.

2.4 The Concept of Interest

According to Roscoe Pound; 'interest' means the claims or desire or demands asserted by the individual interest of the child and a social interest weighed against the claims of parents. The juvenile courts, courts of domestic relations and family courts have greatly changed the balance of these interests.²⁵

Pound's theory of interests included a three-fold classification of interests, including the individuals in society: That is, according to the institutional orders of society. The interests are grounded in the segments of society and represent the institutional concerns of the segments. Interests are structured according to differences in power and conflict.²⁶

²⁵ Stone Julius, Social Dimensions of Law and Justice, Maitland Publications Pvt. Ltd., Sydney, 1966.

²⁶ *Ibid.*

In the interest theory of sociological jurisprudence, the law is an instrument that controls interests according to the requirement of social order. In Pound's justice approach, the law represents the consciousness of the total society.

As a process, the law is a dynamic force that is continuously being created and interpreted. Whenever a law is being created or interpreted, values of some are necessarily assured and the values of others are either ignored or negated.²⁷

Pound saw the law as adjusting and reconciling interests. It is an instrument which controls social interests according to the requirements of social order. But there is no doubt that for Pound, the law represents the consciousness of the whole society. Ultimately, it serves those interests that conduce to the good of the whole society "Interest is the principal force behind the creation and interpretation of the law."²⁸ Accordingly to Pound "interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilized society must take into account. Pound's statement was:

"After all, in seeking for a universal principle, we inevitably are carried onwards to the most universal principle – that the essence of good is simply to satisfy demand....Since, everything which is demanded is, by that fact, a good must not be the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all time as many demands as we can? That act must be the best act, accordingly, which makes form the best whole, in the sense of awakening the least sum of dissatisfaction."

According to Ehrlich, when the jurist is asked to draw the line between the conflicting interests independently, he is asked by implication to do it according to justice. He is asked to arrive at a decision any consideration of expediency and uninfluenced by the distribution of power. There are great social interests involved in the decision. Each segment of society has its values, its norms and its ideological orientations. When these are considered to be important for the existence and welfare of the respective segments, they may be defined as interests.²⁹

The views that interests are not distributed randomly in society but are related to one's position in society follows Marx's theory of economic production and class conflict.

²⁷*Ibid.*

²⁸ . See Ralf Dahrendr of, class and Class conflict in industrial Society, Stanford University Press 1955,pp 3-35

²⁹ Lord Lloyd of Hampstead, *Introduction of Jurisprudence*, Stevens and Sons Ltd., London (1979), p.46.

1.2.5 The Concept of Best Interest

To evaluate the best interest, there are forces like the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man whether he be litigant or judge. Value judgments have to be made.

Therefore, the principle of the best interest of the child is to override several conflicting interests to determine the needs, desires and claims of the child that are in his welfare. The expression ‘shall’ in the various statutes of India give rise to a duty i.e. an obligation or a positive duty to the courts to ensure the best interest of the child and to provide justice to the child.

Individualization of justice concerns the application of legal precepts to take into account the concrete circumstances of particular cases. The need for this kind of individualization has long been recognized in some parts of the law. All “standards” of conduct for instance” fairness or “good faith” in equity or “reasonableness” at common law involve individualization. The court must weigh the special circumstances of each case in applying the standard.³⁰ So also the directions by conferring administrative or kindred discretion’s on the applying authorities have encouraged individualization.

The practice of democratic legal system has accepted on a wide front, the challenge of individualization. The juvenile Courts and Family courts are examples of individualization of justice. Procedures, forms of detention and treatment according to their home conditions, general background and other factors adopted are the features of individualization of justice that help on deciding the interests of the child.

The legal standard is wide and indeterminate. It allows or even requires individualization of decision. The welfare of the child should no longer be subordinated to the outcome of the legal battles in these courts.

1.2.6 Concept of Justice to the Child

Justice is’ *suumcuique*’ i.e to ‘each his due’. The just state of affairs is that in which each individual has exactly those benefits, which are due to him by his/her personal characteristics and circumstances.

The evolution of the principle can be depicted as follows:-

Stage	Concept	Meaning
I stage	Authority and control	Right and power of the father
II stage	Care and welfare	Benefit and charity to the child

29. Stone Julius, *Social Dimensions of Law and Justice*, Maitland Publications Pvt Ltd Sydney (1966), p.167.

III stage	Best interest	Right of the child and justice to the child
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It is now a right of the child that his/her best interest be considered in all matters. A legal right is an interest recognized and protected by a rule of law; an interest – the violation of which would be a legal wrong is done to him/her whose interest it is and respect for which is a legal duty for everybody.

1.3 Need for the Study

Article 3 of the United Convention on the Rights of the Child provides that the best interest principle should be the overriding factor in all matters concerning children. This principle should be applied by all decision-makers, whether public or private, when acting in any matter concerning children.

It is a guiding principle in the implementation of the Convention. India has ratified the Convention on December 11, 1992, and should ensure that the rights enshrined under the Convention are protected in our country. Any international Convention not inconsistent with the fundamental rights and in harmony with its spirit can be read into them to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.³¹ This is implicit from Article 51(C) and the enabling power of the Parliament to enact laws for implementing the international on Seventh Schedule of the Constitution of India.

Article 73 of the Constitution also is relevant. It provides that the executive power of the Union shall extend to the matters concerning which Parliament has the power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide the measures needed.

1.4 International Laws Enforceable Directly

Article 73 of Constitution of India which states, “subject to the provisions of this Constitution, the executive power of the Union shall extend to the matter which Parliament has the power to make laws’ and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by any treaty or agreement. Article 253 of the Constitution states, ‘parliament has the power to make any law for the whole or any part of the country or countries or any decision made at any international conference, association or other body’.

The discussion on this issue is found in the case of *Maganbhi Ishwarlal Patel v Union of India*³² in which the Court observed that “making of law is necessary when (International) Treaty or Agreement operated to restrict the rights of

30. *Vishaka and others v. State of Rajasthan and others* (1997) 6 SCC 241.

³² AIR 1969 SC 783.

citizens to others, or modifies laws of the state. If the rights of the citizens or others which are justifiable are not affected, no legislative measure is needed to give effect to the Agreement or Treaty.”

Thus, if in consequence of the exercise of power, rights of the citizens or others are restricted or infringed or laws are modified, the exercise of power must be supported by legislation. Where there is no such legislation or modification of the law, the executive is incompetent to exercise power.

The position, therefore, is that even if a treaty or convention or resolution is not ratified or agreed to by India, courts are still at liberty, provided no Indian law to the contrary exists, to incorporate these conventions, treaties and resolutions into Indian law and thereby enforce them. In *Peoples Union for Civil Liberties v Union of India*³³ the Supreme Court held:

“The provisions of the Convention which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can certainly be relied upon by the courts as facets of those fundamental rights and hence enforceable as such.”

This is, therefore, clear enunciation of a principle that since fundamental rights are incapable of ever expanding definitions international instruments may be incorporated into the fundamental rights and enforced in this manner.

This was done by the Supreme Court in the recent case of *Vishakha v State of Rajasthan*³⁴. The Court reiterated the principle that in the absence of domestic law to check the evil of sexual harassment of working women, the contents of the international convention and norms are significant for the interpretation of the guarantee of gender equality, the right to work with human dignity in Article 14, 15, 19(1)(g) and 21 of the Constitution of India. Any international convention consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the content thereof.

Referring to the Convention for the Elimination of All Forms of Discrimination against Women [CEDAW] the Court held “The International conventions and norms are to be read into them [fundamental rights] in the absence of an enacted domestic law occupying the field when there is no consistency between them”. The court also referred to the decision of the High Court of Australia in *Minister of Immigration and Ethnic Affairs v Tech*³⁵ where the High Court recognized the concept of legitimate exception in the context of the observance of international law in the

³³ (1997) 3 SCC 433.

³⁴ (1997) 7 SCC 323.

³⁵ 128 ALR 353

absence of a Bill of Rights in the Australian Constitution.³⁶It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for constructing domestic law when there is no inconsistency between them. As India has ratified UNCRC the best interest principles assume great significance in the Indian legal system and can be directly applied in all matters concerning children.

1.5 Judicial Interventions in the Best Interest of the Child

On 10th June 29, 2000, the bitter custody battle for Cuba's Elian Gonzalez ended after the boy returned to the Caribbean homeland from the United States, after seven months of legal wrangling. The boy had survived a November 1999, shipwreck that killed his mother and 10 other illegal Cuban migrants. The boy was rescued by two fishermen from the ocean of Florida.

This custody battle had international political overtones also. The personal tragedy of Elian unleashed a bitter family, feud and other flashpoints in the turbulent history of Cuba-US relations. The best interest of the child was considered by the US Court and the boy was returned to his father or relatives in Cuba.

On Feb. 17, 1999, a significant judgment was passed in the petition of Gita Hariharan. It was held that the mother is also the natural guardian of her minor children. Till this order, the position in Hindu law under Section 6 of the HMG³⁷ was that during the lifetime of the father, the mother was not the natural guardian. Even after the death of the father, all public bodies insisted that the mother get a court order declaring her to be the natural guardian. There is now a need for a law which determines parental responsibility rather than guardianship so that the interests of the child do not suffer by necessary litigation³⁸. Incidentally, this judgment applies to Hindus only. The judgment has still not completely equated the mother and father.

In matters of adoption also, only the Hindus have legislation, the Hind Adoption and Maintenance Act, 1956. Children of other communities have to be taken as 'wards' under the Guardians and Wards Act, 1956. There are some High Court judgments (Kerala and Mumbai) attempting to give the right to children of other communities.

But there is still a long way to go, Children as 'a class' are being discriminated. There is a need to review and reform the legal system in the interests of the child. Protection of children's rights is now recognized as a primary obligation of every society, whatever its political ideology or level of development. There is an increasing awareness of the 'child dimension' in the development and implementation of social politics.

31. See Gonsalves, C, "Domestic Enforcement of Universal Conversions", *Lawyers Collective*, July, Aug 99. p.67.

³⁷ Section 6 of the Hindu Minority and Guardianship Act. 1956, stated that the natural guardian of a minor in relation to his person and his property is the father and after him the mother.

33. Jaising, I., "One Step Forwarded: Many More to Go" *Lawyers Collective*, May 1999.

2. Family Courts and the Best Interest of Child in Various Legal Systems

Juvenile Justice is primarily based on the precept of guardianship. Any parent has to give due care and attend the needs of their children. This obligation is enforced in the nation by due process of law in such a way that the ultimate duty lies on the nation to take care of neglected and persecuted delinquent youngsters. Based on this obligation numerous legislations had been made by governments at both levels of the federal set up.

The propaganda instigating for the unique treatment of teenage offenders commenced towards the final leg of the 18th Century. Before this, the juvenile offenders were treated precisely alongside the adults. They have been prosecuted in criminal courts as in the case of adults and were handled with a similar degree of sentences for like offences.

An elaborate understanding of the existing legal system concerning the Juvenile Justice System in India ascertains recourse to history. This system in India originated in tune with the British rule and changed its stature and emerged as the outcome of western ideas and developments in connection with the genre of prison reforms and juvenile justice.

These legislations more or less helped India to deal with delinquent juveniles, but the new version imbibed ideas that have not been confined simplest to the ones practised in England but a lot more. The Juvenile courtroom under the Madras Children Act, 1920 was not that exceptional from that underneath the English Children Act, 1908 however being par with it. The subsequent Acts concerning children were legislated with the parents patriae model of the American juvenile courts. The Juvenile welfare boards were adopted following the Scandinavian concepts in international arenas, which have now become an essential part of the legislations handling anti-social and disregarded or persecuted children.

7.1 The Japanese Law - The Family Court in Japan and the Best Interest of the

Child

The Family Court in Japan is a specialized court dealing with family affairs cases and juvenile delinquency cases. Through its basic objectives of maintaining the welfare of families and seeking the sound upbringing of juveniles, it tries to answer the modern demand of justice fitted to the needs of society.

It is a court in which the principles of law, the conscience of the community, and the social sciences, particularly those dealing with human behaviour and personal relationships, work together. Practically, the function of the court is to deal, within the scope defined by law, with actual problems of families and delinquent juveniles.

Using the casework method, it attempts to diagnose the cause of a particular trouble and to prescribe a reasonable remedy. Its nature and function differ greatly from the transitional judicial tribunals.

The procedure of the Family Court is informal and readily adjustable to the circumstances of the person before it, while its hearings are kept in privacy and therefore generally protected from publicity. The Court not only seeks to determine and secure the legal rights of individuals before it but also it is charged with a supervisory role for the protection of family affairs provided that the purpose of the law is “to establish family peace and to maintain a wholesome cooperation among relatives upon the basis of dignity of the individual and the essential equality of both sexes,” while the purpose of the juvenile law is said to be “to seek, to the end of a sound and wholesome development of the youth, to set up educative measures to be taken for the benefit of juvenile delinquents in regard to correction of their character and adjustment of their environment.”³⁹

Organization and Staff of the family court:

Organization:

The family Court is a constituent of the organized judiciary of Japan. It is a specialized court of the first instance independent from, as well as equivalent to, the District Court.

The staff of the Family Court:

Efforts of many personnel are indispensable for an efficient flow of cases through the family court. As any case brought to the family court is to include legal, social, economic, medical and emotional factors, the family court is equipped with any kind of family court personnel who are expected to work together to contribute to the determination process and resolution process.

Judges:

Only persons possessing sufficient enthusiasm, ability, understanding to deal with family and juvenile cases are appointed as judges of the Family Court. The judges of the Family Court are selected by the same method as District Court and High Court Judges. They are appointed for a term of ten years after having been chosen by the cabinet from a list of candidates supplied by the Supreme Court.

Family Court Probation Officer:

The office of the Family Court Probation Officer was created on June 1, 1954, unifying the functions of the former Juvenile Protection Officer and the Family Affairs Investigation Officer. The post of the Juvenile Protection Officer was set up on January 1, 1949, and that of the Family Affairs Investigation Officer on April 1, 1951.

³⁹ See *Guide to the Family Court of Japan* – Supreme Court of Japan - 1987

The reason for establishing these two separate posts with functions essentially the same had only been historical. The unification was materialized as a large step forward for achieving one of the Family Court's, i.e., a whole-sale settlement of family problems regardless of whether the most conspicuous symptoms happens to be a domestic relation case or a juvenile case.

The officer investigates the facts and background of the case assigned to him by the Judge. Matters covered by such investigations usually include the personality, behaviour, personal history, financial conditions, home environment etc., of the parties, juveniles and interested persons. It is required by law that such investigations should be conducted through scientific methods based upon medical knowledge.

After investigation, he makes a report on the results to the judge in a written form or orally. He may, and in certain cases must present his opinion about the case to the Judge, relying upon the outcome of his investigation.

Where necessary, the officer may engage himself in certain adjustment activities, such as counselling a party or juvenile and coordinating the services of social welfare authorities concerned. He may also observe and supervise the conduct of juveniles placed under his probation until the final decision is made, or take measures to ensure the performance of obligation processes on family affairs cases. His duties are quite comprehensive and important.

For achieving these expected functions, the Family Court Probation Officers are expected to have widely organized professional knowledge and skill of medical science, psychology, pedagogy, sociology and other sciences related to human beings. Given this, intensive programs of in-service training are offered to qualified officers to develop their professional ability and skill. The Research and Training Institute for Family Court Probation Officers was set up for this purpose in 1957 by the Supreme Court.

In, 1956, the Supreme Court partially amended Rules for the Determination of Family Affairs to extend the powers of the Family Court probation officer who is responsible for family affairs cases. Before this amendment, the scope of his authority had been considerably restricted when compared with that of the Family Court Probation Officer in Juvenile cases.

Now he may make an investigation into the character, personal history, and living conditions of the parties before the court. He may attend the conciliation conference to present his views and may carry on what liaison necessary with various social welfare organizations concerning the case.

Court Clerks:

Every family court has court clerks who are in charge of the preparation and custody of official documents such as case records. They are also responsible for taking care of the children, ensuring that the proceedings go on smoothly as well as for making an auxiliary investigation of laws, precedents etc. for the judges to whom they are assigned.

Medical Officers:

Every Family Court is equipped with a family court clinic, which is an auxiliary organ of the court for scientific examinations and diagnosis of problems of juveniles. The majority of medical officers are psychiatrists or specialists in internal medicine.

Family Court Counselors and Conciliation Commissioners of Family Affairs:

To take advantage of the experience and wisdom of citizens in the various course of life to the settlement of family problems, participation of the layman in the Family Court's handling of family affairs cases has been adopted. Family Court Counselors and Conciliation Commissioners of Family Affairs are such participants. They are part-time government officers who participate in the determination proceedings while Conciliations Commissioners of Family Affairs play important roles in the Conciliation process.

They are chosen from among the general public, usually upon the recommendation of the community authorities, bar associations and other citizens or organizations. The most important criterion for appointment is whether the candidate is a person of board knowledge and experience and the appointment is a matter of great honour.

Note should be taken of the importance of women Counselors and particularly of women Conciliation Commissioners of family Affairs. For, in the majority of family affairs cases, one party is a woman and participation of a women Conciliation Commissioner of Family affairs serves to ensure the committee an accurate understanding of the sentiment and position of women, as well as to secure the trust of the party, which is essential to a successful conciliation.

Family Bureau of the General Secretariat of the Supreme Court:

Under the Japanese Judicial system, all courts, including the Family Court, are regulated by the Supreme Court. The Supreme Court appoints and removes all officials other than judges, and manages the financial and other administrative affairs of the courts. The actual performance of these functions is entrusted to the General Secretariat of the Supreme Court, which is divided into several bureaus. One of these is the Family Bureau, which takes care of the necessary administration for the Family Courts.

Jurisdiction of the Family Court:

The Family Court has very broad jurisdiction encompassing all disputes and conflicts within the family as well as all related domestic affairs, which are of legal significance.

Jurisdiction over Juvenile Delinquency Cases:

The juvenile division of the Family Court handles cases involving delinquent juveniles under 20 years of age and adults who have in some way brought about an injury to the welfare of juveniles. "Delinquent Juveniles" include not only minors who have committed criminal offences under the penal laws but juveniles whose tendencies indicate that they might commit offences in future as well. The court has primary jurisdiction concerning all juvenile offences, whether they are felonies such as homicides or arsons, or misdemeanours such as traffic offences, violation of administrative control laws, all criminal concerning minors must primarily be sent to the Family Court for investigation and hearing.

The present Juvenile Law provides that the Family Court has jurisdiction over such minors as those who (a) habitually disobey the proper control of the persons charged with their protection (b) absent themselves from home without proper reasons (c) associate with a person who shows a disposition for offence or who are immoral character, or frequent notorious places, or (d) habitually commit acts injurious to their morals or those of others, provided that from their character or environment there is a strong likelihood that the minors evolved will become offenders.

Children under 14 years of age are primarily handled by the Child Guidance Centre, as provided by the Child Welfare Law even though they have committed acts which, if committed by an adult, would constitute an offence under the penal laws. These young children come under the jurisdiction of the Family Court should deal with the matter or the Center feels that some compulsory measures, such as restriction of freedom, are required.

The Family Court has ordinary jurisdiction over any juvenile under 20 years of age, but has exceptional jurisdiction over the following persons over 20 years of age; (1) any probationer of whom the Family Court is informed by the Chief of the Probation Parole Supervision Office on the ground of his tendency of delinquency beyond control by probationary supervision; (2) any parolee who does not keep the conditions to be observed and is applied for the necessity of his recommitment to the Reform and training School by the District offenders Rehabilitation Commission; and (3) of his commitment by the Superintendent of the school on the ground of the necessity of continuance of his reform education.

Jurisdiction over Adult Criminal Cases:

Adults who have committed acts injurious to the welfare of juvenile are also subject to the Family Court's jurisdiction. Various specific offences are set down in the Child Welfare Law, the Labor Standards Law, the School Educations Law etc. Offences such as the inducement of obscene acts, cruel treatment and employment of children at extremely late hours are examples.

The foundation of the jurisdiction over the offences is the protection of juveniles and the maintenances of their basic human rights. However, neither desertion nor neglect of the duty of support by parents or guardians constitutes an offence justifying the jurisdiction of the Family Court in Japanese Juvenile Law. Support is considered to be a

family law problem and therefore is subject to determination and conciliation procedure of the family affairs division, while desertion, if sufficient to constitute an offence under the Penal Code, is handled by a regular criminal court.

The Family Courts Procedure:

Procedure for Family Affairs Cases

Both determination and conciliation proceedings are commenced upon application of the person concerned. The application may be either written or oral. All bearings involved are not open and informal, which are quite different from litigation in a regular civil court. After the application is filed, the Family Court summons the parties and conducts a hearing in the presence of Family Court councillors. Where necessary the judge may order an investigation by the Family Court Probation Officer who may seek the diagnostic services of the Family Court clinic or may require the production of evidence.

When a determination is issued by the judge, it may be appealed to the High Court if the Supreme Court Rules permit. Once the determination becomes binding, a personal relationship is fixed in accord therewith. If the decision orders payment of money or transfer of property, it may immediately be enforced.

Conciliation seeks to settle a family dispute through the intervention of a court facilitating a compromise between the parties. The conciliation proceedings are conducted by a conciliation committee, which is normally composed of one judge and two conciliation Commissioners of Family Affairs, one of whom is usually a woman. As mentioned above the parties are ordinarily summoned to the Family Court for hearing. An attempt is then made through expert advice to guide the parties to reach a compromise, which is just and fitted to the actual circumstances.

When the parties in the conciliation proceedings reach an agreement approved of by the conciliation committee, the agreement is entered in the court's case record and it has the same binding force as an absolute judgment or an order of determination.

Procedure for Juvenile Delinquency Cases

(1) Family Court Proceedings involving juveniles are generally commenced when:

- i. one charged with the protection of the juvenile, a school teacher, or any other person informs the court of the case;
- ii. the Family Court Probation Officer who has discovered a delinquent juvenile report the case to the court;
- iii. the Prefectural Governor or the Chief of the Child Guidance Center has referred a juvenile case to the court;
- v. the police officer or the Public Prosecutor has sent a juvenile case to the court (Cases involving minor offences and way-ward minors are sent directly to the Family Court by the police officer while felony cases first pass through the Public Prosecutor).

) When a case is filed in the Family Court, the judge in charge of the particular action assigns the Family Court Probation Officer giving him directions for his investigation. The officer then undertakes a thorough and precise social inquiry into the personality, personal history, family background and environment of a Juvenile concerned into protective custody or a medical or psychological examination of the juvenile is necessary, a judge detains him into the Juvenile Detention and Classification Center until the adjudicatory hearing is held. He may be required to appear at the Family Court Clinic.

There is a system of an Attendant, which is similar to the system of a defence counsel for a criminal defendant. A juvenile and his parents or guardians may appoint an Attendant with the permission of the Family Court. If a lawyer is to be appointed as the Attendant, however, no permission of the Family Court is required.

Upon completion of his inquiry, the Family Court Probation Officer sets down the minor's social record and his opinion as to the case with his recommendation for its disposition and submits this as a report to the judge. Taking this report into consideration, the judge sets a time and place for the hearing. The hearing, itself, is not open, to protect against unwarranted publicity. No person other than the judge, the court clerk, the persons charged with the protection of the juvenile (parents or guardians), the Family Court Probation Officer, the Attendant, persons specially permitted by the judge for having a proper interest in the case may be present.

) If the judge feels that it is improper to take any of the above courses immediately or that further and more thorough investigation must be necessary before a determination can be made, the juvenile may be placed under the supervision, the juvenile may continue to live with the person who is charged with his protection (his parents or guardians) under restrictions imposed by the Family Court or he may be placed under the guidance of a suitable institution or individual. This intermediate disposition, taken while the final determination is held in suspension, is called tentative probation (Shikenkansatus) and is one of the important responsibilities of Family Court Probation Officers

) The Family Court judge renders his decision and issues his determination in accord with his wisdom after considering the investigation of the Family Court Probation Officers involved, the mental and physical examinations required, and the testimony at the hearing. Where necessary for the determination of facts, the witness may be examined-including expert witness-under the Code of Criminal Procedure in so far as the provisions of the Code do not conflict with the nature of juvenile proceedings.

) The determination of the judge may take one of several forms. It is made based on the Family Court Probation Officer's report, the judge's study and inquiry, and the results of the hearing. The possible forms are as follows;

i. A decision to refer the case to the Prefectural Governor or the Chief of the Child Guidance Center. This action is taken when it is deemed that the minor should be dealt with under the Child Welfare Law rather than be placed under protective control.

- ii. A decision to dismiss the case. Such a decision is reached when it is considered unnecessary to make any particular disposition of the child. Though, often a considerable amount of casework is carried on before the final determination.
- iii. A decision to refer the case to the Public Prosecutor. The basis of this decision is the view that the minor should be subjected to normal criminal procedure due to the serious nature of the offence or the circumstances of the case, only when a juvenile is 16 yrs of age and over.
- v. A decision to place the juvenile under protective controls (educative measures). There are three kinds of protective control.
 - a. The juvenile is placed under the supervision of the Probation-Parole Supervision Office. This is an organ of the Ministry of Justice with one office located in the district or each Family Court. The actual supervision over juveniles is undertaken by the Probation Officer of the district office and he is aided in his work by volunteers from among the public who are called Volunteer Probation Officers.
 - b. The juvenile is placed in the child education and Training Home (Kyogo-in) or the Home for Dependent Children (Yogo-Shisetsu). Both of these institutions are provided for under the Child Welfare Law. The Child Education and Training Homes are established by the National or Prefectural Governments, or private persons to take care of children who are delinquents or are likely to become delinquents, while the Homes for Dependent Children are private or prefectural institutions designed to care for a dependant, abused or neglected children.
 - c. The juvenile is placed in the Reform and Training School (Shonenin). This is a government-established institution to give corrective education to juveniles committed to it by the Family Courts. The Reform and Training Schools are divided into four groups: Primary-which care for juveniles between 14 and 16, Middle – which care for juveniles over 16 without aggravated criminal tendencies, Senior-which care for juveniles over 16 with aggravated criminal tendencies, and Medical- which care for all juveniles over 14 who are physically or mentally defective.

(6) In this order of determination, the judge writes out the reasons for his decision and the disposition of the juvenile to be taken. A copy of the order then is attached to the prior social records and forwarded to the particular agency charged with its execution, such as the Probation-Parole Supervision Office or the Reform and Training School to provide a reference for the minor's treated.

Notice of the order of determination, when gives, deprives the Family Court of jurisdiction over the juvenile. However, because of the protective nature of the disposition of the juvenile and the concern of the court involved with his future development, the judge and the Family Court Probation Officers may as a matter of right visit the place having custody of the juvenile for observation and necessary recommendations as to aftercare. Further, if an inmate of the Reform and Training School is to be kept thereafter he has attained his majority to continue his corrective education, a petition to the Family Court must be made by the Superintendent of the Reform and Training School and the approval of the judge obtained.

(7) If the juvenile or the person charged with his protection objects to the Family Court's determination, they may file an appeal in the High Court. In addition to that, he may file an appeal in the High Court. In addition to that, he may make a second appeal to the Supreme Court from an order dismissing an appeal only on limited grounds.

7.2 Australian Law

The Family Law Act, 1975, brought in the single 'no-fault' ground of irretrievable, breakdown evidenced by 12 months separation. The Family Court was set up to administer the law. It was envisaged as a 'helping court' and was to operate as a 'closed court' with limited formality, simplified procedures and with the assistance of specialist counselling and welfare staff.⁴⁰

The Act directed that, in custody and other proceedings concerning children, the paramount consideration should be the welfare of the child. The main innovations in custodial matters were provided for parents to attend conferences with welfare officers to discuss the welfare of children and endeavour to resolve differences, provision for the wishes of children concerned to be ascertained and observed and an attempt to provide more effective enforcement procedures. The court was also given wide powers to grant injunctions in circumstances arising out of the marital relationship. Legal aid was to be readily available to needy parties. Finally, the Act emphasized the availability of reconciliation and counselling procedures for people contemplating or involved in a divorce or other proceedings

Children in the Family Court in Australia.

Jurisdictional Problems:

When the Family Law Act was introduced it was intended that the Family Court should have as wide a jurisdiction over children as possible to avoid the need for a recourse to state courts in custody, guardianship, access and maintenance matters concerning children. The potential scope of the Act was, however, limited to areas on which the federal parliament could legislate. The Constitution of 1901 limited the power to certain specified areas; those relevant for family law are 'marriage' and 'divorce and matrimonial causes,' and in relation thereto, parental rights, and the custody and guardianship of infants.

In the hope that the Court would give a wide interpretation to these constitutional provisions, the Family Court was given jurisdiction over proceedings concerning the custody, guardianship or maintenance of, or access to, a child of the marriage. The Court could hear such proceedings whether or not they were between husband and wife and, contrary to the position under the previous law, whether or not a divorce was being sought or had been granted.

⁴⁰ See Current Affairs Bulletin Nov. 1978

A child of the marriage was widely defined to include as adopted a child, a child of the husband and wife born before the marriage, and a child of either party (including an ex-nuptial child of, or child adopted by, either party) if that child was ordinarily a member of the household. One restriction was that the Court would make orders concerning the state only in special circumstances.

As a result of *Russell v Russell; Farelly v Farelly*⁴¹, a decision of the High Court on the constitutional validity of certain provisions of the Family Court Act, the Act was amended so that, as from 1 July 1976, the Family Court's jurisdiction over children was limited to custody, guardianship, maintenance or access actions between the parties to the marriage and maintenance proceedings by or on behalf of a child against a party to the marriage.

Proceedings could still be instituted independently of any divorce action but could relate only to the natural or adopted children of the husband and wife. This means that the Family Court could not make orders concerning a step-child or an ex-nuptial (illegitimate) child of one party to the marriage even if then child is a member of the household. Any dispute over the custody of such a child must be determined in a state court.

This was particularly unsatisfactory as these differences in the law applied in the two court systems particularly concerning custody. The Family Law Act gave parents joint custody of their children; The State Acts merely gave the mother a right to apply for custody of their equal to that of the father who at common law had the right to custody of his legitimate children. Further, under the Family Law act the wishes of a child over 14 must be given effect to in the absence of special circumstances. Under state law, the child's wishes are relevant but not necessarily determined.

Settlement of custody problems is facilitated by a provision of the Commonwealth Act empowering the Court to order (and not merely advise) the parties to attend a compulsory conference with a welfare officer to discuss the welfare of children and to attempt to resolve differences. The Court may also obtain a report from a welfare officer. There is no state equivalent, nor do the state acts include the detained provisions for enforcement or orders found the Family Law Act. Concerning maintenance, the main difference is that the Family Law Act specifies relevant criteria and, contrary to several of the state acts, abolishes imprisonment for non-compliance with a maintenance order.

Apart from these differences of substantive law, the major problems resulting from the limits on the Family Court's jurisdiction are that stepchildren and ex-nuptial children of one parent must be dealt with apart from other members of the household, and that third parties such as relatives cannot initiate proceedings under the Family law act. For example, if grandparents wish to obtain custody of a child must proceed in the state courts even in a dispute with the parents. The Family Court can deal with applications by third parties where there are disputed custody proceedings between the husband and wife.

⁴¹ (1976) 9 A.L.R 103.

In such cases, a third party may be granted leave to intervene and the Court may be grant custody to a person other than a party to the marriage. Further, if a spouse in whose favour a custody order has been made should die, the Court may grant custody to a non-parent with care and control of the child. The constitutional validity of this provision is currently being considered by the High Court. Of course, even apart from the amendments to the Acts, in the absence of marriage, children could not be dealt with by the Family Court, as the Federal Parliament has no power to legislative concerning children generally.

Enforcement:

Another procedural factor of practical importance is the difficulties a parent may experience in enforcing his or her legal rights when the other party takes children interstate or overseas. The main problem is financial the other expense of obtaining a court warrant for the police to take possession of the child, of travelling interests to take delivery of the child and, where the children are taken overseas, of travelling overseas and if necessary instituting custody proceedings in the foreign courts.

Delay:

The main problem area which has emerged concerning children is the delay which can occur before the Court deals with defended custody applications. Because of the work-load before the Courts, there can be a two-year wait before an application can be heard, although the actual time waited will vary from case to case. The consequences of this delay for the welfare of the children can be seen by a consideration of the factors relevant to the court's determination in custody matters.

Paramount Consideration- The Welfare of the child:

At common law, a father had sole custody of his legitimate children. This gave him physical control over the children and the right to determine their education bands religious upbringing. By the Family Law Act the father and mother, subject to any court order, have joint custody of children of the marriage under the age of 18.

In exceptional circumstances, the Family Court may order that disputing parents have joint custody with care and control; to one party. However, the Courts tend to take the view that such an order can create problems than it solves as it anticipates that the parents, who may have separated because of serious incompatibility, will reach an agreement as to the upbringing of the child. The most common order is a grant of sole custody to one parent with the other parent given access to the child.

The concern of the legislation in this area is to promote the interests of the child, which may often be overlooked by the parents themselves, embroiled as they may be in a bitter dispute. Even if the parties agree as to the custody of the

child the court must, before any *decree nisi* of divorce is made absolute, satisfy itself that proper arrangements have been made for the welfare of any children (including adopted or ex-nuptial children of either party).

If it is not satisfied, it can adjourn the proceedings until a welfare report is prepared. It may also in any divorce or contested custody proceedings direct the parties to attend a conference with a welfare officer to discuss and attempt to resolve disputes as to the welfare of the child. The proceedings at such conferences are confidential.

The Act states that in custody proceedings the court shall regard the welfare of the child as the paramount consideration. This test was also applied under the Matrimonial Causes Act, 1959. There are no principles of law providing a decisive test as to the welfare of the child. Rather this is a question to be determined from case to case on the particular unique facts.

There are however certain factors which are commonly raised as relevant. First, the conduct of the parents may be relevant if it affects the welfare of the child. Although it has been said that the 'inquiry is essentially a positive one designed to promote the interests of the child, not to demote the claims of either parent's, to some extent consideration of parental conduct is necessary, particularly conduct which in the view of the Court renders a parent unsuitable to have custody. An example would be violent behaviour.

Several instances have arisen where parents engage in sexual conduct which some regard as outside conventional morality. While the Court will not deprive a parent of custody merely based on an unorthodox lifestyle, it will do so if it considers that this lifestyle is injurious to the child's welfare. Different judges take different views on how unconventional behaviour, particularly sexual behaviour, is likely to harm a child's welfare.

For example, in some cases, custody has been awarded to a lesbian mother while in other it has been refused. The different circumstances, such as exposure of the children to the parent's sexual relationship and other relevant factors in the particular cases may partly explain, different standards, and placing different emphasis on conformity with conventional morality. This is, of course, a possibility inherent in the broad discretion allowed to the court (to make such orders, as it thinks proper) and in the generality of the test of the welfare of the child.

The religious convictions of parents were once regarded as of great importance. Now such convictions will be regarded as relevant only if they are likely to affect the welfare of the child. At one stage before the introduction of the Family Law Act, there was a policy of the courts that a young child would be placed in the custody of the mother. However, the Family Court has stated that although the mother's role is an important factor it is not an overriding principle or presumption.

The court does show reluctance to separate children unless they are already separated, or to disturb any stable environment, which a child has established with one parent, it is appropriate for the courts to take this into account in appreciation of the possible psychological danger to the child in disturbance of the *status quo*. But the current

de facto custody of the child while awaiting the hearing has a powerful argument in favour of preserving that custody as strong evidence will be needed to justify a change. Understandably, the parent who has not had care and control in this period may see the Court's stress on preservation of a situation perpetuated by its delays as unfair.

Wishes of the child:

In addition to emphasizing the welfare of the child, the Act directs that except in special circumstances the court shall not make a custody order contrary to the wishes of any child of 14 or over. This is an advancement from the previous Act under the wishes of the child were merely one of the relevant factors, If the child is under 14 then Court may take into account his or her wishes.

There are several ways in which the wishes of children can be ascertained. The judge may interview the child in chambers. However, the results of such interviews are confidential so that if the judge makes an order based on an interview, his reasons may not be apparent to the parents. The Family court takes the view that judicial interviews should be used sparingly and that a preferable approach may be to order separate legal representation for the child, to be arranged, if necessary, by the Australian Legal Aid Office. The role of the child's counsel is not merely to put forward the wishes of the child but also to make submissions as to the welfare of the child.

A further way in which the child's wishes (and welfare) can be determined is by the provision of a welfare report at the order of the court. The Court may require a report in any divorce proceedings if the court doubts that the agreed custody arrangements are satisfactory or in any contested application. It is also possible for a child's wishes to be presented to the court by affidavit evidence. However, on the basis that it is undesirable to involve directly in litigation between their parents save in exceptional cases, it is now provided that a child's affidavit can be filed only with the leave of the court.

This also limits evidence by children on matters such as their parent's separation. In some cases, expert evidence from psychiatrists or psychologists on the welfare (not merely the wishes) of the child is presented. However, unless the child has a psychiatric problem there is some opposition by the courts to the practice of 'shopping around' from psychiatrist to psychiatrist to get an opinion supporting the claims of one parent concerning a healthy, normal child.

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Access:

The factors which the court considers in custody matters are also relevant to access applications. The Court regards access as a right of the child which will promote its welfare and which should be denied only in exceptional circumstances. It is not a 'right' of the non-custodial parent although in practice it is rarely refused even to parent

⁴² Ibid

who is regarded as unfair to be given custody. The court may grant access in general or specific terms and may order supervision of the order so that a welfare officer can be consulted by the parties can report any mistreatment of the children to the court.

Problems faced by the Australian Family Court

- Delay and its indirect effect on the eventual decision
- Family Courts do not have jurisdiction over all children. In particular, questions concerning ex-nuptial and stepchildren.

7.3 The French Legal System Relating to Custody of Children

The Court which has exclusive jurisdiction on matters of divorce and its consequences is the *Tribunal de Grande Instance*. One of the judges of the Tribunal is appointed to deal with matrimonial matters. He is especially in charge of the duty of safeguarding, the interest of minor children. The judge of matrimonial affairs is exclusively competent to pronounce divorce on mutual consent. He is also exclusively competent to decide on the custody of children and the modification of the alimony whatever the ground for divorce. The trial on the grounds or consequences of divorce and the interim relief's are held in the camera system.⁴³

If a petition for divorce is filed by an adult person under guardianship it has to be filed by the guardian and not by the spouse after obtaining the approval of the family council and the advice of the attending doctor. If the adult is only ordering trusteeship, he may bring the action himself with the assistance of the trustee.

Similarly, a petition against the spouse under guardianship has to be filed against the guardian and if the spouse is under the trusteeship, he defends himself personally with the assistance of the trustee. In case the trusteeship had been entrusted to the other spouse, and *ad hoc* trustee is appointed for the case. When one of the spouses has been placed under judicial protection the trusteeship according to the case has been constituted. When one of the spouses is under guardianship or trusteeship the petition for divorce on mutual consent is barred. In case of legal indirection due to conviction, the petition for divorce can be filed by the guardianship only with the consent of the spouse in directed.

Conciliation

In all cases of divorce, the judge makes first an attempt for conciliation. Such an attempt may be renewed at any time during the pendency of the suit. If the parties so desire, the counsels shall be called to assist and participate in the talk. The attempt for conciliation may be suspended and resumed without any formality, giving time to the parties

⁴³ See Annoussamy David. J, *The French legal System and its Indian Connection* Institute of Cmparat.,

for reflection, which shall not exceed eight days. If further time appears useful, the judge may stay the proceedings and take all steps for conciliation within six months. He may make interim orders if need be.

Anything stated orally or in writing in the course of an attempt for conciliation in whatever form it occurred, cannot be relied upon for or against a spouse to a third party in the future course of the proceedings.

When the conciliation talks fail to avoid divorce, the judge shall endeavour to persuade the spouses to settle at least by way of agreement, the consequences of divorce especially in respect of the children. The settlement shall be taken into account by the judge at the time of judgment.

Interim Measures

In a joint petition for divorce by mutual consent, the spouses themselves make arrangements regarding interim measures and record them in the provisional agreement, which should necessarily be annexed to the petition. However, if there are clauses in the agreement which appear to the judge prejudicial to the interest of the children, the judge may cancel or modify them.

In the case of divorce by one spouse and accepted by the other when they appear before the judge and in other cases upon the order of non-conciliation being passed the judge prescribes all measures necessary to ensure the maintenance of the spouse and children and that order will remain valid till the judgment on the main case becomes final and binding.

The temporary measures, which may be ordered, include allocation of the conjugal house and movables to one of them or order partition of such enjoyment between them; clothing and personal objects; quantum of maintenance and cost of litigation which one spouse has to pay to other. Spouses advance on his share in the *communauté* if such a step is warranted by the circumstances;

The decision about the custody of the minor children and the right of the spouse who is not entrusted with such custody to visit and receive them;

Fixing the contribution by the spouse does not have custody of the children for their maintenance and education.

If the circumstances warrant then the judge may order emergent measure immediately after the original petition be filed. He may for instance authorities the petitioner to reside separately and if need be with the minor children. He may also order any protective measures such as affixing seals on the assets of the *communauté*. The order safeguards provided in the matrimonial settlements made at the time of marriage will continue to remain in force.

In the case of a joint petition for divorce by mutual consent, however, the provisions of the agreement by the spouses with such modification by the judge will be applicable.

In all cases, at the end of the divorce proceedings when the petition for divorce is dismissed, the judge after hearing the parties and their points on the matter may decide on the contribution of spouses to household expenses, the residence of the family and the custody of the minor children.

Consequences of Divorce on the Children

The general principle is that divorce leaves intact the rights and duties of the father and mother concerning their children. However, the custody of the children is given to either of the spouses. In exceptional cases, such custody may be given to third-person chosen preferably among the relatives or when such is not possible, to an educational institution.

For determining the person to whom custody is to be given the judge shall essentially take into consideration the interest of the children. Before deciding on custody, the judge may appoint a qualified person to inquire to collect information regarding the material and moral state of the family and the conditions, in which the children live and are brought up.

The inquiry officer may also in his report make suggestions on measures to be taken in the interest of the children. This report makes suggestions on measures to be taken in the interest of the children. This report is communicated to the spouses. If one of the spouses contests the findings of the inquiry, he may seek a further inquiry or counter inquiry.

The spouse who does not have the custody of the children may present a detailed scheme which he would put into action to ensure the maintenance and the education of the children if custody was entrusted to him. Third parties, relatives or friends may stand as sureties for the implementation of the scheme. The possibility of the realization of the scheme shall also be inquired into.

The judge shall take into account the inquiry conclusions and those of counter inquiry before deciding on the interim or final custody of the children or on the right to visit them. It is, however, to be noted that the report of such inquiry cannot be made use of in the course of arguments on the grounds for the divorce.

The spouse who has been deprived of the custody of the children has the right to watch the way on which they are brought up and educated. He has also the duty to contribute, proportionately to his income, to the expenses. He has also the right to visit and to receive them in his residence. Such a right can be denied only for grave reasons. Notwithstanding the normal provisions to the contrary, in law, the spouse who is denied the custody of the children may be entrusted with the task of administering the property under judicial control all or a part of the estate of the children, in the interest of a good administration of such estate so required.

The decision on the grant of the custody of the children and the mode of exercise of parental authority is taken as the request of one of the spouses or a member of the family or the *Procureur de la Republique*. For reaching a decision the judge shall take into account:

1. the agreement entered between the spouses;
2. the information collected during the inquiry and counter inquiry;
3. the feeling expressed by the minor children. They will be heard if it appears necessary and when no inconvenience is likely to be caused to them.

The orders relating to the exercise of parental authority may be modified or completed at any time by the judge, at the request of either of the spouses or a member of the family or the *Procureur de la Republique*. Even in case of divorce on joint request, the terms of the agreement as approved by the judge, relating to the exercise of parental authority may be revised, for serious reasons, at the request of either of the spouses or the *Procureur de la Republique*.

The spouse who has been denied the custody of the children will contribute to their maintenance and education in the form of alimony paid to the person who has been entrusted with their custody. The form of such alimony and the guarantee for its payment is fixed by the judgment or in case of divorce on a joint request by the agreement between the spouses as approved by the judge.

When the nature and the assets of the liable spouse to pay permits, the liability for alimony may be discharged, in whole or in part.

- I. By depositing a certain amount of money with an accredited organization with a charge to pay to the children a periodical allowance indexed to the cost of living;
- II. By granting usufructuary right over some properties;
- III. By allotting some income yielding properties.

When the capital thus constituted becomes insufficient to cover the needs of the children, the person who has the custody may ask for a grant of supplement in the form of alimony.

The parent who is mainly in charge of the major children, who are unable to provide themselves for their needs, may ask the other spouse to pay him a contribution for their maintenance and education.

7.4 The Law in the United States of America

The interest of the child, the parent and the State balance delicately. The natural rights of parents have a constitutional basis in American Law and cover such areas as control over religious training, medical decisions, and mental health. Parental rights are not absolute.

The child's interests are protected by the state through the *parens patriae* power. The State uses *guardian ad litem* and *special child advocates* to protect many children whose parental rights are questioned. Each child advocate is appointed individually to act often in a volunteer capacity to represent children in court or to make recommendations to the court that are in the best interest of the child.

The best interest of the child' standard is the basic guideline governing civil cases involving children. In broad terms, it means that a court must operate in such a manner as to further justice while at the same time promoting the welfare and well-being of the child. The best interest' standard is used in a variety of situations in the US; mental health commitments, delinquency hearing, abuse, neglect or dependency hearings; and custody determinations following a divorce.

In cases wherein, the parent's rights and responsibilities are balanced against the child's best interest, above all other considerations, the child's interests in the eyes of the judge are paramount. But to enforce the rights of the child above those of the parents, the parents' rights first must be overcome. A Kansas judge first used the best interest of the child in the custody decision *Chapsky v Wood (1881)*. The custody of a young girl was in question. She was an infant when her mother died. Her mother's sister took the infant into her own home on a farm where work and love abounded. The child's father was a drafter. Five years after the child's birth, the father and his wealthy parents decided they wanted her to live in grandparent's home.

The judge observed that the loving aunt and uncle who had cared for the child for over 5 years and wanted her to continue to be in their family. The parental grandparents, on the other hand, promised a governess, a higher education, and superior opportunities for cultural enrichment. The judge recognized the strong bond of love between the child and the only parents she has ever known were her maternal aunt and uncle. So the girl was ordered to remain in that living home.

The 'Best'-or "Least Worst"-Interests of the Child

The term *best interest* also refers to the goal of the judicial determination in abuse, neglect, and dependency actions in juvenile court. The courts are charged with discovering and putting into place dispositions that will meet the child's best interest. This phrase, though neither advocated nor invented by the courts, came into popular use after the publication of the series of books by Professor Joseph Goldstein, Dr Anna Freud, and Dr Albert Solinit; *Beyond the best interest of the child (1973)*, *Before the Best Interest of the Child (1979)*, and *in the Best Interest of the Child (1986)*.

These books are an examination of information derived from the Yale University Child Study Centre and the Hampstead Child-Therapy Clinic. In these books, the authors question the value and ability of any person's attempts to determine and put into effect the best interest of a child. The case goal that is offered by these authors to supplant the so-called best interest' goal is 'the least detrimental harm'

Another Author, professor Ane Coyne (1992), of the University of Nebraska at Omaha, has used a different phrase; ‘finding the least worst solution.’ Although the least worst solution may not be readily apparent to the lawyers and the judge in a particular case, focusing on the least worst solution, Professor Cayne says, will force the lawyers or judge to conflict the perils in other choices available, thereby avoiding or mitigating them. A more productive goal than seeking the best interest, which may be unknowable, is to seek the least worst solution, which would help the professionals involved in the case avoid doing greater harm to a child who is already the subject of an abuse, neglect, or dependency actions.

Children’s Rights

Before the reforms of the early 19th century, when a married couple divorced, the children of the family had no right to determine the future of their custody. After the reforms began, any apparent rights accorded to the children were nurturing types, but even the nature of these has changed over the past century. For example, the “right” according to children in the first reforms was the right to live with their mothers in infancy and, afterwards, to have contact with her until adulthood.

Once they had reached adulthood, of course, sons could determine with whom they would associate-provided they could withstand the withdrawal of the purse, should their fathers be so inclined; a daughter could have such contact with her mother, depending on the inclination of the father, husband or other males who asserted “protection” over the daughter.

Until the early 1800s, children were treated as chattel, or property, and were automatically assigned to the custody of the father, as he was their “owner,” with an attendant obligation to protect, financially support, and educate his minor children. But early in the 19th century, the parental-fitness issue emerged, as did legal decisions that took into account the needs of the children involved; thus, the “best interest of the child” analysis emerged. The point in American legal history when “best Interest” came into being was relatively soon after the United States has ceased to be the colonial ward of Great Britain, except for the Louisiana Territory, which had asserted British case law as its jurisprudential history.

The Best Interest Standards in the United States

The need for reform in the United States was expressed earlier. In the early 19th century, the view of families as patriarchal entities gave way to the newer ideal democracies populated by individuals with inalienable rights-and obligations.⁴⁴

⁴⁴ Walker, Brooks, Wringsma, *Children’s Right in the United States*,(New Delhi: Saga publications, 1999)

The husband-father undertook an exclusive responsibility for productive labour. The wife-mother was expected to confine herself to domestic activities. The children of this marital pair were set off as distinctive in their own right.⁴⁵

Three U.S Cases, predating the Talfourd Act of 1839, illustrate this new way in which the custody of children was considered in the context of divorce. One, *Commonwealth of PA v Addicks* (1813; hereafter referred to as Addicks1), involved a mother whose adultery ultimately interfered with her attempt to get custody. Absent the adultery, the court was willing to award her custody of her children based on the children's relationship with her; in fact, in Addicks I (1813) one finds the first language referring to the "tender years" of the children as a rationale for awarding to a mother.

A Sampling of Children's Rights landmark Decisions in the United States.

Date	Case/Document	Ruling
1874	'Mary Ellen'	The American Society for the Prevention of Cruelty to Animals (ASPCA) prevailed in arguing that a girl, Mary Ellen, was covered under laws barring the barbaric treatment of animals.
1943	West Virginia State Board of Education v Barnette	The Supreme Court rules that public school students may refuse to salute the flag because of their religious beliefs.
1967	In re Gault	The Court extended to juvenile crime suspected the right to a lawyer, the same protections afforded to adult defendants.
1968	Jehovah's Witnesses in State of Washington v King Co. Hospital unit No1.	The Court allowed states to order blood transfusions for children over the religious objections of their parents
1969	Tinker v Des Moines Independent Community School District	The Court ruled that children are persons, It also held that a parent, schoolchildren are protected by the First Amendment to the Constitution and therefore may wear black armbands protesting the war.
1970	Voting rights Acts	Congress passed legislation allowing 18-yearold to vote; the Constitution has amended accordingly 1 year later.

⁴⁵Demos, 1979, cited in Areen, 1992, p.88

1979	Bellotti v Baird	The court ruled that minors seeking abortions could obtain approval from judges instead of parents.
1990	Baltimore City Department of ‘	For the first time, the Supreme Court-appointed an attorney to protect a child’s right during pleadings in an abuse case.
1992’ 1993	‘Gregory K’	A Florida Court rules that minors may sue to terminate their parents’ rights. One year later, an appeals court reserved that holding.

Tender Year’s Doctrine in the US

By 1830, a Maryland court was ready to give open support to the nation that a child had an important interest in remaining in n his or her mother’s care. In *Helms v Franciscus* (1830), the Court gave custody of a child of tender years to the mother after she had been granted a legal separation – on the basis that her husband had been living in open adultery with another woman. The innocent injured spouse received custody of the infant of the marriage, but again the father’s right to the older children was upheld although the man was an adulterer.

The right of a father to ownership of his children was recognized, but the court acknowledged that the laws of nature require that a child not be snatched from a mother in infancy: A child should stay with the best-feeding mother. Here, the emphasis is not on a woman’s right to the companionship of her child I Helms, but rather on the tender year’s interests of a breastfeeding child.

The tender years' rule was the first appearance of legal consideration of the needs of very young children; as such, it was the best interest standard. Once the tender years' rule was fully accepted by U.S divorce courts, fathers found the table completely turned. For almost a century, the only way a father could gain custody over the children of the marriage, on legal separation or divorce, was to prove the mother’s unfitness. During the peak of the tender years' rule, the law was as gender-biased against men as it had been on the favor of them beforehand.

The gender bias was declared unconstitutional by many states in the wake of the first gains of the woman’s movement. In *Ex parte Devine* (1981), for example, the Alabama Supreme court declared the gender-based ‘tender years rule’ over when it found the doctrine to be unconstitutional. Similarly, a few years earlier, in *state ex rel. Watts v watts* (1978), in effect, refusing to disapprove the state court’s decision.

West Virginia’s high court, however, has held the tender years' rule to be constitutionally based on the following:

1. Men and women are not similarly situated when it comes to parenting, at least when the child is very young (e.g., breastfeeding).
2. The presumption in favour of mothers is an appropriate offset to the historic disadvantages they suffered.

As state courts dropped the tender years and its explicit preference for mothers, they retained the spirit of it in the name of “the best interest of the child standards’. In essence, the tender years' doctrine, which was aimed at meeting the needs of children, became gender mental without losing the goal of appropriately addressing children’s needs. Currently, the courts are asked to carry out evaluations about the child’s best Welfare. A judge is not required to follow the Psychologists recommendation. Judges’ decisions may reflect their own stereotyped beliefs about what is in a child’s best interest, beliefs that may or may not fit with empirical findings.⁴⁶

New Challenges to the ‘Best Principle’ in the US

Courts today face challenging circumstances like when parents requesting custody or even access are gay or lesbian or when family members are of different races. Secondly, there is a controversy relating to joint custody arrangements with single custody homes. During the 1980s joint custody was seen as a panacea to the problem of custody because it appears to allow children to maintain their relationship with both parents but a continuing conflict riddled relationship between parents can be detrimental to the children in a joint custody arrangement.

Today custody meditations, which represent an ‘alternative’ to the adversarial system is also being questioned because of their non-legal character. Meditations lack the precise and perfected checks and balances that are the principal benefit of the adversary process.

The Uniform Marriage and Divorce Act (UMDA, 1979), which has had a significant impact on the statutory reforms of many states, described the following as among the factors a judge may consider in reaching a custody decision:

- The mental and physical health of all individuals involved
- The child’s adjustment to home, school, and community
- Each parent’s ability to provide food, clothing, meditation, and other remedial care and material benefits to the child.
- The interaction and interrelationship of the child with parents or mother individual who might affect the child’s best interest (thus, in a general sense, the parent’s lifestyle and the child’s individualsneeds)
- The wishes of the parents and the child

It is concerning the last factor that children’s to self-determination are beginning to emerge. At least 20 states permit children beyond a specified age to state which parent they prefer for custody. Some states specify in age, typically 12 or 14; others consider the maturity of the child’s cognitive or emotional development. For instance, in the case *In re Marriage of Rosson* (1986), the court concluded that a child of sufficient age and capacity to reason well enough to form an intelligent custody preference does have the right to have that preference seriously

⁴⁶ *Ibid.*

considered. But the consensus is lacking on how much weight is to be given to the child's preferences. Sometimes the child's choice is considered only when other factors balance out the choice between parents.

Family Court Judges, though, possess tremendous discretion in how they weigh different criteria and whether they even follow the preferences of the interested parties. Sales, Manber, and Rohman (1992), concluded that often only slight consideration is given to the specific needs of each child who comes before the court, and in fact, "surprisingly few states child's – custody statutes explicitly include the needs of the child as a factor relevant to the application of the best- interests – of – the- child standard."(P.24)

Evaluating Child Custody Decisions under the Best Interest Standard. Under the gender-neutral standard of "best interest," judges gained great discretion in awarding custody even though psychologists are now being consulted.

7.5 Laws in Pakistan

In Pakistan, today the **Guardians and Wards Act 1890**, applies to custody and Guardianship cases while keeping in view the personal law to which the minor is subject. The minor is supposed to be subject to the same personal Law as his/her father. The Guardians and Wards Act, 1890 were part of an attempt to codify the often divergent principles derived from different Schools of Muslim Jurisprudence to ensure some measure of uniformity and certainty. This Act is similar to the GWA, 1890 of India.

It should be noted that there is no Quranic text on the point of custody and Guardianship. The various Schools of Muslims Jurisprudence have therefore developed their own quite divergent principles regarding the issue. The principles under Hanafi Law and Shia Law are followed. The preference is to female relatives in giving custody.

Customary Practice Regarding Custody and Guardianship

While there are regional variations, customary law in Pakistan assumes father has the natural guardians of their children and tends to grant fathers custody of their children's person and property in cases where custody is disputed; this is particularly so where a widow or divorcee mother remarries. The age at which the physical custody of children living with mothers reverts to the father does not always rigidly follow the principles of established Muslim jurisprudence and in many areas may be younger than under Muslim personal law.

Analysis of Case Law of Pakistan

Analysis of case law reaching the superior courts reveals that the bulk of custody and guardianship litigation has fallen under five main strands: where custody was awarded to the mother; where custody was awarded to the father' where remarriage was the decisive factor in awarding custody; where the religion of the parent was the decisive factor in awarding custody; cases involving custody of minor married females.

On a purely statistical level, the number of cases where the mother has been given preference by far outnumbers the cases where the minor's father or other male relatives were awarded custody. Even in those cases where remarriage of the parents was a material factor in deciding custody, the courts showed no particular disfavour towards the mother on these grounds, even though remarriage of mother to a stranger is a disqualification under personal law. However, it must be remembered that their generally sympathetic attitude of the courts towards women in custody cases is only a result of the court's perception of the child's best interest.

Father is 'Natural Guardian'

Law has tended to accept the father as the natural guardian even when minors are in the custody of the minor.⁴⁷ *Imbandi v Mustaddi* is the leading case in the area of custody and guardianship and is still relied upon by Pakistani courts. It is established that even when the mother has custody, the father is nevertheless the legal guardian and the child is under his supervision.⁴⁸

Father has to file a case for custody: It should be noted, however, that despite being termed the legal guardian, custody does not, automatically shift to the father once the children reach an age where the mother is no longer entitled to *hizanat* under personal law. The father or anyone else wanting custody has to file a case for custody, has to file a case for custody in the guardian court.⁴⁹

Court not compelled to pass an order in father's favour:

Moreover, although the courts accept that the guardian (meaning the father) is entitled to custody, no order will be made to that effect, unless the court is satisfied that it will be for the welfare of the ward. The welfare of the minor is the sole consideration that must prevail in the final analysis and the fact that the father is the lawful guardian of his minor children does not compel the court to pass an order in his favour unless it is in their welfare to do so.⁵⁰

Father's right to custody not absolute:

The father's right to custody is not absolute and if he shows a lack of interest in the minor since he divorced the minor's mother, custody has been refused.⁵¹ Although the exception rather than the rule, there are cases where, in the

⁴⁷ *Ghulam Fatima v Chanoomal* AIR1967 Kar. 569

⁴⁸ *Imbandi v Musstaddi*, (1918) 45 I.A 73

⁴⁹ *Nazeer Begum v Abdul Sattar*, PLD 1963 Kar, 465

⁵⁰ *Feroz Begum v Muhammed Hussain*, 1983 SCMR 606

⁵¹ *Zainaba Bibi v Ferzeud Din*, PLD 1954 Lah 704

absence of the event of the disqualification of the father or other male guardians, the mother is accorded the status of a guardian. Thus, the word ‘guardian’ has been interpreted as including a person who has custody of the minor.⁵²

The welfare of the minor is Paramount:

This principle justified deviation from general principles of custody and guardianship. The lack of clarity and uniformity or rules relating to custody and guardianship is perhaps the single most important factor used to justify deviation from the general principles of personal law regulating this area.

Working under the broad framework of the principle that the ‘welfare of the minor is always of paramount consideration’⁵³ the courts in Pakistan have succeeded in making inroads into established Muslim Jurisprudence and at times have even overridden the express provisions of law.

The courts have declared that in certain instances personal law is subordinate to the welfare of the minor.⁵⁴ For instance, in one case it was held that although under Muslim law there is the presumption that the welfare of the minor lies in living with the party entitled to *hizanat*, this can be rebutted; “the paramount consideration in the matter of the custody of minor of tender years is the interest of the child and not the rights of the parents’.⁵⁵

Similarly, in another case⁵⁶ it was stated:

“It would be permissible for courts to differ from the rule of *Hizbnat* stated in the textbooks on Muslim Law for there is no Quranic or a traditional text on the point. Courts which have taken the place of Qasis, therefore, conclude that it would be permissible to depart from the rule stated therein if, on the facts of a given case, its application is against the welfare of the minor.”⁵⁷

The welfare of the minor can overrule an agreement between the parents regarding the father’s rights to custody. In one case the separated parents of minor girl entered into a deed under which custody would remain with the mother only until the minor attained seven years of age or until the mother contracted a second marriage. However, the

⁵²*Niaz Bibi v Fazal Ellahi*, PLD 1953 Lah 442

⁵³*Mohammed Bashir v Ghulam Fathima*, PLD 1953 Lah 83 at pp 78-79

⁵⁴*Muhamme Nawaz v A.D.J*, 1992 CLC 1487 (a)

⁵⁵*Mumawar Jan v Mafasar Khan*, PLD 1965 Lah 695

⁵⁶*Mt. Zohara Begum v latif Ahamed Munawar*, PLD 1965 Lah 695

⁵⁷ *ibid*

father's lack of interest in the minor and his on remarriage was held to indicate the welfare of the minor lay with her mother irrespective for then agreement between the parties.⁵⁸

The welfare of the child equally justifies granting custody of a minor beyond a certain age to a parent who would otherwise under personal law be disentitled from custody. Thus in one case, custody of a boy over the age of seven years was granted to his mother; regarding the custody of a minor female. In the same case the court observed that Section 17 (4) of the Guardians and Wards Act, 1890 requires that rights of control of a female child should preferably be given to mother without any limitation of any age.⁵⁹

The courts also considered whether it would be conducive to the welfare of the minor to be separated from a sibling, wherein the rigid application of Muslim Personal Law, for example, a female child has remained with the mother while custody of a minor boy has been awarded by the lower courts of the father.⁶⁰

Definitions of 'Welfare of the minor':

There are a variety of views, some of which may be contradictory, on what constitutes 'welfare of the minor'. 'Welfare' is considered a question of fact to be resolved on consideration of material of evidence placed before the court and not on any presumption (including presumption under Muslim Personal Law).⁶¹ The welfare of the minors can be determined by summary proceedings under S. 491 Cr PC since the determination of welfare of minor requires evidence and is to be settled by a guardian judge.⁶²

Factors listed in considering 'welfare':

The Guardians and Wards Act lists the following considerations regarding the welfare of the child: (Similar to Indian Law)

1. The age, sex and religion of the minor
2. The character and capacity of the purposed guardian and his/her nearness of kin to the minor;

⁵⁸*Taj Bibi v KhudaBaksh* PLD 1988 Desh 57

⁵⁹*Mrs. Marina Pushond v Derick Puhond*, PLD 1974 Lah 385 The sub-section has since been omitted by the Federal Laws (Revision and Declaration) ordinance XXVII of 1981. the Courts however continue to apply the principle of giving a mother preference in custody of female minors.

⁶⁰*Habiban v Riaz Ahamed*, 1989 ALD 482

⁶¹*Rahimullah v Hilaji Begum* 1974 SCMR 305 at p. 319

⁶²*Awal Marjan v Gul Jn* 1991 PCCr LJ 717

3. The wishes, if any, of a deceased parent;
4. Any existing or previous relations of the proposed guardian with the minor or his/her property;
5. If the minor is old enough to form an intelligent preference, the court may consider that preference;
6. The court shall not appoint or declare any person to be a guardian against his/her will.

Definition of ‘welfare’ in case law:

In case-laws the welfare of a minor has been taken as his/her material, intellectual, moral and spiritual well being.⁶³ In one case, the matters to be considered in determining the award of custody were cited as the comfort, health and moral and spiritual welfare of the children.⁶⁴ Welfare also includes the adequate and undisturbed education of the children.⁶⁵ The mental and psychological development of the minor should also not be adversely affected by a reversal of the existing status.⁶⁶ It has been repeatedly specified in case laws that the religion in which a minor is brought up is a very important factor, amongst other consideration, which affects the welfare of the minor.⁶⁷

The presumption that welfare lies with mother:

At the same time, there is the presumption on the part of the court that the welfare of the minor invariably lies with the mother. It has been held that the mother’s biological relationship with minors takes precedence over a relationship established through extended custody and care.⁶⁸

Personal law and welfare

Last but not the least, although the courts do involve rules of personal law, it is primarily where they believed these to be in the interest of the minor.⁶⁹ Wherever it is evidence before the court that by following a particular rule of law, the welfare of the minor would be prejudicially affected, the judges have looked elsewhere to determine welfare.

⁶³*Feroz Begum v Muhammed Hussain*, 1983 SCMR 606

⁶⁴*Ms. Christine Brass v Dr, Javed Iqbal*, PLD 1981 Pesh 110

⁶⁵*Mrs. Marina Pgshong v Derick Noel Pushong* PLJ 1974 Lah. 385; *Zahid Mahmood v Rehana*, 1980 CLC 1027; *Aisha Mnzoor Hussain* PLD 1985 SC 436

⁶⁶*Bashir Ahamed v Abida Sulthana* 1989 ALD 432

⁶⁷*Maryam Zohra v Younus Jamal* 1986 CLC 1857

⁶⁸*Kushi Muhammad v Bashiran*, 1981 CLC 84

⁶⁹*Mohammed Bashir v Ghulam Fathima*, PLD 1953 Lah 73

The English concepts of justice, equity, and good conscience, a legacy of the British legal system have been retained as the underlying guiding principles in custody cases. For example, despite the principle that the mother's residing far away from the father disqualifies her, in a recent case involving a foreign Muslim mother residing abroad (a British national of Pakistani origin) the courts nevertheless awarded her custody.

Importance of minor's preference:

Although case law is not consistent in this area, in general, the court has wherever possible taken the minor's preferences into account when deciding upon who should have custody.

The superior courts have criticised the lower courts for failing to ascertain the wishes of a minor⁷⁰ and have further held that capacity of minor to make an intelligent preference plays a decisive role in determining the suitability and desirability of a person seeking the minor's custody.⁷¹ Indicating another departure from the rigid application of personal law the courts have also considered the preference of minor females to remain with their mother beyond the age of puberty.⁷²

Minor's preference not taken into account:

It has also been held that the question of the consent of minors does not arise.⁷³ Equally a minor's preference was discarded in favour of the strict application of personal law in a case involving adoption and a difference of religion.⁷⁴

Age and maturity of minor significant:

The age at which the courts consider a minor capable of making an independent choice depends upon the circumstances of the case but appears to be roughly 9 years of age.⁷⁵ Although in guardianship cases the father is considered the child's 'natural' and legal guardian, a study of Pakistani case law amply demonstrates the courts

⁷⁰*Habiban v Riaz Ahmed*, 1989 ALD 482

⁷¹*Akbar bibi v Shauhatali*, 1981 SCMR 481

⁷²*Rafiqan v Jalal Din*, 1983 SCMR 481

⁷³*Safia Bibi v Ghulam Hussain Shah*, PLP 1970 Azad J&K 13

⁷⁴*Shaukat Khalid V ADJ Rawalpindi* 1989 CLC 1377

⁷⁵*Khusi Muhammad v Bashiran*, 1981 CLC 84 (where preference rejected); and *Habiban v Riaz Ahamed*. 1989 ALD (where preference accepted)

have preferred a case-by-case consideration of the facts rather than rigidly applying the principles of established Muslim jurisprudence.

Father proves unfit:

While the law accepts the father as the natural guardian even when the children are in the custody of the mother, it has been held that a natural or certificated guardian may prove himself to be an undesirable person unfit for fulfilling the responsibility of guardianship and/or custody⁷⁶. Where, for example, the father has remarried and had children by his second wife, the court has assessed these circumstances to be against the welfare of the minor. In such cases then, the mother is given custody and/or guardianship of children even beyond the period stipulated under the law.⁷⁷

There is no one definition of the factors constituting a serious disqualification for the father. Definitions have instead been developed through evidence and have included abandonment, drug addiction and the absence of any female relative of the minor with father.

Family courts in Pakistan

Family Court in Pakistan was established by the Family Court Act, 1964.⁷⁸ The jurisdiction of the court includes cases relating to the dissolution of marriage, maintenance, custody and 'guardianship' of children. The Family Court is deemed to be a District Court for Guardians and Wards Act, 1890. The Act provides for pre-trial proceedings for a compromise of reconciliation. There is a provision for the Arbitration Council.

7.6 Laws in Hong Kong

The marriage system in China is based on the constitutional principles of the freedom of marriage, of monogamy, and equal rights for each gender. These principles are articulated in the Marriage Law of 1980.

Parents Child Relationship

Article 15 provides that parents have to bring up and educate their children. If parents fail to perform their duties children who are minors or are not capable of living on their own shall have the right to demand the costs of upbringing from their parents. Criminal liability may even be imposed on parents who refuse to perform their duties in this respect, which constitute abandonment. Moreover, to combat gender discrimination against females the law

⁷⁶*Feroze Begum v Muhammad Hussain*, 1983 SCMR 606.

⁷⁷*Ibid*; see also *Kalsoom Bibi v Muhammas Saeed*, NLR 1980 AC (lah.) 483; *Zarina v Farzand Ali* NLR (Lah.)318

⁷⁸ West Pakistan Act No. xxx of 1964 and known as the Punjab /Sind /NWEP /Baluchistan Family Court Act, 1964.

prohibits infanticide by drawing or any other acts causing serious harm to infants. Article 32 of the *Law Concerning Protection of Maternal and Infant health of 1994* further prohibits technical tests to determine the gender of the foetus unless medically necessary.⁷⁹

Article 17 allows parents the right to subject their children to discipline and to protect them. Thus, then parents shall be held liable for compensation for any damages caused by their children. In 1991, the *Law concerning Protection for People under Age* was adopted to give special legal protection to minors under the age of 18. The duties of parents under the marriage law include the duty to guard and financially support; not to abuse and abandon; not to discriminate against female and disabled children; to respect a child's right to education; to guide children with healthy ideologies; to prevent children from, and stop them smoking, drinking, gambling, drug abuse, and prostitution; and Parents or other guardianship may be subjected to legal liability or deprived of guardianship if they fail to carry out their duties under Law.

According to Article 19 of the *Marriage law*, children born out of wedlock shall enjoy the same rights as ones born in wedlock. No one may harm or discriminate against them. By taking into account the difference of income and earning ability between males and females in China, the law further explicitly requires the father of a child born out of wedlock to bear part of all of the child's living and educational expenses until the child can support itself.

Article 15 also imposes a duty on children to support and assist their parents. If children fail to perform their duties, parents who are unable to work or have difficulty to earn for them shall have the right to claim from any or all of their children as a matter of right. The Rules applicable to the relationship between parents and children are also applicable to the relationship between step-parents and step-children who receive care and education from them.

Child custody and Support

Article 29 provides that the relationship between parents and children shall not come to an end with the divorce of the parents. After divorce, regardless of who is granted the right of custody, they shall remain the parents of the children and shall still have the rights and duties to bring up and educate their children.

In principle, the mother shall have the custody of an infant after divorce. Over disputes on the custody of older children, the people's court shall make a decision based on the rights and interest of the child and the actual condition of the parents. The detailed guidelines are provided in the circular issued by the Supreme Court on November 3, 1993. Generally, a child under the age of two shall be under the custody of the mother unless the father and other agree otherwise and the healthy growth of the child will not be negatively affected under such an agreement or she has health or financial difficulties.

⁷⁹Chenguang, Zhanq (eds), *Introduction to Chinese Law*, (Asia: Sweet and Maxwell, 1997).

Both parents are entitled to the custody of a child above the age of two. The priority, however, will be given to the party who can no longer have any children; who live with the child longer than the other party; who does not have any children while the other party has either through previous marriage or adoption; and who has advantageous conditions for the healthy growth of the child. If the conditions of the two parties are equal, the relations between the child and his or her parental and maternal grandparents as well as their ability to look after the child may even be taken into account to decide the preference. The opinion of a minor above the age of 10 should be considered in deciding custody. Alternating custody may be granted if the parent so agrees.

After divorce, the non-custodian parent shall still meet part of all of the child's living and educational expenses. According to the Circular, the payment for child support in principle is capable at twenty to thirty per cent of the party's fixed monthly income in the case of a single child, and fifty percent in case of two or more children involved. This support shall be given until the child reaches the age of eighteen or unless the child can live on his or her earnings which must correspond to the average local living standards after the child reaches the age of sixteen. The support duty of the parents may continue if the child has not lived on his or her loss of his or her capacity to work, or is unable to make a living independently.

Any agreement or court judgment on the payment of child support shall not prevent the child from making a reasonable request, when necessary, to either parent for an amount exceeding what was agreed to in the agreement or judgment.

Guardianship: Competence of minors

A citizen aged 18 or above under the Chinese law has full competence to perform civil acts and may engage in civil activities (GPCL, Article II, Para-1). A citizen with full competence has the legal capacity to perform any civil act independently. A citizen, who has reached the age of 16 years but not the age of 18, is deemed to have full competence, provided his principal source of support is income from his labour. The standard here is that such a citizen received income from his on labour and maintains a living standard comparable to that prevailing in the local community. A minor aged 10 or over may only engage in civil activities, which are appropriate for his age and intelligence. Minors under the age of 10 and persons of mental illness, who are unable to understand the nature and property of their acts are regarded as incompetent and they have to be represented by their guardians in all civil activities.

Guardianship is a civil law institution designed to supervise and protect the lawful rights and interests of persons with incompetence or limited competence. Guardianship, on the one hand, redresses the problem of the lack of full competence of the ward and affords protection for his rights and interest. On the other hand, guardianship requires the guardian to supervise and control the conduct of the ward to maintain the security and stability of the society.

The GPCL provides for two types of guardians. The law contains a list of *statutory guardians* who shall serve as guardian if they are competent to do so. In case of a dispute over who shall serve as the guardian, the law authorizes certain organizations to appoint *designated guardians* for the ward.

The parents of a minor are his guardians [GPCL, Article 16 Para I]. Where the parents of minor are dead or are not competent to be guardians, one of the following persons shall serve as the guardian, if he is competent to do so:

- (a) grandparents;
- (b) elder brothers or sisters;
- (c) relatives and friends with a close relationship to the minor who is willing to serve as guardians provided the units of the minor's parents or the neighbourhood or village committee at the minor's domicile shall approve (GPCL, Article 16 para.2).

If none of the above persons exists, the unit of the minor's parents, the neighbourhood or village committee or the civil affairs department at the minor's domicile shall serve as guardian (GPCL, Article 16, para.4)

In case of a dispute over who shall serve as the guardian, the units of the minor's parents or the neighbourhood or village committee at the minor's domicile shall make a designation among the close relatives. If the designation is not accepted and an action is brought to the court, the court shall decide.(GPCL, Articles 16, para.3.)

The Duties of a Guardian

A guardian is the statutory agent of his ward (GPCL, Article 14). He is charged with the responsibility of protecting the person and property as well as others with the responsibility of protecting the person and property as well as other lawful rights and interests of his ward. In particular, a guardian may not dispose of the property of the ward save in the interest of the ward (GPCL, Article 18, para.1). The Supreme People's Court specifies the duties of a guardian as follows:

Protecting the health of the ward;

Caring for the ward in his daily life;

Managing and protecting the property of the ward;

Representing the ward in civil activities;

Supervising and educating the ward; and

Representing the ward in litigation when the lawful rights of the ward are infringed or where the ward has a dispute with another person.

A guardian who has failed to perform his duties or has infringed the ward's lawful rights or interests shall bear civil liability. He shall pay compensation if he causes damage to the ward's property (GPCL, Article 18, para.3). The

persons and units enumerated in GPCL, Articles 16-17, who qualify guardianship may petition to the court, demanding that the guardian bear civil liability or the guardianship be revoked.

U.K. Laws

The term 'child' means a person, who has not reached his or her eighteenth birthday. This broad definition grants agencies and courts great discretion when dealing with young people. In English Law, the word 'custody' has been used in a wider sense to include practically all the rights of guardianship as well as in a narrow sense as to include only 'care and control'. The history of the law in the United Kingdom relating to the custody of a child shows two important trends:

The first in the gradual equalization of the parental status of the mother and father of a child born in wedlock. In a second development, the parental rights of both mother and father have become less important as the welfare of minor has reason to be the first and paramount in any litigated issue relating to the custody or upbringing and administration of the puberty of the child. The implementation of the principle of the best interest of the child was part of a gradual process.⁸⁰

The Talfourd's Act, 1839, although now repealed, marks a decisive point in the history of custody law, for it empowered the court of Chancery to give the mother custody of her children until they reached the age of seven and access to them until they came of age. But the Act specifically provided that no order was to be made if the mother had been guilty of adultery.

The concept of the Courts regarding the welfare of the child as a 'paramount consideration' entered the English Law through equity and legislative developments from the beginning of the nineteenth century.⁸¹ The Guardianship of Infants Act, 1925, for the first time shifted the focus of English Law to a clear concern for the interests of the child. This statute introduces the basic principles that the courts deciding custody, disputes should make the 'child's welfare the first and paramount consideration'⁸².

The Guardianship of Minor's Act, 1971, repealed the Guardianship of Infants Act 1925. It made no changes in the substantive law.

General Principles

⁸⁰ Cretney, Masso, *Principles of Family law* (London: Sweet and Maxwell, 1997).

⁸¹ Gooneskers. S. *Children, law and Justice*, UNICEF, (Delhi: Saga Publications, 1998).

⁸² Bromley, Lowe, *Bromley's Family Law*, (London: Butterworth 1987)

A dispute over custody may take one of two forms: it may be a dispute between the father and the mother, or it may be a dispute between one parent and a stranger, for example, a testamentary guardian appointed by the other parent or a person who has obtained *de facto* control of the child either with the parent's consent or as a result of his having abandoned it.

As the House of Lords held in *J.V.C*⁸³, the principle laid down in Section 1 of the Guardianship of Minors Act, 1971, that the welfare of the child is to be regarded as the first and paramount consideration, applies equally whether the dispute is between the parents or between one or both parents and a stranger. In this case, however, the wishes of an unimpeachable parent stand high among the remaining considerations: to give effect to the blood tie will itself normally be for the child's benefit and usually, he should be with his natural parents. But there is no presumption that the natural parents should have custody. In the words of Lord Macdermott:⁸⁴

“.....when all the relevant facts, relationships, claims and wishes to parents, risks choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood”.

If all considerations are equal, however, the court will give effect to this relationship and grant custody to a parent rather than to a stranger. This was not the case in *J.V.C*. The parents of the child were Spanish nationals resident in Spain, but the child, who was then aged ten years, had spent the whole of his life except for eighteen months with foster parents in England. He had been brought up as an English boy, spoke little Spanish and scarcely knew his natural parents.

The House of Lords refused to interfere within the order of the trial judge who left custody, care and control with the foster parents and refused to give it to the natural parents on the ground that they “would be quite unable to cope with the problems of adjustments or with consequential and suffering and that the father's character would inflame the difficulties” if the boy were to go to live with them in Spain.

The one statutory exception to this rule is to be found in Section 3 of the Custody of Children Act, 1891. This section provides that where a parent has abandoned or deserted his child or allowed it to be brought up by and at the expense of, another person, school, institution or local authority, in such circumstances as to show that he was unmindful of his parental duties, no order is to be made giving him the custody of the child unless he proves that he is a fit person to have it. But to bring this section into play, the parent's conduct must show some degree of moral turpitude: if he relinquishes control temporarily because this is the best that he can do for the child in the

⁸³ (1969), All E.R. 788

⁸⁴ *Ibid.*, at pp. 8 (21) and 710-711, respectively, see also ppm8 (23), 8(24), 8(32) and 7(14), 7(15),7(24,)respectively

circumstances, the court ought not on this ground alone to deprive him of custody. In practice, this section is rarely invoked.

Power of Appellate Courts- It will be seen that the court must always be guided by the interests of the child and, as the House of Lords emphasized in *J.V.C.*,⁸⁵ a court of the first instance has a discretion with which no appellate court will interfere unless it is satisfied that the lower court has acted under a misapprehension of fact, or gave weight to irrelevant or unproved matters, or failed to take relevant matters into account.⁸⁶ On the other hand, an appellate court is not entitled to allow an appeal and substitute its discretion merely because it would have come to a different conclusion on the evidence.⁸⁷

The difficulty arises because in some cases appellate courts are so convinced that the lower court exercised its discretion wrongly that they will reverse the decision even though then latter purported to apply the right principles in reaching it.⁸⁸ On hearing an appeal, a court is entitled to consider the relative weight which the lower court attached to the various facts which it had to take into account.⁸⁹

Children's Act 1989 Section 1 of this Act provides: "When a court determines any question with respect to –

- a) Unbinding of a child or
- b) The administration of the child's property or their application of any income arising from it, the child's welfare shall be the court's paramount consideration"

The welfare principle in Section 1 applies not only to Court, but parents, local authorities and children themselves must also have regard to children's welfare. Decisions by parents which conflict with welfare may be reviewed by the courts and thus it has been said that parents must apply the welfare principle. The same could be said of children.⁹⁰ Local authority's decisions which do not require court approval are generally immune from the review on the merits but local authorities are under a duty to safeguard and promote the welfare of children in need and those

⁸⁵As in *re thin*, [1926] Ch. 676, C.A

⁸⁶ See *Re.O'Hara*. [1900] 2 I.R, 232, at pp 238, 243,251; *Re Carroll*,[1931] I K.B 317., 360-363, C.A; *R.V Bolton Union* (1892), 36 Sol.J.255

⁸⁷ [1969] 1 ALL E.R 788, H.L.; [1970]A.C.668

⁸⁸ ALL E.R.891, 961; [1969] p.103,115

⁸⁹ If evidence is available to the appellate court which was not before the lower court.

⁹⁰ (1971) 2 WLR 784 C.A

they are looking after.⁹¹ The Law Commission also suggested that the child's welfare should be balanced with other factors.⁹²

The meaning of the welfare principle

The leading modern case on the welfare principle is *J.V.C.*⁹³ where the courts considered whether a 10-year old boy should be returned to his parents (Spanish national resident in Spain) or remain with English foster parents who had looked after him all, except 18 months, of his life. The House of Lords upheld the decision of the judge and the Court of Appeal that he should stay in England. Lord Macdermott stated that 'paramount consideration to the welfare' means:

"more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. [The words] connote a process whereby, when all the relevant facts, relationships claims and wishes of parents, risks choices and other circumstances are taken into account and weighed the course to be followed will be that which is most in the interests of the child's welfare as that term is now understood.

.....[It is] the paramount consideration because it rules upon or determines the course to be followed."⁹⁴

Against these considerations, the claims of "unimpeachable" natural parents could not prevail. The court came to a different conclusion in a similar case in 1996:-

In *Re.M.a Zula* boy, aged six, was brought by an Afrikaner widow to England after her mind, the child's single mother, had signed papers (which she later claimed she thought related to insurance) agreeing to his adoption. He lives in London for four years; obtained a scholarship to attend public school and lost his ability to speak his mother tongue. Thorpe J acknowledged that the child had "two psychological mothers" and favoured his return to South Africa after a series of visits to be paid for by the Afrikaner women. The women were unable to keep her undertaking to pay for the visit and appealed. The court of Appeal held, despite the boy's protest that it was in his interest to return to live with his parents in South Africa immediately.

⁹¹ (1962) 2 All.E.R 10 C.A

⁹² Law Com 96 para 6,9 Law Com No. 172, Review of Child Law Guardianship and Custody (1988) HC 594 para.

⁹³ 1990 AC 668

⁹⁴ *Id.* at pp.710-711

The Children's Act 1989 did not create a unified Family Court but it reformed the magistrates' court, remaining the domestic court the 'family proceedings court' and giving it jurisdiction over all civil matters concerning the upbringing of children.

The Act created four orders relating to children. These are:

- Residence order as to the state where the child should live
- The contact order which requires a caretaker to allow someone to have contact with the child.
- The prohibited steps order which restricts the exercise of parental responsibility and
- The specific issue order which determines how parental care is to be exercised.

Some legal developments and trends of Comparative Law relating to Children in Custody and Guardianship proceedings in the Best Interest of the child

When the needs of children cannot be met by those responsible for their care, the State recognizes its responsibility to intervene and assure their care, development and safety. A survey of comparative legal inventions in custody and guardianship proceedings reveal that the democratic legal system has been given to the Courts to make decisions based on the welfare of children during marital proceedings.

- As general rule children are represented by a next friend or guardian *ad litem*. A child who wishes to proceed without a guardian *ad litem* must seek leave of the court.
- The definition of the child in developed countries is a person who is under the age of 18.
- The opinion of the minor is considered in deciding custody. In Honk Kong: the age is above 4 years and in Australia, it is 14 years.
- The welfare principle applies not only to courts but parents, local authorities and children themselves.
- Evaluators get involved in a family's legal dispute and the custody and visitation of the family's minor children. The evaluators help the courts understand the family dynamic in a way that will allow for the development of an appropriate plan for custody and visitation of minor children.
- In developed countries, it is a well-settled law that the religion of minor is not at all a relevant factor in determining the custody of the child. In developing countries, the law is still to be settled, though the trends are changing through case law.
- The law imposes a duty on children to support and assist their parents
- Acceptance of arbitration awards by the court.
- Representation of the child's interest in matrimonial disputes
- The Arbitration option is given to the parties in dispute
- Conciliation counselling in an attempt to bring about an agreement.
- Meditation has become an important option.

- The utilization of alternative dispute resolution techniques (ADR) in custody disputes.
- Unified family courts that bring together under one court custody and guardianship disputes as well as juvenile justice matters.
- Strong evidence needed to justify a change of custody.
- Third Parties, relatives and friends may stand as sureties for the implementation of scheme relating to children
- The maintenance amount for children can be deposited with an accredited organization with a charge to pay the children a periodical allowance.
- Finding the least or worst solution will force the lawyers and judges to confront the perils in other choices available.
- The gender-based tender years' doctrine was found unconstitutional by some US courts but it was retained in the best interest of the child.
- In the tender years' doctrine, the emphasis is not on women's rights to the companionship of her child but the tender years' interest of a breastfeeding child.
- The consensus is lacking on how much weight is to be given to the child's preference.
- Scientific evaluations of child custody decisions are carried out.
- A continuing conflict riddle relationship between parents can be detrimental in the joint custody arrangement.
- Today custody meditations are being questioned because of their 'non-legal' character.
- In-service training to develop professional ability and skill.
- Family Court clinic is an auxiliary organ of the court for scientific examination and diagnosis of parties and juveniles
- Involving senior citizens and volunteers of Public
- Attendants as the defense of Matrimonial Court exclusively appointed to take charge of safeguarding the interest of minor children.
- Child's wishes presented in an affidavit.
- Access is a right of the child, which promotes its welfare and should be denied, only in exceptional circumstances.
- Use of casework method to diagnose the cause of a particular trouble and to prescribe a reasonable remedy.
- The supervisory role of the court for the protection of the welfare of families
- Judges and Probation Officers to use wide professional skills in the field of medicine, psychology, pedagogy, sociology and other science to human being.
- Welfare conference to discuss the welfare of the child
- Judicial interviews should be sparingly used
- Childs counsel to make submissions in the welfare of the child and put forward the wishes of the child.
- Paramountcy of welfare is a principle whereby all the relevant facts, relationship, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed.
- A list of factors of the welfare checklist of all individuals involved.

Conclusion

Today, the best interest principle universally applies not only in the context of legal and administrative proceedings or in other narrowly defined contexts, or custody and guardianship in family law but in relation to all actions concerning children. Above all, the trend is to view the family divorce through the eyes of children as well as to understand how children feel, what they fear and wish and what makes conflict resolution difficult to be achieved. We need to focus on the needs of the children who have the most to lose and finally we must reduce the pain for the children – the real victims in the game of their parent’s divorce proceedings.